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Terror/Torture

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ABSTRACT

In the face of terrorism, human rights law's requirement that states "respect and ensure" rights necessitates that states take active steps to safeguard their populations from violent attack, but in so doing do not violate rights. Security experts usually emphasize the aspect of *ensuring* rights while human rights advocates largely focus on *respecting* rights. The trick, which neither side in the debate has adequately referenced, is that states have to do both at the same time. In contrast to these largely one-sided approaches, adopting a radical universalist stance, this Article argues that both contemporary human rights and security discourses on terrorism must be broadened and renewed. This renewal must be informed by the understanding that international human rights law protects the individual both from terrorism and the excesses of counter-terrorism, like torture. To develop this thesis, the Article explores the philosophical overlap between both terrorism and torture and their normative prohibitions. By postulating new discourses around the paradigm of terror/torture, it begins the project of creating a new human rights approach to terrorism.

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I.
INTRODUCTION: THE LIGHT OF EL MANARA

In the Algerian film *El Manara*,[1] three young friends' lives are forever transformed by terror and torture in the context of Algeria's civil war. In that real-life North African conflict, the forces of the state battled the forces of armed fundamentalism[2] for a decade beginning in the early 1990s.[3] One hundred thousand people or more perished in what one Algerian academic described as "a September 11th every year for a decade."[4] Terrorist bombings and murders, carried out by non-governmental armed groups, claimed countless victims.[5] Both the army and its opponents routinely tortured their respective captives.[6] Though fundamentalist ideology[7] represented a particular assault on concepts of human

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1. EL MANARA (Production Machaho 2004). For a discussion of issues surrounding the making of this film, see Michel Amarger, *Rencontre avec Belkacem Hadjaj, L'Algérie face à son histoire récente* (Apr. 9, 2005), *available at* http://www.africine.org/?menu=art&no=4367. Amarger, the editor of, Africiné, the official website of the African Federation for Film Criticism, says that the characters' trajectories "allow us to relive the events which threw Algeria into violence." *Id.* (translated by author).

2. For definition of this controversial term, see *infra* notes 244-249 and accompanying text.

3. *See, e.g.*, MAHFOUD BENNOUNE, ESQUISSE D'UNE ANTHROPOLOGIE DE L'ALGÉRIE POLITIQUE (Editions marinoor 1998); Hugh Roberts, *Under Western Eyes: Violence and the Struggle for Political Accountability in Algeria*, MIDDLE E. REP., Spring 1998, at 39-42; WOMEN LIVING UNDER MUSLIM LAWS (WLUML), COMPILATION OF INFORMATION ON THE SITUATION IN ALGERIA (1995).

4. These are the words of Dr. Mahfoud Bennoune, cited in Karima Bennoune, *"A Disease Masquerading as a Cure": Women and Fundamentalism in Algeria: an Interview with Mahfoud Bennoune*, *in* NOTHING SACRED: WOMEN RESPOND TO RELIGIOUS FUNDAMENTALISM AND TERROR 75, 86 (Betsy Reed ed., 2002).

5. Mahfoud Bennoune, *Comment l'integrisme a produit un terrorisme sans précédent*, EL WATAN, Nov. 6, 1994, at 7.

6. On torture of women by armed groups, see Karima Bennoune, *S.O.S. Algeria: Women's Human Rights Under Siege*, *in* FAITH AND FREEDOM: WOMEN'S HUMAN RIGHTS IN THE MUSLIM WORLD 184 (Mahnaz Afkhami ed., 1995); *see also* COMPILATION OF INFORMATION, *supra* note 3.

7. In the Algerian context, the fundamentalist political movements advocated banning the mixing of the sexes in public places and strict clothing restrictions for women, and opposed women working. *See* Rabia Abdelkrim-Chikh, *Les enjeux politiques et symboliques de la lutte des femmes pour l'égalité entre les sexes en Algèrie*, Peuples méditerranéens, Nos. 48-49, July-Dec. 1989. Moreover, their supporters carried out attacks on women who lived outside their paradigm. *See Testimony on the Case of Oum Ali, an Algerian Woman, Vienna, June 1993*, *in* DEMANDING ACCOUNTABILITY: THE GLOBAL CAMPAIGN AND VIENNA TRIBUNAL FOR WOMEN'S HUMAN RIGHTS (Charlotte Bunche & Niamh Reilly eds., 1994). Meanwhile, their associated armed groups carried out widespread attacks on civilians, including many women, as well as attacks on the Algerian military, to further this agenda. *See* Miriam Shahin, *Algerian Women Fight Terror*, JORDAN TIMES, Nov. 13, 1994, at 1; Youssef Ibrahim, *Bareheaded, Women Slain in Algiers: Killings Follow Islamic Threat*, N. Y. TIMES, Mar. 31 1994, at A3. This was true both before and after the cancellation of the elections of 1992 which the Islamic Salvation Front (FIS) was likely to have won. *See* Louisa Aït-Hamou, *Women's Struggle against Muslim Fundamentalism in Algeria: Strategies or a Lesson for Survival?*, *in* WARNING SIGNS OF FUNDAMENTALISMS 117 (Ayesha Imam et al. eds., 2004). For a thorough discussion of the human rights impact of fundamentalisms more broadly, including termi-

rights, in practice, both sides committed grave abuses.[8] The circle of death was complete.

These events reverberate through the lives of the main characters of *El Manara*. In the film, two male friends, Fawzi and Ramdane, compete for the affection of fellow student Asma in the years leading up to the conflict. Ultimately, Fawzi becomes a journalist and marries Asma, while Ramdane turns to fundamentalism and joins one of the armed groups that terrorizes the country. This extremist militia later abducts Asma and Fawzi. When his father pays his ransom, Fawzi is released, and must leave Asma behind in the custody of the fundamentalist armed group. Asma's fate is similar to that of many women abducted by armed groups[9] in the actual Algerian civil war: she is raped by her captors.[10] One of the rapists is Ramdane, her former suitor.

Subsequently, remorse overcomes Ramdane and, fearing for his own life from even more extreme elements, he helps Asma escape. But as they flee, he is captured by the Algerian army. Fawzi, the journalist and former human rights activist, who does not yet know his wife has been freed, gains access to the cell where his onetime friend is now being held by the military. Moved by his desperation to find and save Asma, he tortures Ramdane with a blow torch. Ultimately, everyone's life is destroyed. The circle of destruction is complete.

As unlikely as *El Manara*'s plot may sound, similar scenarios played out in too many true stories during Algeria's "*décennie noir*."[11] I saw the film in Al-

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nological problems, see *infra* notes 243-258 and accompanying text; *Human Rights and Fundamentalisms*, 100 PROC. AM. SOC. INT'L. L. 407-421 (2006); RIGHTS AND DEMOCRACY, FUNDAMENTALISMS AND HUMAN RIGHTS: REPORT OF THE MEETING (2005).

8. The Algerian government also engaged in a range of grave human rights abuses, including "disappearances," extra-judicial executions and torture. *See, e.g.*, HUMAN RIGHTS WATCH, HUMAN RIGHTS IN ALGERIA: NO ONE IS SPARED (1994). The efforts of the mainstream human rights movement during this time focused largely on these abuses.

9. LEILA HESSINI, FROM UNCIVIL WAR TO CIVIL PEACE: ALGERIAN WOMEN'S VOICES 28 (1998). Hessini, and many other Algerian feminists, have been very critical of what they see as the failures of mainstream human rights organizations to document armed group abuses against women during the conflict. *Id.* at 26-27. Central to the argument in this essay, she calls for "a more comprehensive approach to human rights abuses . . . to document and render visible the manifold types of violence that women experience" in such situations. *Id.* at 27.

10. Here we begin to see the overlaps between terror and torture. This rape, carried out by an armed group as part of a strategy to subjugate and punish the female population, was clearly an act of terrorism. *See, e.g.*, Amy Ray, *The Shame of It: Gender-Based Terrorism in the Former Yugoslavia and the Failure of International Human Rights Law to Comprehend the Injuries*, 46 AM. U. L. REV. 793 (1997). But, in accordance with international humanitarian law, and understandings from the field of women's human rights, it may also be seen as an act of torture. *See, e.g.*, United Nations Economic and Social Council, *Report of the Special Rapporteur, Mr. Nigel S. Rodley, submitted pursuant to Commission on Human Rights Resolution 1992/32*, ¶¶ 15-24, U.N. Doc. No. E/CN.4/1995/34. For more information on these questions, see the detailed discussions of the international law definitions of terrorism and torture, *infra* notes 76-109 and 130-147 and accompanying text.

11. The online version of Al Ahram, one of Egypt's most important newspapers, described *El Manara* as "a faithful and brutally direct depiction of Algerian society during the rise of fundamentalist Islam . . . ." *Abortive Reunions*, AL-AHRAM WEEKLY ONLINE, Dec. 9-15, 2004,

giers in May 2005. Of course, audiences were only able to go to a movie theater because part of Algeria's coercive struggle against terrorism had been successful.[12]

This article begins with *El Manara* because the debate about terrorism and human rights in the U.S. often proceeds on the tacit assumption that the U.S. situation post-September 11 is *sui generis*.[13] Furthermore, much international law scholarship in English frames terrorism as a largely East-West phenomenon that mainly targets Western liberal democracies.[14] Such a view is both ahistorical and unhelpful. For years, many countries around the world, Algeria being but one of them, have been contending with horrific patterns of terrorism, including fundamentalist terrorism, which have claimed tens of thousands of lives.[15] Governments of many political stripes have been regularly responding to (or provoking, depending on your viewpoint) this violence with atrocity.[16] This is a global problem requiring a global response.

I also begin with *El Manara* because it displays the terrible complexity of the web of human rights issues that arise out of terrorism and counter-terrorism, a web more tangled than either human rights or security discourses acknowledge. Furthermore, it explicitly confronts the particular impact of terrorism and torture on women, even re-enacting a rape by an armed group—a radical depiction for Algerian cinema. It neither shies away from this grim reality, nor balks at exploring the human rights implications of religious fundamentalism. Most of all, though, this article begins with the film *El Manara* because of the absence of selectivity in its moral outrage regarding attacks on human dignity, whether

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http://weekly.ahram.org.eg/2004/720/cu4.htm.

12. After initially failing to respond to the problem of terrorism, the Algerian government and military, as well as paramilitary organizations, responded vigorously to the armed groups with a domestic version of the "war on terror." This both improved security in many areas for the civilian population, and led to gross violations of human rights. *See, e.g.*, AMNESTY INTERNATIONAL, ALGERIA: TORTURE IN THE "WAR ON TERROR": A MEMORANDUM TO THE ALGERIAN PRESIDENT, AI Index MDE 28/008/2006 (Apr. 18, 2006).

13. For an example of such a view, see Ruth Wedgwood, *Countering Catastrophic Terrorism: An American View*, *in* ENFORCING INTERNATIONAL LAW NORMS AGAINST TERRORISM 103 (Andrea Bianchi ed., 2004).

14. For an example of such scholarship, see PHILIP B. HEYMANN, TERRORISM AND AMERICA (2000).

15. Such countries include Sri Lanka, Uganda, Afghanistan, and Colombia. *See* HUMAN RIGHTS WATCH, IMPROVING CIVILIAN PROTECTION IN SRI LANKA (2006); HUMAN RIGHTS WATCH, THE SCARS OF DEATH: CHILDREN ABDUCTED BY THE LORD'S RESISTANCE ARMY IN UGANDA (1997); AMNESTY INTERNATIONAL, AFGHANISTAN: INTERNATIONAL RESPONSIBILITY FOR HUMAN RIGHTS DISASTER (1995); AMNESTY INTERNATIONAL, COLOMBIA: POLITICAL VIOLENCE: MYTH AND REALITY (1994).

16. *See, e.g.*, AMNESTY INTERNATIONAL, "DISAPPEARANCES" AND POLITICAL KILLINGS: HUMAN RIGHTS CRISIS OF THE 1990S (1994) 2-46 (discussing "counter-insurgency" related human rights violations in Sri Lanka and Colombia); *see* generally NOAM CHOMSKY, PIRATES AND EMPERORS, OLD AND NEW: INTERNATIONAL TERRORISM IN THE REAL WORLD (2002) (providing a critical perspective on terrorism and counter-terrorism).

those attacks come in the form of terrorism, or of torture.[17] It is against this backdrop that I wish to think through contemporary difficulties regarding the human rights response to terrorism and counter-terrorism.

As a human rights lawyer, I begin with the notion that the human rights movement and its fellow-traveling scholars need to radically rethink approaches to terrorism and human rights.[18] We must comprehend and respond to terrorism as a human rights violation, in and of itself.[19] At the same time, security proponents need to expand their notion of safety to include fundamental aspects of human rights, including the right to be free from torture.[20] Those who justify torture, and other atrocities, in the name of fighting terror undermine the very respect for human dignity and the universality needed to sustain comprehensive global norms against terrorism. Neither the human rights depiction of current events nor the security one is multifaceted enough to comprehend the situation now facing the international community.

Furthermore, abuses on which the human rights movement classically focuses, like torture, rest on the same philosophical assumption as practices, like terrorism, which claim the attention of many concerned with security. This assumption is the permissibility of instrumentalizing severe and deliberate human suffering. Such a commonality suggests that, to take the approach that best champions human dignity, one must look attentively at the human rights impact of both what is labeled "terrorism" and what is labeled "counter-terrorism."

Though most often considered the discrete starting points of separate discussions, in the current moment the two halves of terror/torture are woven together in a fabric of callousness and othering.[21] To eradicate one, we must eradi-

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17. This is in stark contradistinction to the many particularist responses to outrages since September 11. *See infra* note 64.

18. I fully recognize that this is a time when the human rights community feels that both it and the norms it invokes to defend victims of human rights abuse are under attack. *See, e.g.*, INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY, HUMAN RIGHTS AFTER SEPTEMBER 11, 19-38 (2002). Human rights groups, including those whose practices related to terrorism are reviewed here, have made tremendous contributions to safeguarding these rules and exposing violations related to counter-terrorism in the years since September 11. The critique below should be read in this context.

19. *See infra* notes 192-217 and accompanying text.

20. This is similar to the claims made by advocates of the concept of human security. According to the Human Security Centre, "While national security focuses on the defense of the State from external attack, human security is about protecting individuals and communities from any form of political violence . . . [h]uman security and national security should be—and are—mutually reinforcing." THE HUMAN SECURITY CENTRE, THE HUMAN SECURITY REPORT 2005, WAR AND PEACE IN THE 21ST CENTURY, WHAT IS HUMAN SECURITY? (2005), *available at* http://www.humansecurityreport.info/content/view/24/59/. An even fuller understanding has been promulgated by the United Nations Development Programme (UNDP). It "equates security with people rather than territories." UNITED NATIONS DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT (1994), *available at* http://hdr.undp.org/reports/global/1994/en/.

21. Discourses of othering are central to justifications of both terrorism and torture. These are often based on discriminations of various kinds, including on the basis of race, religion, ethnicity, social class and gender. *See infra* notes 65 and 185-188 and accompanying text. For an exploration

cate the other. Examined holistically, this is the clear message of human rights law. Such an understanding should lead intrinsically to staunch rejection of both terror practices and torturous ones. The human rights community should oppose the circles of death and destruction depicted in *El Manara* by presenting an alternative: the circle of decency.

Instead of offering such a holistic response that encompasses the threats to human dignity from both terrorism and the "war on terror," international law writers either seem to engage with terrorism *or* with counter-terrorism, with security *or* with human rights, with terror *or* with torture, with the abuses of one side *or* with another. Many security-oriented commentators write only about what non-state actors are doing, while many human rights commentators seriously scrutinize only, or primarily, what states are doing. These narrow perspectives, focusing only on one side of the "war on terror,"[22] sharply limit the inter-

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of the relationship between torture and discrimination, see NIGEL RODLEY, THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW 14-15 (1999); AMNESTY INTERNATIONAL, COMBATING TORTURE: A MANUAL FOR ACTION (2003), *available at* http://www.amnesty.org/resources/pdf/combating_torture/sections/section1-3.pdf. The latter report notes that "Torture feeds on discrimination. Torture involves the dehumanization of the victim, the severing of all bonds of human sympathy between the torturer and the tortured." *Id.* Exactly the same thing may be said of terrorism. For an interesting discussion of how terrorist groups "dehumanize the group's purported enemies", see JESSICA STERN, TERROR IN THE NAME OF GOD: WHY RELIGIOUS MILITANTS KILL 9-31 (2003). The challenge is to overcome these discourses and try to think about these issues in universal terms. Part of this involves forcing ourselves to ponder whether we would want to be treated in the way we are advocating for others. Universality radically alters one's sense of the discourses that are acceptable here. *See infra* notes 185-188 and 278-282 and accompanying text.

22. This label is used by the Bush Administration to describe the fight against Al Qaeda and other terrorist groups. Eric Schmitt and Thom Shanker, *U.S. Officials Retool Slogan for Terror War*, N.Y. TIMES, July 26, 2005, *available at* http://www.nytimes.com/2005/07/26/politics/26strategy.html. Other versions of the phrase, such as "war against terrorism" and the "global war on terror" (or even the jaunty acronym "G-WOT") are sometimes used interchangeably. In 2005, some had suggested substituting a term that would emphasize the ideological aspects of the battle, such as "a global struggle against violent extremism." In 2005, some had suggested substituting a term that would emphasize the ideological aspects of the battle, such as "a global struggle against violent extremism," *or* a "global struggle against the enemies of freedom." *See id.*; Matthew Davis, *New Name for 'War on Terror'*, BBC News Online, July 27, 2005, http://news.bbc.co.uk/2/hi/americas/4719169.stm). However, none of these alternatives has caught on. President Bush continues to use the phrases "the war on terror" and "the global war on terror." *See, e.g.*, President Bush Visits National Defense University, Discusses Global War on Terror, Oct. 23, 2007, http://www.whitehouse.gov/news/releases/2007/10/20071023-3.html. The 2006 National Strategy for Combating Terrorism also employs this term. THE NATIONAL STRATEGY FOR COMBATING TERRORISM 1 (2006), *available at* http://www.whitehouse.gov/nsc/nsct/2006/. In fact, all of these terms are highly contested, and criticized from diverse points of view on a wide range of grounds, including that this struggle should not be considered a "war", that war cannot be declared on a phenomenon or tactic (terror), that it is misapplied to provide justifications for unrelated actions, such as the 2003 invasion of Iraq, and that it is unlimited in scope or duration. *See, e.g.*, *U.S. Officials Retool Slogan for Terror War*, *supra* (detailing the objections of Gen. Richard B. Myers to the term); Mike Allen, *Edwards Rejects the "War on Terror"*, TIME, May 2, 2007, *available at* http://www.time.com/time/nation/article/0,8599,1616724,00.html (referencing the "hostility" of "many Democrats" to the term "War on Terror," and the "skepticism" of "some Republicans" about it also); Joan Fitzpatrick, *Speaking Law to Power: The War Against Terrorism and Human Rights*,

national lawyer's ability to grasp or convey the range of perils in the current moment, and therefore diminish her power to analyze them adequately and devise or contribute to strategies to respond to them.

In contrast, in Part I, this Article adopts a radical universalist stance and argues that both contemporary human rights discourses and security discourses on terrorism and human rights must be broadened and renewed. In Part II, it explains how this renewal must be informed by the understanding that international human rights law protects the individual both from terror *and* from torture: in other words, both from terrorism and the excesses of counter-terrorism.

As an example of this novel approach, Part III embarks on an analysis of the philosophical overlap between both terrorism and torture and their normative prohibitions. Next, the Article considers the definitional controversies that have plagued both debates about terrorism and about torture, and shaped the discourses critiqued herein. Part IV refutes the justifications of torture born out of the "war on terror," and explains how maintaining an absolute approach to the ban on torture is essential to preserving absolute bans on terrorism. Subsequently, Part V critiques the human rights movement's insufficient response to terrorism, suggesting that a better response is urgently needed, both as a matter of human rights principle and to strengthen work against abuses, like torture, that arise out of counter-terrorism. Finally, this Article considers the implications of two key questions that are often neglected: the gender dimension of terrorism, discussed in Part V.C; and the problems associated with addressing the particular challenge to human rights from terrorism that Muslim fundamentalist armed groups carry out, described in Part VI. By critiquing old discourses on security and human rights, and postulating new ones around the paradigm of terror/torture, this Article ultimately begins the project of creating a human rights approach to terrorism.

II.
DOUBLE BURDENS, SINGULAR ANALYSES: TOWARD A MORE BALANCED APPROACH TO INTERNATIONAL LAW AND TERROR/TORTURE

Dutch sociologist W.H. Nagel wrote in 1980 that "[t]he profile of terrorism is circular. Terrorism creates counterterrorism and counterterrorism is pregnant with future terrorists."[23] Some would suggest that it is rather state violence that

14 EUR. J. INT'L L. 241, 248 (2003) (critiquing the "war against terrorism" as unprecedentedly open-ended). Hence, though the term "war on terror" will be employed in this Article, it will be used only in quotation marks. This emphasizes the ongoing debates and critiques of the notion, and is an attempt to distinguish such a construct from the broader, international (and often popular) struggle against terrorism. In contrast, below I discuss why it is, however, inappropriate in most contexts to employ quotation marks around the word "terrorism." *See* discussion *infra* notes 118-130 and accompanying text.

23. W.H. Nagel, *A Socio-legal View on the Suppression of Terrorists*, 8 INT'L J. OF THE SOC. OF L. 213, 221 (1980).

gives birth to terrorism in the first place (at least sometimes).[24] Nevertheless, this unresolved chicken-and-egg debate does not undermine Nagel's basic thesis about circularity.

Circularity is a crucial refrain in this article: circles of threats, circles of decency, circles of causality, and the comprehensive legal obligations needed to address them.[25] However, much of the legal analysis has instead been flat, failing to reflect this dimension. Such linear analysis cannot adequately respond to round conundrums or to complexity. This Article attempts to think through a range of what are usually seen as dichotomies, but are often in fact points on the circumference of the same circle: terror/torture, terror/counter-terror, security/human rights, state action/non-state action.[26] Frequently, assumptions are made that practices can only fit on one side or another of these dividing lines, and that they should be legally categorized and strategically prioritized differently based on this placement. Such a narrow understanding is unhelpful. Menaced by both the Scylla of terror and the Charybdis of counter-terror, by terror and torture, by the actions of armed groups and states, you cannot navigate today's troubled international seas without recognizing and contending with both.[27] Security should be understood not in opposition to human rights, but rather as a human rights value. Hence, sometimes counter-terror programs may be necessary to protect human rights. But conversely, enjoyment of human rights is a basic part of the notion of security, and must serve as a limit on counter-terrorist strategies.

Such an understanding also makes sense when one considers the very difficult double burden that human rights law puts on states, and how that burden is affected by the phenomenon called terrorism. The International Covenant on

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24. *See, e.g.*, Chomsky, *supra* note 16.

25. *See infra* notes 28-34 and accompanying text.

26. We must be careful of easy assumptions. For example, states should be understood as capable of committing both terror and torture, as should non-state armed groups. On the "attenuate[d] . . . impact of the public/private distinction" in the general prohibition of torture, see, for example, James Crawford, *Revising the Draft Articles on State Responsibility*, 10 EUR. J. INT'L L. 435, 440 (1999).

27. Scylla and Charybdis were monsters placed, according to Greek mythology, on either side of the Strait of Messina. Scylla had twelve feet and six heads and lived underneath a dangerous rock. On the other hand, Charybdis sucked in all the water three times a day creating a devastating whirlpool. Sailors had to navigate carefully between these perils to avoid destruction. When the goddess Circe advised Odysseus to veer towards Scylla's cliff so as to only lose a few men rather than losing his entire ship to Charybdis, Odysseus pleaded with her. He asked: "goddess . . . tell me truly – could I somehow escape this dire Charybdis and yet make a stand against the other [Scylla] when she sought to make my men her prey?" HOMER, THE ODYSSEY 145 (Walter Shewring trans., Oxford University Press 1980). Odysseus and his ship made it through the Strait of Messina by navigating according to Circe's suggestion. However, when Scylla consequently tortured and murdered some of his men, Odysseus grieved terribly: "Scylla swung my writhing companions up to the rocks, and there at the entrance began devouring them as they shrieked and held out their hands to me in their extreme agony. Many pitiful things have met my eyes in my . . . searchings through the seapaths, but this was the most pitiful." *Id.* at 148. The modern challenge is to find a better route, to confront both Scylla and Charybdis, or perhaps to remove the monsters themselves.

Civil and Political Rights (ICCPR), in its second article, calls on states to both "respect and ensure" the rights in the Covenant.[28] This means states have to take affirmative acts to protect the rights of those within their jurisdiction from impingement by others.[29] But, in so doing, the state must not violate rights itself.

In the face of terrorism, the double burden of respecting and ensuring rights requires states to take active steps to safeguard their populations from violent attack by non-state armed groups as, *inter alia*, a matter of human rights law. However, in so doing, the state must not itself contravene the rights guaranteed in the ICCPR. In our time of terror, security experts usually emphasize the aspect of *ensuring* rights (though not often using such language) while human rights advocates largely focus on *respecting* rights (though they usually at least acknowledge, *en passant*, that governments must protect their populations). The trick, which neither side in the debate has adequately referenced, is that states have to do both—respect rights and ensure rights—and at the same time.

Human rights discourse often minimizes discussion of ensuring rights to protection from terrorist violence by the enforcement of international law, and is instead largely or solely a critique of state policies in response.[30] This discourse is firmly entrenched on the "respect" side of the coin. While such a critique is essential today—in a world in which torture[31] and other human rights abuses have become part of counter-terrorism policy and the judiciary is failing to offer remedies[32]—it also offers an insufficient response to the current moment. A complicated balancing[33] process between respecting and ensuring rights is nec-

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28. The relevant language from Article 2(1) sets out that: "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant . . . ." International Covenant on Civil and Political Rights, art. 2(1), Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 [hereinafter ICCPR]. Those rights covered in the ICCPR include the rights to be free from arbitrary deprivations of life (Article 6), and from torture and ill-treatment (Article 7), and the rights to liberty and security of person (Article 9). *Id.*

29. MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 38 (1993).

30. On this point, see *infra* notes 189-217 and accompanying text.

31. See, for example, the recent *New York Times* exposé of secret Justice Department memos authorizing the torture and cruel, inhuman or degrading treatment of terror suspects. Scott Shane, David Johnston and James Risen, *Secret U.S. Endorsement of Severe Interrogations*, N.Y. TIMES, Oct. 4, 2007, *available at* www.nytimes.com/2007/10/04/washington/04interrogate.htmoi?_r=1&hp=&adxnnl=.

32. See, for example, the Supreme Court's recent unwillingness to hear the appeal of Khaled al-Masri, a Lebanese-born German citizen who accuses the CIA of kidnapping and torturing him, a refusal which commentators have noted can be understood as "an endorsement of the Bush Administration's argument that state secrets would be revealed if the case were allowed to proceed." *US Court Rejects CIA Kidnap Case*, BBC News, Oct. 9, 2007, *available at* http://news.bbc.co.uk/2/hi/europe/7036051.stm. This decision terminates Mr. Masri's lawsuit. *Id.*

Some challenge the appropriateness of the methodology of balancing altogether or appeal for [illegible] care in any such process. *See, e.g.*, Speech by Lord Chancellor and Secretary of State for Constitutional Affiars, Lord Falconer of Thoroton, Royal United Services Institute, London, Feb. 14, 2007, *available at* http://www.dca.gov.uk/speeches/2007/sp070214.htm.

essary to chart a course through the maze of complex contemporary reality reflected by *El Manara*'s Byzantine plot. The human rights movement will be unable to engage convincingly in the raging debates about balancing if it is only (or is only seen to be, or is primarily seen to be) engaged with one side of this double responsibility. Neither side of the equation—neither the responsibility to respect nor to ensure rights—may be left out. At the same time, any balancing process should be accompanied by the understanding that some values and rights are so fundamental as to be unbalanceable.[34]

Furthermore, the only protection from fulfilling Nagel's prophecy that counter-terrorism is pregnant with future terrorists may be respect for clearly established international legal norms and a radical commitment to universality. Yet recent governmental disregard for human rights standards and broader principles of international law in the battle against terrorism, along with the horror that modern terrorism itself represents, have undermined the delicate balancing process required to both respect and ensure rights. The same is true for the security discourses that have championed or justified these policies (or even inspired them).[35] These factors have also conspired to destabilize the notion that some rights are unbalanceable. Ultimately, this may doom the "war on terror" to fulfilling Nagel's prophesy, and hence to failure.

> I believe that we need to get away from the politics of polarization—where you are either tough or soft, with us or against us. The debate where liberty and security can be traded off against either as if balancing an equation. As I said, this is a complex problem that requires a more nuanced analysis . . . Liberty and security are not transferable. Diminution of one does not necessarily lead to the other. We must get away from the false dichotomy in which security and basic freedoms are seen as being in opposition. It is important that we recognize that national security does not automatically lead to the negation of our human rights . . . Neither tough nor soft, but right. *Id.*

And indeed, in view of the holistic approach advocated here, one must be careful of a zero-sum approach to security and human rights. Nevertheless, some opponents of the balancing methodology sometimes seek to avoid it by simply omitting one side of the equation altogether, a clearly mistaken approach. Moreover, as one of the dominant paradigms in today's public discourse about security and human rights, the theme of balancing is difficult to avoid. As even then-U.N. Secretary General Kofi Annan has asserted, "particular attention needed to be given to balancing anti-terrorism measures and the observance of human rights standards." As paraphrased in Leslie Palti, *Combating Terrorism While Protecting Human Rights*, U.N. Chronicle Online Edition, http://www.un.org/Pubs/chronicle/2004/issue4/0404p27.html. Even Lord Falconer concedes, "Withdrawing individual freedoms must be *balanced* against the practical purpose that will be served in so doing." Speech by Lord Falconer, *supra* (emphasis added).

34. This is the essence of nonderogability, as found, for example in Article 4(2) of the ICCPR. Under this provision, no suspension of the human rights to be free from arbitrary deprivation of life and to be free from torture and cruel, inhuman or degrading treatment or punishment, *inter alia*, is permitted, even "[i]n time of public emergency which threatens the life of the nation . . ." ICCPR, *supra* note 28, at art. 4(1)-(2). In other words, neither instrumental killings amounting to terrorism, nor torture, can ever be justified by the approach of "balancing." For a critical discussion of the limits of balancing, see Susan Marks, *Civil Liberties at the Margin: the UK Derogation and the European Court of Human Rights*, 15 OXFORD J. LEGAL STUD. 69 (1995).

35. For a discussion of all the U.S. government "torture memos," which were certainly such security discourses, see *A Guide to the Memos on Torture*, NYTimes.com, http://www.nytimes.com/ref/international/24MEMO-GUIDE.html (last visited Nov. 15, 2007).

A. To Respect and To Ensure

The rethinking of human rights and security discourses that is necessary to avoid the pitfalls described above begins in the crucial language of Article 2 of the ICCPR.[36] In his authoritative commentary on the ICCPR, Manfred Nowak has written that Article 2, which establishes the responsibility to both respect and ensure rights, provides the "systematic context"[37] of all the Covenant's substantive provisions. The "respect" side of its equation establishes what have been termed "duties of forbearance."[38] "It means that the State Parties must *refrain* from restricting the exercise of these rights where such is not expressly allowed."[39] This speaks to what are termed negative rights or negative liberties in the language of U.S. constitutional law.[40]

On the other hand, the duty to ensure rights is a reminder of the oft-overlooked reality that guarantees of civil and political rights do require states to take affirmative steps.[41] This responsibility applies to all of the substantive

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36. Of course, many economic, social and cultural rights are also heavily impacted by both terrorism and counter-terrorism. The basic obligation of States Parties to the International Covenant on Economic, Social and Cultural Rights is, according to the Committee on Economic, Social and Cultural Rights, "to respect, to protect and to fulfill" all of the rights in the Covenant. Committee on Economic, Social and Cultural Rights, General Comment No. 12, ¶ 15, U.N. Doc. E/C.12/1999/5 (1999). The obligation to protect includes the responsibility to ensure that the relevant rights of individuals are protected from non-state actors. *Id.*

37. NOWAK, *supra* note 29, at 28.

38. *Id.* at 36.

39. *Id.* The commentary notes that the meaning of this obligation varies depending on the nature of the underlying substantive right in question. It is either entirely protected and subject to no limitation whatsoever (*i.e.* the obligation not to torture); subject to non-arbitrary limitations (*i.e.* the right to life or to privacy) or subject only to expressly stated, negotiated limitations (*i.e.* freedom of expression). *Id.* at 34.

40. Sotirios Barber, *The Negative-Liberties Model of the Constitution*, *in* SOTIRIOS BARBER, WELFARE AND THE CONSTITUTION 5-8 (2005).

41. As Nowak explains, "States Parties are obligated to take positive steps to give effect to the rights." NOWAK, *supra* note 29, at 36-7. Some provisions of international human rights law make the obligation for the state to act to protect individuals from harms by non-state actors explicit. For example, Article 5(b) of the International Convention on the Elimination of All Forms of Racial Discrimination requires states to "guarantee the right of everyone . . . [to] security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution." International Convention on the Elimination of All Forms of Racial Discrimination, 660 UNTS 195; G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), at Art. 5(b); see also the general discussion in ANDREW CLAPHAM, HUMAN RIGHTS IN THE PRIVATE SPHERE (1996), and Stephanie Farrior, *State Responsibility for Human Rights Abuses by Non-State Actors*, 92 AM. SOC'Y OF INT'L. L. PROC. 299 (1998). This full approach to the obligations created by both civil and political rights and economic, social and cultural rights has been further supported by the case law of the European Court of Human Rights (Osman v. United Kingdom, App. No. 0023452/94, Eur. Ct. H.R., (1998)), and the Inter-American Court of Human Rights (Velásquez-Rodríguez Case, 1988 Inter-Am.Ct.H.R. (Ser. C) No. 4 (July 29, 1988), *available at* http://www1.umn.edu/humanrts/iachr/b_11_12d.htm).

Notwithstanding this jurisprudence, civil and political rights are often still described by commentators as functionally the equivalent of negative liberties requiring only that states refrain from violative conduct. *See, e.g.*, Cass Sunstein, *Against Positive Rights*, 2 E. EUR. CONST. REV. 35 (1993);

rights guaranteed by the ICCPR and requires the agents of the state to protect individuals from private abuses.[42] Nowak labels this, "the requirement to take positive measures to protect against private interference."[43] In 2004, the Human Rights Committee, which monitors implementation of the ICCPR, explicitly spelled this out in its authoritative interpretation of Article 2:

> The legal obligation under article 2, paragraph 1, is both negative and positive in nature . . . . [T]he positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights . . . .[44]

Though the ICCPR text itself was drafted long before a sophisticated understanding of such human rights problems prevailed, this approach represents the only one capable of adequately responding not only to terrorism by non-state actors, but also to many violations of women's human rights in the family and community, and to abuses by private actors like transnational corporations.[45] This aspect of the Covenant makes clear that "rights are not protected only from violations by the State,"[46] implicating a panoply of international actors.

While our reconsideration of security and human rights paradigms begins with appreciation of the specific nature of Article 2 of the Covenant, we must also transcend its parameters. Beyond the strict framework of the ICCPR, in the context of the explicitly global "war on terror," this notion is projected across the international community by the idea of universality.[47] Hence, in balancing

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DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189 (1989). In the much-criticized latter case, Justice Rehnquist suggested that "the Due Process Clauses [of the United States Constitution] generally confer no affirmative right to governmental aid, even where . . . necessary to secure life, liberty or property interests of which the government itself may not deprive the individual." *Id.* at 196.

42. NOWAK, *supra* note 29, at 37.

43. *Id.* at 38.

44. U.N. Human Rights Committee, *General Comment No. 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶¶ 5, 8, U.N. Doc. CCPR/C/21/Rev. 1/Add. 13 (May 26, 2004).

45. With regard to women, see the important discussion in HILARY CHARLESWORTH & CHRISTINE CHINKIN, THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS 218-243 (2000).

46. NOWAK, *supra* note 29, at 38.

47. The touchstone instrument of the human rights framework, the Universal Declaration of Human Rights clearly grounds this assertion. It seeks to promote human rights "for all peoples and all nations . . ." *i.e.* across frontiers in a transnational sense. Universal Declaration of Human Rights, G.A. Res. 217A, pmbl., U.N. GAOR, 3d Sess., 1st plen. Mtg., U.N. Doc. A/810 (Dec. 12, 1948). Furthermore, it stipulates that "Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration [which include both the right not to be arbitrarily deprived of one's life, and to be free from torture and cruel, inhuman or degrading treatment or punishment] can be fully realized." *See* UDHR, art. 28. For discussion of a transnational understanding of human rights, see Karima Bennoune, *Toward a Human Rights Approach to Armed Conflict: Iraq 2003*, 11 U.C. DAVIS J. INT'L L. & POL. 171, 196-210 (2004), and Ruti Teitel, *Humanity's Law: Rule of Law for the New Global Politics*, 35 CORNELL INT'L L.J. 355 (2001-2002).

respect for rights with ensuring rights, we must give consistent consideration to the concerns and safety of both the Palestinian refugee camp resident[48] and the Israeli bus passenger,[49] the New Yorker[50] and the resident of Kabul,[51] and those in cities whose tribulations are forgotten by the international community, like Algiers.[52] Human dignity must be seen from all these vantage points, rather than from one alone.

B. Protecting the Pretences of Civilization When the Angel of Death Sounds His Trumpet

Bernard Shaw wrote that "when the angel of death sounds his trumpet the

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48. Palestinian civilians, especially those in refugee camps, have often been victims of Israeli policies claimed to be undertaken in the name of countering terrorism, including torture, arbitrary detention, deliberate and arbitrary killings, and prolonged use of curfews and checkpoints. All this has had a grave impact on their human rights. *See, e.g.*, International Court of Justice, Advisory Opinion: Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. 20, ¶¶ 79-85 (July 9) and THE ASSOCIATION OF ISRAELI-PALESTINIAN PHYSICIANS FOR HUMAN RIGHTS, TORTURE: HUMAN RIGHTS, MEDICAL ETHICS AND THE CASE OF ISRAEL (Neve Gordon & Ruchama Marton eds., 1995). These policies have been carried out in the name of protecting the victims of the terrorism as described in sources cited *infra* note 49.

49. Palestinian armed groups have regularly targeted civilian transportation in Israel for terrorist attack with devastating results. *See* JESSICA STERN, TERROR IN THE NAME OF GOD, WHY RELIGIOUS MILITANTS KILL 32-62 (2003); *Israelis on Living with Bombers*, BBC News Online, July 19, 2005, http://news.bbc.co.uk/2/hi/middle_east/4679373.stm. For recent attacks, see, for example, *Tel Aviv Suicide Bomber Kills 9*, BBC News Online, Apr. 17, 2006, http://news.bbc.co.uk/2/hi/middle_east/4915868.stm. Many of these attacks have been claimed to be carried out in response to steps taken as described in sources cited *supra* note 48.

50. New York City is a city "widely recognized as [a] prime terrorist target . . . ." Dan Eggen & Mary Beth Sheridan, *Anti-Terror Funding Cut in D.C. and New York*, WASH. POST, June 1, 2006 at A01. This concern has greatly increased since September 11, 2001. Ernest Sternberg, *Always a Target (What Draws Terrorists to NY?)*, N.Y. SUN, Feb. 21, 2007, *available at* http://www.freerepublic.com/focus/f-news/1788546/posts. Terrorist threats against the city are often justified in the name of what is done by Western forces in countries like Afghanistan, discussed *infra* note 51.

51. Residents of Kabul have fallen prey to unthinkable levels of terrorist violence by non-state armed groups over the last thirty years, currently again on the rise. *See, e.g.*, AFGHANISTAN: INTERNATIONAL RESPONSIBILITY FOR A HUMAN RIGHTS DISASTER, *supra* note 15; Ian MacWilliam, *Upsurge in Afghan Suicide Attacks*, BBC News Online, Feb. 27, 2007, http://news.bbc.co.uk/2/hi/south_asia/6400257.stm. In addition, they have suffered from counter-terrorist operations both by the United States and its allies, and by the Afghan government. *See, e.g.*, Human Rights Watch, *U.S.: Failure to Provide Justice for Afghan Victims*, Feb. 16, 2007, *available at* http://hrw.org/english/docs/2007/02/15/usint15351.htm. The latter are sometimes justified in the name of protecting Americans in cities like New York, discussed *supra* note 50.

52. Such a global view serves as a retort to what Richard Falk has criticized as "the spatial focus" which "preoccupie[s] discussions of world order." RICHARD FALK, HUMAN RIGHTS HORIZONS: THE PURSUIT OF JUSTICE IN A GLOBALIZING WORLD 28 (2000). Re-conceptualizing human rights beyond this limited focus and in a truly transnational way is critical to an effective response to the jurisdictional and spatial games states have played during the "war on terror" in an effort to immunize their counter-terror practices from legal scrutiny. *See, e.g.*, United Nations Commission on Human Rights, Working Group on Arbitrary Detention, *Situation of Detainees at Guantánamo Bay*, ¶ 11, U.N. Doc. E/CN.4/2006/120, 15 (Feb. 2006).

pretences of civilization are blown from men's heads into the mud like hats in a gust of wind."[53] The tragedies that beset *El Manara*'s protagonists, and too many televised atrocities since and including the events of September 11, 2001, testify to the truth of his admonition. In the post-September 11 era, international human rights law can mitigate the potential damage to the "pretences of civilization" Shaw invoked, such as "constitutional guarantees of liberty and well-being,"[54] only if human rights is understood not simply as a language to critique government counter-terror policies but also as a tool against terror itself. Otherwise, we will inevitably see more of the key principles that comprise the rule of law, as Shaw warned, "blown . . . into the mud."

In many countries where people are genuinely threatened by violence from non-governmental armed groups, or have been convinced by their governments that they are, our "pretences of civilization" will not seem relevant and it will be difficult to sustain outrage when they are trampled in the dirt unless we are balanced. Among many other consequences, Michael Reisman reminds us that September 11 shattered "the emotional foundation on which [the] sense of security [of many in the Global North] rested."[55] Of course, this has also been true of the effect of other September 11ths in other places. Human rights discourse must be responsive to that reality. On the other hand, this emotional reality cannot be allowed to vitiate the rules of the game in the way that some security narratives suggest.

Both would-be terrorists advancing a goal they see as vital, and some putative counter-terrorists who see themselves as defending states and innocents, often argue that there are no relevant rules, or in any case that such rules do not apply to them given their higher purpose, or do not apply in the instant situation, which is invariably "exceptional."[56] These actors are trapped in a symbiotic relationship that threatens the very fiber of the normative order.

What the counter-terrorist must remember as she constructs her strategy is that the suspension of rules also deconstructs the concept of terrorism. If there are no absolutes, no inherently foul acts (like torture), if the ends really do justify the means, then it is just a question of who has better ends—and there will always be widely divergent views about that question across the international community. Instead, some acts must be absolutely forbidden, whatever their alleged goal. As the former U.N. High Commissioner for Human Rights Mary Robinson has noted, "the essence of human rights is that human life and dignity must not be compromised and that certain acts, whether carried out by State or non-State actors, are never justified no matter the ends."[57]

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53. GEORGE BERNARD SHAW, HEARTBREAK HOUSE, at xxv (1919).

54. *Id.* at xxiv.

55. Michael Reisman, *In Defense of World Public Order*, 95 AM. J. INT'L L. 833, 833 (2001).

56. *See* the discussion and critique of the argument that the "war on terrorism" renders international law rules "inapplicable" in PHILIPPE SANDS, LAWLESS WORLD 206 (2005).

57. U.N. High Commissioner for Human Rights, *Report of the United Nations High Commis-*

This Article argues above all for a holistic, congruous approach. It asks how we can, in the era of the "war on terror," move towards a thick analysis that embodies the ambit of responsibilities in human rights law, that responds to the range of challenges to human dignity, that confronts Scylla *and* Charybdis. A key strategy may be to consider the similarities between abuses that are ordinarily seen as being on opposite sides of the line between state and non-state abuses in our current context. The best candidates for this rethinking are the twin processes of terrorism and torture. The concept of terror/torture provides a prism for seeing the limitations of current discourses and suggests possibilities for more comprehensive ones.

III.
TERROR/TORTURE: MEANINGS AND MODALITIES

Terror/torture represents a spectrum of brutalizing practices often justified in the name of a greater good or higher purpose.[58] Torture terrorizes, and terrorism often involves a kind of torturing.[59] Both sets of practices can be said to provoke the "three expanding circles of effects" that Michael Reisman postulates for terrorism.[60] What he terms the immediate effects are on the victims themselves who are maimed or murdered in the process.[61] The intermediate effects serve to intimidate many others, especially those who share characteristics with the victims, a ripple magnified in the era of mass media.[62] Finally, both ter-

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sioner for Human Rights and Follow-Up to the World Conference on Human Rights, Human Rights: A Uniting Framework, ¶ 5, E/CN.4/2002/18 (Feb. 27, 2002).

58. The justification for torture in the context of terrorism is very often the protection of society and of innocent life. Terrorists too often claim an important moral goal. *See* LOUISE RICHARDSON, WHAT TERRORISTS WANT 41-44 (2006).

59. See, for example, the description of the suffering of Daniel Pearl during captivity in Complaint at 200, Mariane Pearl v. Ahmed Omar Saeed Sheikh et al, No. 6639 (S.D.N.Y. July 24, 2007); see also Jeff McMahan's argument that "[p]erhaps the worst form of torture is terrorist torture, whose instrumental function is fulfilled when the mutilated bodies of the victims are strewn in public places as a means of intimidating others. Jeff McMahan, *Torture, Morality, and Law*, 37 CASE W. RES. J. INT'L L. 241, 242 (2006).

60. W. Michael Reisman, *International Legal Responses to Terrorism*, 22 HOUS. J. INT'L L. 3, 6 (1999).

61. For example, consider both the harrowing descriptions of the wounded, the dead, and family members searching for lost loved ones after the February 2007 terrorist attack on a Pakistan-bound Indian train, Santik Biswas, *India Blast Victims' Security Questions*, BBC News Online, Feb. 19, 2007, http://news.bbc.co.uk/2/hi/south_asia/6376273.stm, and the graphic descriptions of victims of torture given by the United Nations Special Rapporteur on torture, in BBC News Online, *Iraq Torture "Worse after Saddam,"* Sept. 21, 2006, http://news.bbc.co.uk/2/hi/middle_east/5368360.stm.

62. See, for example, the words of an Algerian woman journalist who said she was so distressed by the fundamentalist terrorist atrocities against women and journalists that she, "thought of buying poison so I can kill myself if taken by them alive, so all they get is a corpse. I am losing my hair from nerves." FAITH AND FREEDOM, *supra* note 6, at 185. Similarly, torture can provoke such fear in society at large that dictators often rule through its use. For example, Saddam Hussein terrorized the Iraqi population into submission with, *inter alia*, grizzly and massive use of torture. Bill

ror and torture have "an aggregate effect of undermining inclusive public order,"[63] to borrow Reisman's formulation. (Recent events all too aptly demonstrate this point.[64])

The similarities between the practices of terror and torture are significant and defining. These include the visitation of severe pain on victims, the intentionality of doing so, and the tremendous fear deliberately provoked in victims, survivors and those around them. Terrorism and torture both share some characteristics with hate crimes.[65] Both torture and terror involve the infliction of extreme suffering, often on a victim chosen on a basis which may include discriminatory motives, often with a message intended for a broad audience,[66] and meant to impact the lives of many.[67]

On the other hand, instances of torture and particular acts of terrorism may differ in important ways. Terrorism most often occurs in public, while much torture is often a more hidden, secretive practice.[68] Some terrorists crave great pub-

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Neely, *Inside Saddam's Torture Chamber*, BBC News Online, Apr. 9, 2003, http://news.bbc.co.uk/2/hi/middle_east/2930739.stm.

63. Reisman, *supra* note 60, at 6.

64. For interwoven examples, one can pick the atrocities which occurred on September 11, 2001, that led to calls for the rules of international law to be rewritten, and to a resurgence of Islamophobia in many parts of the Western world on the one hand; and the atrocities at Abu Ghraib, that led to particular anger at the United States in the Muslim world, a rise of Occidentalism and some acts of terrorism. Unfortunately, the cumulative result of all this highly televised suffering has, for the most part, not been a universalist backlash against all forms of inhumane treatment authored by anyone, but rather polarization and selective reaction. For further discussion of this problem, see Karima Bennoune, *Making the World Safe for the Dallas Cowboy Cheerleaders*, Address Before the Michigan Journal of International Law Conference: "Dueling Fates: Should the International Legal Regime Accept a Collective or Individual Paradigm to Protect Women's Rights ?" (Apr. 6, 2002), *in* 24 MICH. J. INT'L L. 461, 465 (2002).

65. As Andrew Taslitz has explained, "Hate criminals generally use their criminal conduct to express their contempt for, and perceived superiority over, various identifiable groups, based on, for example, their race, ethnicity, gender, religion, or sexual orientation. Andrew Taslitz, *Hate Crimes, Free Speech, and the Contract of Mutual Indifference*, 80 B.U.L. REV. 1283, 1284 (2000). While the individual victim is the immediate target, the intended audience may be much broader, and the ripples of fear created may travel far. The analogy may seem easier to terrorism than to torture. However, as explained above, much torture, like much terrorism, has an intimate relationship to a variety of forms of discrimination. *See* discussion *supra* note 21. This is certainly true in the era of the "war on terror." *See, e.g.*, American-Arab Anti-Discrimination Committee (ADC), Fact Sheet: The Condition of Arab Americans Post 9/11 (Mar. 27, 2002), *available at* http://www.adc.org/index.php?id=282.

66. Those who favor the use of torture or ill-treatment in combating terrorism reveal this very truth about torture, when they suggest that Al Qaeda has a strategic advantage because its supporters believe that in U.S. hands they will not be tortured (an assumption it seems increasingly difficult to sustain). In other words, spreading fear among potential informants is, in this universe, a reason to torture. Heather MacDonald, *Too Nice for Our Own Good*, WALL ST. J., Jan. 6, 2005, *available at* http://www.findarticles.com/p/articles/mi_kmopi/is_200501/ai_n13294616.

67. Taslitz describes this aspect of hate crimes as "expressive violence." Taslitz, *supra* note 65, at 1288.

68. *See* Steven Watt, *Torture, "Stress and Duress," and Rendition as Counter-Terrorism Tools*, *in* AMERICA'S DISAPPEARED 72, 95 (Rachel Meeropol ed., 2005).

licity for their claims of responsibility,[69] while many torturers seek to conceal what they have done.[70] Some torturers have direct and long-term contact with their victims while some terrorists may have none. One should, of course, be wary of generalizations with regard to these differences. Some terrorists may spend protracted periods of time with hostages, for example, or may even die along with their victims. And in the era of Abu Ghraib, certain acts of torture are clearly displayed for a wide audience, inadvertently or otherwise.[71]

Terrorists often target busy public places like restaurants and markets with explosives, usually hurting numerous individuals who are in those locales at that time and also causing vast property damage.[72] In contrast, torturers more often directly target the body of a specific individual, or the bodies of small groups of victims.[73] However, this difference may not always be so clear either. Consider the infamous National Stadium in Chile during the reign of Pinochet where many victims were simultaneously tortured and subjected to the horror of the torture of the hundreds around them.[74] This distinction between torture and terror is also blurred by the fact that, some terrorists may indeed target particular individuals for assassination or abduction.[75]

Ultimately, the concrete results of what is called torture and what is called terrorism are often experienced as much the same: the devastation of the bodies and minds of those targeted by these practices; grave physical and psychological injury to many with profound and lasting sequelae for survivors, some of which may be invisible to the eye; and the spread of fear among many others of falling victim to the same fate.[76] These consequences—and the shared characteristics

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69. This is exemplified by the practice of some suicide bombers who leave behind videotaped claims of responsibility. *See, e.g.*, Paul Reynolds, *Bomber Video 'Points to al-Qaeda,'* BBC News Online, Sept. 2, 2005, http://news.bbc.co.uk/2/hi/uk_news/4208250.stm.

70. *See, e.g., U.S. Denies 'Prison Torture' Charges*, BBC News Online, Feb. 14, 2003, http://news.bbc.co.uk/2/hi/americas/2760301.stm.

71. *See* Diane Amann, *Abu Ghraib*, 153 U. PENN. L. REV. 2085, 2085 (2005). Historically, when torture was legally sanctioned (and even mandated) it was sometimes openly performed, especially when prescribed as punishment. *See* MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 3-31 (1978).

72. *See, e.g., 'Passover Massacre' at Israeli Hotel Kills 19*, CNN.com, Mar. 27, 2002, http://archives.cnn.com/2002/WORLD/meast/03/27/mideast/.

73. AMNESTY INTERNATIONAL, ISRAEL AND THE OCCUPIED TERRITORIES: DEATH BY SHAKING: THE CASE OF 'ABD AL-SAMAD HARIZAT, AI Index: MDE 15/23/95 (1995).

74. *See Soldier Confirms Chile Stadium Killings*, BBC NEWS ONLINE, June 27, 2000, http://news.bbc.co.uk/2/hi/americas/807599.stm; Katherine Hite, *Chile's National Stadium: As Monument, As Memorial*, ReVista: Harvard Review of Latin America, Spring 2004, *available at* http://www.drclas.harvard.edu/revista/articles/view/704.

75. *See, e.g.*, Pearl v. Sheikh, *supra* note 59.

76. On the direct impact of torture, see, for example, Eyad El-Sarraj, *Torture and Mental Health: a Survey of the Experience of Palestinians in Israeli Prisons*, *in* TORTURE: HUMAN RIGHTS, MEDICAL ETHICS AND THE CASE OF ISRAEL, *supra* note 48 at 104-107. With regard to the human repercussions of terrorism, see, for example, the recitation of facts in *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 7-8 (D.D.C. 1998) (describing the death of 21 year-old Alisa Flatow in a suicide bombing of the bus on which she was traveling in Gaza) and Syed Shoaib Hasan, *Struggling to*

described above—are why terrorism and torture matter, and why both practices are beyond the pale in international law. We turn now to definitional questions that have plagued the debates about both these practices, first regarding terrorism and then concerning torture.

A. The Definitional Debates

From a global perspective, both terrorism and torture must be understood as somewhat controversial phenomena. International public opinion reflects some division on the acceptability of these practices. For example, a global BBC poll found that "59 [percent] of the world's citizens say 'no'" to torture, while some 29 percent think that governments should be allowed to use torture in some cases.[77] Meanwhile, attacks perceived by some as heinous terrorist acts seem acceptable to others for political reasons.[78]

Mirroring these divides in public opinion, controversy has also swirled around the definitions of these concepts. Yet, both terrorism and torture have been defined—and unequivocally prohibited—in international law. While questions remain about these definitions, they have served as the bases for a range of prohibitions and criminalizations. For those who position themselves primarily as opponents of terrorism, the meaning of the term is clear, or clear enough. The relevant discussion for this group revolves around how to end it. For those who focus on ending torture, its definition is similarly so established as to be above question. In contrast, those who are wary of either the concept of torture or of terrorism tend to underscore the definitional problems with the respective term, and sometimes thereby erect conceptual roadblocks to the operational process, intentionally or otherwise.

1. The Question of Legal Definitions of Terrorism

Judge Rosalyn Higgins, current President of the International Court of Justice, suggested in her 1997 academic writings that "'[t]errorism' is a term with-

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Cope with Bomb Horror, BBC News Online, Oct. 19, 2007, http://news.bbc.co.uk/2/hi/south_asia/7053308.stm (describing the aftermath of the Oct. 18, 2007 suicide bombings in Karachi directed at supporters of Benazir Bhutto that killed more than 130 people).

77. This was out of a sample of 27,000 people in 25 countries. Jonathan Marcus, *Heated Debate over Use of Torture*, BBC News Online, Oct. 19, 2006, http://news.bbc.co.uk/2/hi/europe/6063800.stm.

78. *See* Nabil Charaf Eddine, *A force de louer la "résistance irakienne,"* ELAPH, *reprinted in Courrier International*, No. 767, July 13-20, 2005, at 32 (detailing the shock of Iraqis traveling abroad at the failure to universally condemn armed group terrorism against civilians in Iraq because of these groups' opposition to the American occupation). *Newsweek Magazine* cites a Pew Research Survey result which claims that 26 percent of Muslims in the United States, aged 18 to 29, believe that suicide bombing can be justified in some circumstances. Lisa Miller, *American Dreamers*, NEWSWEEK, July 30, 2007, at 31. Note that this cited result is controversial, and critiqued by some Arab-American community leaders. *Id.*

out legal significance."[79] Her words epitomize a view often articulated in the human rights literature today, despite the many developments in law and fact since the time of her writing.[80] The human rights community sometimes deploys this argument as an excuse either for not using the word "terrorism," or as an explanation for not campaigning more actively against the practice.[81]

The U.N. High Level Panel on Threats, Challenges and Change set out to put such a notion about the legal meaning of the term "terrorism" to rest in December 2004 by proposing a consensus definition.[82] This definition labels as terrorism

> any action, in addition to actions already specified by the existing conventions on aspects of terrorism, the Geneva Conventions and Security Council resolution 1566 (2004), that is intended to cause death or serious bodily harm to civilians or non-combatants, when the purpose of such an act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act.[83]

Notably, the U.N. High Level Panel definition excludes state violence on the grounds that other instruments already cover such conduct.[84] The report argues that "the legal and normative framework against State violations is far stronger than in the case of non-State actors . . . ."[85] Additionally, it rejects any possible justification for terrorism by non-state actors, specifically excluding military oc-

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79. Rosalyn Higgins, *The General International Law of Terrorism*, *in* TERRORISM AND INTERNATIONAL LAW 13, 28 (Rosalyn Higgins & Maurice Flory eds., 1997).

80. *See, e.g.*, *infra* notes 107-110 and 119 and accompanying text.

81. *See id.*

82. *See* U.N. High Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, ¶ 164, U.N. Doc. No. A/59/565 (Dec. 2, 2004).

83. *Id.* ¶ 164(d). Other definitions include those found in the International Convention for the Suppression of the Financing of Terrorism: "Any . . . act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act." International Convention for the Suppression of the Financing of Terrorism, art. 2(B), Dec. 9, 1999, U.N. Doc. A/Res/54/109, 39 I.L.M. 270 (2000), *available at* http://untreaty.un.org/ENGLISH/Status/Chapter xviii/treaty11.asp. Interestingly, U.N. Security Council Resolution 1373, by which the international community collectively responded to September 11, 2001, and in which it adopted certain coercive measures under Chapter VII of the U.N. Charter to be undertaken by all nations to "combat [terrorism] by all means, in accordance with the Charter of the United Nations," saw no need to define the concept. S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001). The United States Code defines terrorism as "activities that – (A) involve violent act or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; and (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping..." 18 U.S.C. § 2331, (as amended by the USA PATRIOT ACT of 2001, H.R. 3162, § 802).

84. High Level Panel, *supra* note 82, ¶¶ 159-61.

85. *Id.* ¶ 160.

cupation as a legal excuse.[86]

While the omission of exemptions for "freedom fighters" is thoroughly laudable, the exclusion of state conduct from the scope of the definition raises concerns.[87] It makes moral and legal sense to restate, as the U.N. High Level Panel definition does, that no *casus belli*, specifically including a military occupation, is a valid justification for violence targeted against civilians.[88] In that respect the ban is absolute, and justifiably so.

However, the panel assesses that sufficient norms already govern state conduct, and that separating out such violence normatively coheres.[89] Juridically, this may be true. Nevertheless, in today's political reality, the word "terrorism" carries a special stigma—just as the European Court of Human Rights once said of the term "torture."[90] Hence, there is a significant downside to the exclusion of state violence from this legal category. Part of the justification for this exclusion is that the Rome Statute of the International Criminal Court[91] regulates state violence.[92] Such an argument fails to convince, however, in a world where three of the five permanent members of the Security Council, and some ninety states overall, have not ratified that treaty.[93]

In any case, these outstanding questions do not mean that we have no international legal definition of terrorism, as conventional wisdom in some circles suggests.[94] Even prior to the High Level Panel report, Antonio Cassese asserted that, "a definition of terrorism does exist" in international law.[95] He emphasized that disagreement persists only with regard to the exceptions to that definition. In his view,

> [l]ogically, to say that because there is no consensus on the exception a general notion has not evolved would be a misconception. It is as if one were to say that, since in international criminal law it is doubtful whether murder may exceptionally be justified by duress, as a result one could not define murder.[96]

To support his thesis, he points to the number of treaties and other legal texts

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86. *Id.* ¶ 160.

87. For arguments about the prevalence of state terrorism, see WESTERN STATE TERRORISM (Alexander George ed., 1991).

88. High Level Panel, *supra* note 82, ¶ 160.

89. *Id.* ¶ 159-161.

90. Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) at 41, ¶ 167 (1978).

91. Rome Statute of the International Criminal Court, *opened for signature* July 17, 1998, 2187 U.N.T.S. 90.

92. High Level Panel, *supra* note 82, ¶ 158.

93. Of the permanent members of the U.N. Security Council, the only states which have ratified the Rome Statute are France and the United Kingdom. China, Russia and the United States have all failed to do so. *See The States Parties to the Rome Statute*, http://www.icc-cpi.int/asp/statesparties.html (last visited Oct. 29, 2007).

94. Higgins, *supra* note 79, at 27.

95. Antonio Cassese, *Terrorism as an International Crime*, *in* ENFORCING INTERNATIONAL LAW NORMS AGAINST TERRORISM, *supra* note 13, at 213-14.

96. *Id.* at 214-15.

that not only prohibit but in some cases criminalize terrorism.[97] Current U.N. High Commissioner for Human Rights, Louise Arbour, came to a similar conclusion when she stressed that "many of the elements of the crime of terrorism are already established."[98] *Inter alia*, she points to the decision of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in *Prosecutor v. Galic*, the first international criminal tribunal conviction for the crime of terror.[99] Significantly, the ICTY specifically "rejected claims that convicting a person on the basis of this crime violated the principle of *nullum crimen sine lege*."[100]

Still, other scholars continue to raise the definitional problems as an ongoing threat to the appropriate enforcement of international law. Andrew Clapham, for example, underscores the concern in the human rights field with "overly flexible definitions of 'terrorism' and 'terrorist groups' . . . adopted at the national level."[101] This, he fears, may lead to continued violation of the freedom of expression of opposition figures around the world.[102]

Indeed, enough of an international consensus exists on the core of a definition of terrorism for enforcement efforts to proceed.[103] However, the perceived lack of consensus, based largely on the General Assembly's failure to adopt a final definition for the draft Comprehensive Convention on International Terrorism (Comprehensive Convention), discussed below, remains profoundly destabilizing to the global discussion of terrorism. It is no doubt for largely political reasons, rather than for filling an actual substantive gap, that the U.N. High Level Panel report urged the adoption of the Comprehensive Convention defini-

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97. These include the Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; the Protocol Additional to the Geneva Conventions of August 12, 1949, The Protection of Victims of Non-International Armed Conflicts, 1125 U.N.T.S. 609, 16 I.L.M. 1442, June 8, 1977 (Protocol II) Article 4(2)(d); the Statute of the International Criminal Tribunal for Rwanda, Article 4, U.N. Doc. S/RES/955 (1994) (Annex), 33 I.L.M. 1598; and the International Convention for the Suppression of the Financing of Terrorism, *supra* note 83, at Article 2. He also cites the conclusion of the Supreme Court of Canada that the latter definition is "workable" and "fair." Cassese, *supra* note 95, at 216.

98. Louise Arbour, U.N. High Commissioner for Human Rights, Keynote Address: Security Under the Rule of Law (Aug. 27, 2004), at 3, *available at* www.hchr.org.co/publico/comunicados/2004/cp0431.pdf.

99. Prosecutor v. Galic, International Criminal Tribunal for the Former Yugoslavia, Case No. IT-98-29-T (Dec. 5, 2003).

100. Arbour, *supra* note 98, at 3. This maxim translates as, "There can be no crime committed without a violation of the penal law as it existed at the time."

101. Andrew Clapham, *Terrorism, National Measures and International Supervision, in* ENFORCING INTERNATIONAL LAW NORMS AGAINST TERRORISM, *supra* note 13, at 296.

102. *Id.*

103. Note in particular the pragmatic reductionist approach to the regulation of terrorism wherein some international instruments "target manifestations of the practice rather than treat it as a generic whole," as described in Richard Garnett and Paul Clarke, *Cyberterrorism: A New Challenge for International Law, in* ENFORCING INTERNATIONAL LAW NORMS AGAINST TERRORISM, *supra* note 13, at 465-66.

tion.[104] As the High Level Panel itself noted, "[l]egally, virtually all forms of terrorism are prohibited by one of 12 international counter-terrorism conventions, international customary law, the Geneva Conventions or the Rome Statutes [sic]."[105]

Nevertheless, this perception of outstanding definitional lacunae leads to nervousness about even using the word "terrorism," with the definitional challenges in question sometimes exaggerated. Hence, Amnesty International's (AI) boilerplate explanation of why it used to avoid using the term "terrorism" overstated the outstanding problems with the definition of the term, and understated the degree of legal agreement about elements of that definition.[106] For example, in a 2002 report on attacks on Israeli civilians by Palestinian armed groups, AI noted that it

> does not use the term [terrorism] because it does not have an internationally agreed definition and in practice is used to describe quite different forms of conduct. States and commentators describe acts or political motivations that they oppose as "terrorist", while rejecting the use of the term when it relates to activities or causes they support. This is commonly put as 'one person's terrorist is another person's freedom fighter'. . . . Recent attempts at the United Nations to finalize a comprehensive international convention on 'terrorism' stalled in part because of disagreements between governments about the definition.[107]

Obviously, there are potential hazards involved in utilizing the word in the context of the Israeli-Palestinian conflict, where the term is highly charged.[108] Still, this quoted language, variations of which AI has reiterated, overstates the extent of the definitional problem, as human rights proponents sometimes do.[109] It also fails to concede that there is substantial international consensus about labeling as terrorism most of the types of attacks on civilians by armed groups documented and condemned in the same report. In fact, there are international legal norms that require the prevention and punishment of such acts as terrorism or as

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104. High Level Panel, *supra* note 82, ¶ 163.

105. *Id.* ¶ 159.

106. This argument makes even less sense when one recalls that a number of contentious terms in international human rights law have not yet been conclusively defined either. A case in point is the term "minority," which is nevertheless a category subject to the protection of human rights law, and which benefits from human rights advocacy. *See, e.g.*, Mary Ellen Tsekos, Minority Rights: The Failure to Protect the Roma, 9 No. 3 Human Rights Brief 26 (2002), *available at* http://www.wcl.american.edu/hrbrief/09/3roma.cfm.

107. Amnesty International, *Without Distinction: Attacks on Civilians by Palestinian Armed Groups*, AI Index: MED 02/003/2002, July 2002, at 7.

108. Note the analysis of the use of "terrorism" in this context in Chomsky, *supra* note 16 at 135-141. Most recently, Hamas has banned outdoor prayers in Gaza as a way of stifling protest by its Palestinian opponents based on the claim that, *inter alia*, such outdoor prayers "were used for the purpose of . . . practicing terrorism." BBC News Online, *Hamas bans Gaza outdoor prayers*, Sept. 4, 2007, http://news.bbc.co.uk/2/hi/middle_east/6978540.stm.

109. *See, e.g.*, Touro Law Center Institute for Human Rights, *There is No UN Definition of Terrorism*, http://www.eyeontheun.org/facts.asp?1=1&p=61 (last visited Nov. 15, 2007).

terrorist acts.[110]

As the human rights movement pushes international law forward in areas where it perceives the need to protect human rights, it should be careful about ducking behind a shield of legality. If the law is insufficient, human rights advocates should be supporting standard setting. To announce a legal lacuna and then walk away from this problem is neither a responsible nor a persuasive approach.

a. Current Developments: The Definition of Terrorism in the Comprehensive Convention

The draft Comprehensive Convention is an effort to combine and expand the twelve existing U.N. counter-terrorism treaties and offer a "legally uniform regime for judicial cooperation and prosecution of terrorist activities."[111] Government negotiators have agreed upon much of the text. However, crucial outstanding issues remain.

The major political fault line in the drafting has been between Western states on the one hand, and the Organization of the Islamic Conference (OIC) and the League of Arab States on the other. The former bloc of states has sought to exclude state conduct from the definition of terrorism, while the latter has sought to include state terrorism, and to find ways to exempt actions for self-determination from the category. However, in the wake of the 2005 London bombings, the head of the Arab League endorsed a separate text which affirmed that targeting civilians "cannot be justified by any cause or grievance."[112] Here he seemed to embrace an absolutist vision. Many states in the Arab League, such as Algeria, now face non-state actor terrorism from the victims' perspective, and this reframes the politics of the definitional debate.[113]

In February 2007, the General Assembly's Ad Hoc Committee on Terror-

110. *See, e.g.*, International Convention for the Suppression of Terrorist Bombings, art. 2, Dec. 15, 1977, U.N. Doc. A/RES/52/164, 37 I.L.M. 249; International Convention for the Suppression of the Financing of Terrorism, *supra* note 83.

111. Center for Transatlantic Relations, SHOULDER TO SHOULDER: VIEWS FROM GOVERNMENTS AND CIVIL SOCIETY ON COOPERATIVE SECURITY (Ctr. For Transatlantic Relations, D.C.), September 2003, at 1, *available at* http://transatlantic.sais-jhu.edu/PDF/publications/mewlsetterseptember_2003.pdf. The drafting process began in 1996; negotiations now proceed on the basis of a text introduced by India in 2001. For a critique of that draft, see AMNESTY INTERNATIONAL, UNITED NATIONS GENERAL ASSEMBLY, 56TH SESSION 2001, DRAFT COMPREHENSIVE CONVENTION ON INTERNATIONAL TERRORISM: A THREAT TO HUMAN RIGHTS STANDARDS (2001), *available at* http://web.amnesty.org/802568F7005C4453/0/C2B5C77098FC83D480256AEF0050ED19?Open. Critique of the subsequent draft is found in Letter from Amnesty International & Human Rights Watch, *Comprehensive Convention Against International Terrorism* (Jan. 28, 2002), *available at* http://www.hrw.org/press/2002/01/terror012802-ltr.htm.

112. *Arab Chief Clears Terrorism Definition*, AL-JAZEERA, July 25, 2005, http://english.aljazeera.net/English/Archive/Archive?ArchiveID=13727.

113. Reisman, *supra* note 60, at 22.

ism met to work further on the draft Convention.[114] Delegates, including the representative of the OIC, "reaffirmed [their] determination to make every effort to resolve outstanding issues related to the legal definition of terrorism."[115] During this meeting, the Ad Hoc Committee recommended the establishment of a working group to finalize the draft Convention at the sixty-second session of the General Assembly beginning in September 2007.[116]

In any case, just because governments have not yet agreed upon the article defining terrorism in the draft Comprehensive Convention does not mean the specified conduct is not already prohibited by other international law, either conventional or customary. Even absent agreement on the Comprehensive Convention, the pre-existing definitions, found in other documents, prevail.[117]

b. "Terrorism"/Terrorism: Language, Law and Ambiguity

As noted above, given the continuing suggestion that terrorism still lacks a definition in international law, some human rights advocates have been wary of even using the word. This is a mistake. After the London bombings, Palestinian intellectual Khaled Hroub published an article in the Arab press that called for "banishing all ambiguity" from how such acts are discussed, an appeal that is relevant here.[118]

Amnesty International has recently decided to stop using quotation marks around the word "terrorism," which it had previously used to indicate that the exact meaning of the term remains contested.[119] This practice was unintentionally reminiscent of a letter I received from Congressman Joe Knollenberg (R-MI), in response to my correspondence on torture concerns, in which he put the word "torture" in quotation marks every time it appeared. In that context, human rights activists would instantly recognize the denial such punctuation can seem

114. Press Release, General Assembly, Considering Sixth Committee Reports, Adopts Text on Criminal Accountability of U.N. Officials, Experts on Mission, U.N. Doc. GA/10544 (Dec. 4, 2006). They also discussed holding a high-level international conference on terrorism in Cairo. *Id.*

115. Press Release, U.N. Department of Public Information, Ad Hoc Committee Negotiating Comprehensive Anti-Terrorism Convention Opens Headquarters Session (Feb. 5, 2007), *available at* http://www.un.org/News/Press/docs/2007/L3112.doc.htm.

116. Report of the Ad Hoc Committee Established by General Assembly Resolution 51/210 of 17 December 1996, U.N. Doc. A/62/37, 2007, at 4.

117. See, for example, the definitions in many of the sources cited *supra* note 83.

118. Khaled Hroub, *Appeler le crime par son nom*, AL HAYAT, *reprinted in* COURRIER INT'L, July 13-20, 2005, at 6. William Schulz, former Executive Director of Amnesty International USA, writing in his personal capacity, called on the human rights movement to "have no hesitation using the word terrorism and roundly condemning it." WILLIAM SCHULZ, TAINTED LEGACY: 9/11 AND THE RUIN OF HUMAN RIGHTS 182 (2003).

119. Previously, for example, in its report, *Iraq: In Cold Blood: Abuses by Armed Groups*, it only used the word "terrorism" when it indicated that it avoids the term because "there is no internationally agreed definition of what constitutes 'terrorism' and in practice the term is used to describe different forms of conduct." AMNESTY INTERNATIONAL, IRAQ: IN COLD BLOOD: ABUSES BY ARMED GROUPS 5 (July 25, 2005) (AI Index: MDE 14/009/2005).

to suggest, intentionally or otherwise. Hence, AI is to be commended for ceasing the use of its questioning punctuation marks,[120] even while it rightfully continues to critique unwarranted uses of the term "terrorism" to repress people who may be non-violent dissidents.[121]

The U.N., including its human rights experts and mechanisms, uses the term "terrorism" (without quotation marks) regularly.[122] Many other international human rights non-governmental organizations (NGOs) also use the word, though sparingly.[123] A review of the websites of Human Rights Watch, Human Rights First, the International Commission of Jurists and the International Federation for Human Rights (FIDH) indicates that they all use the word, but only to a limited extent. [124] Most human rights organizations seem to use the word "terrorism" when speaking generally, but avoid labeling particular atrocities as such.[125]

In contrast, some prominent local and regional NGOs seem to be more comfortable using the word "terrorism"—and also seem to be stepping up their efforts to oppose it. For example, a 2005 statement by the Asian Centre for Hu-

120. Note that, as explained above, this article does use quotation marks around "war on terror" and related terms, due to the controversy about those terms and their parameters. Unlike "terrorism," those terms are certainly not legal terms of art nor do they have international consensus definitions. *See* discussion *supra* note 22.

121. *See* AMNESTY INTERNATIONAL, UK: JUSTICE PERVERTED: APPEALS UNDER THE ANTI-TERRORISM, CRIME AND SECURITY ACT 2001 (Dec. 11, 2003) (AI Index: EUR 45/029/2003). Another problem is that the term "terrorism" is sometimes applied selectively so as not to apply to actions against one's opponents. *See, e.g.*, Posting of Marjorie Cohn, *Fighting Terror Selectively: Washington and Posada*, May 10, 2007, *available at* http://marjoriecohn.com/2007/05/fighting-terror-selectively-washington.html.

122. In 2005, Kofi Annan launched a major U.N. strategy to combat terrorism. *See* Kofi Annan, Secretary-General's Keynote Address to the Closing Plenary of the International Summit on Democracy, Terrorism and Security: A Global Strategy for Fighting Terrorism (Mar. 10, 2005), *available at* http://www.un.org/apps/sg/printsgstats.asp?nid=1345 [hereinafter *Global Strategy for Fighting Terrorism*]. Note also the litany of United Nations Conventions banning terrorism, and aspects of terrorism *qua* terrorism. *See, e.g.*, International Convention for the Suppression of Terrorist Bombings, *supra* note 110. The U.N. High Level Panel devoted an entire section of its report to "[t]errorism," arguing that it "attacks the values that lie at the heart of the Charter of the United Nations: respect for human rights; the rule of law; rules of war that protect civilians; tolerance among peoples and nations; and the peaceful resolution of conflict." High Level Panel, *supra* note 82, ¶ 145.

123. *See, e.g.*, INTERNATIONAL CRISIS GROUP, TERRORISM IN INDONESIA: NOORDIN'S NETWORKS (2006), *available at* http://www.crisisgroup.org/home/index.cfm?l=1&id=4092; INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY, HUMAN RIGHTS AFTER SEPTEMBER 11 (2002), *available at* http://www.ichrp.org/paper_files/118_p_01.pdf.

124. *See, e.g.*, International Commission of Jurists, *Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights, Leading Jurists Begin Terrorism Inquiry in Moscow*, Jan. 29, 2007, *available at* http://ejp.icj.org/hearing2.php3?id_article=104&lang=en, and Fédération internationale des ligues des Droits de l"Homme, Counter-Terrorism Measures and Human Rights: Keys for Compatibility, http://www.fidh.org/article.php3?id_article=2784 (last visited Nov. 15, 2007). When they do employ the term, however, it is used without quotation marks.

125. *See, e.g.*, International Commission of Jurists, *Human Rights Lawyers Condemn Bomb Attacks in London*, July 7, 2005, www.icj.org/news.php3?id_article=3728&lang=en (condemning the London "bomb attacks" without labeling them as terrorism).

man Rights (AHCR), entitled *Jehadi Terror in Bangladesh*, which responded to the 400 coordinated bombings across that country on August 17, 2005, makes frequent use of the words "terrorism" and "terrorist" without quotation marks.[126] ACHR's statement laments the failure of the Bangladesh government to confront both fundamentalism—an issue that it specifically references in the statement—and terrorism: "[H]igh profile cases of terrorism do not lead to prosecution, the perpetrators of the attacks on the NGOs, journalists and liberal thinkers have been roaming scot-free."[127] Additionally, many individual victims, as well as NGOs comprised of victims, identify themselves as "victims of terrorism."[128]

Despite the remaining grey areas, the word "terrorism" is now part of both legal and public discourse, and cannot be avoided. Rosalyn Higgins's deconstruction of the term is now surpassed by the Cassese approach that asserts the existence of an overarching definition, subject only to the remaining debates about exceptions. Given that approach, it is indeed still a legitimate endeavor to continue to raise concerns about the outstanding challenges to the fundamental definition,[129] and, in particular, about the expanding scope of some municipal law definitions to encompass non-violent forms of dissent.[130] The latter abuse of the term "terrorism" does great violence to the reality that extremist movements that target civilians do exist, and must be stopped. However, the response should not be to downplay the very real threat posed by such movements, but rather to reclaim the vigilant universalist high ground.

2. Defining Torture

In a warped mirror image of sorts,[131] security experts and apologists for

126. Asian Centre for Human Rights, *Jehadi Terror in Bangladesh*, ACHR REVIEW, Review 89/05, Sept. 7, 2005, *available at* http://www.achrweb.org/Review/2005/89-05.htm.

127. *Id.*

128. *See, e.g.*, *The Madrid Declaration*, Adopted by the First World Congress of Terrorism Victims, Jan. 2004, *available at* http://www.coe.int/t/e/legal_affairs/legal_co-operation/fight_against_terrorism/3_codexter/working_documents/2004/CODEXTER%20_2004_%20Inf%2002%20E%20Madrid%20manifesto.pdf.

129. For example, the definition of "terrorist" is a profoundly more difficult question. Who is a terrorist? Someone found guilty of a terrorist offense in a court in accordance with internationally accepted fair trial norms? Someone purportedly planning such acts? Someone who belongs to an organization which has engaged in such acts in the past? Someone who advocates such behavior? For a discussion of related issues, see Silvia Borelli, *The Treatment of Terrorist Suspects Captured Abroad: Human Rights and Humanitarian Law*, *in* ENFORCING INTERNATIONAL LAW NORMS AGAINST TERRORISM, *supra* note 13 at 39, 39-62.

130. *See, e.g.*, Clapham, *supra* note 101, at 296.

131. A note of caution: the definitional discourses of human rights advocates and security proponents critiqued here are also radically different. Human rights discourse does not condone terrorism, but often fails to pay adequate attention to it. However, some of the security discourses based on definitional challenges to torture and CIDTP actually justify violations of *jus cogens* norms.

harsh counter-terror strategies sometimes justify torture and cruel, inhuman or degrading treatment or punishment (CIDTP) by alleging that there are definitional problems with these terms. Such questioning rips the fabric of fundamental international law norms. Human Rights Watch argues that the absolute prohibition of torture and CIDTP is a cornerstone of international human rights standards, and "one of the most fundamental of all human rights."[132] Torture is undoubtedly the most rigorously codified of international human rights;[133] it rises to the level of *jus cogens*; it is subject to universal jurisdiction.[134] An entire human rights treaty regime under the U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture) seeks to achieve its total abolition.[135] Furthermore, moving from rules to values, the prohibition of torture must be at the heart of any conception of human dignity.

The Convention against Torture defines torture, in relevant part, as

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.[136]

Although this definition is the imperfect product of a difficult decision process, it is workable.[137] There is more controversy about the definition of terrorism in international law than about the definition of torture, yet some policymakers and commentators quibble about the latter while declaring war on the former.

Interestingly, despite the recent congressional debate on the meaning of CIDTP,[138] at the international level the U.S. government remains committed to

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132. Human Rights Watch, Torture and Other Cruel, Inhuman or Degrading Treatment, http://www.hrw.org/about/projects/womrep/General-86.htm (last visited Nov. 17, 2007).

133. As Sands argues, "[t]his is one area in which the rules of international law are clear." SANDS, *supra* note 56, at 207.

134. U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, arts. 5-8, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85.

135. There are currently 145 States Parties to this treaty. *See* U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Ratifications or Reservations, http://www.ohchr.org/english/bodies/ratification/9.htm (last visited Oct. 29, 2007).

136. Convention against Torture, *supra* note 134, at art. 1(1).

137. On the difficult drafting history, see J. HERMAN BURGERS & HANS DANELIUS, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT (Martinus Nijhoff 1988). On imperfections in the definition as diagnosed by human rights experts, see Ahcene Boulesbaa, *Analysis and Proposals for the Rectification of the Ambiguities Inherent in Article 1 of the UN Convention on Torture*, 5 FLA. J. INT'L. L. 293 (1990). For a contemporary overview of definitional questions, see GAIL MILLER, DEFINING TORTURE (2005).

138. *See* Alfred McCoy, *The Bush Legacy of Legalized Torture*, Feb. 8, 2006, http://www.tomdispatch.com/post/57336/tomdispatch_alfred_mccoy_on_how_not_to_ban_torture_i

agreed understandings. As it stated in its May 2005 report to the U.N. Committee against Torture, "The definition of torture accepted by the United States upon ratification of the Convention . . . remains unchanged."[139]

With regard to CIDTP, a murkier area than torture, the Convention against Torture does not offer a definition.[140] For guidance on its meaning, a footnote to the U.N. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment stipulates that CIDTP should be interpreted so as to extend the widest possible protection against abuses.[141] The U.N. Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment also explains that "Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment."[142] CIDTP is then part of the same continuum of practices as torture. Both are illegal, but CIDTP is lower on the scale with regard to either the required severity of the pain and suffering inflicted, or the intentionality of its infliction.

While this broad and open approach to understanding CIDTP poses some danger, both in terms of legitimate confusion about acceptable detention practices and bad faith governmental evasion, it is hard to imagine an exact definition that provides the needed flexibility and is not even more amenable to manipulation. This was precisely the conclusion of the Working Group of the Commission on Human Rights that studied early draft texts of the Convention against Torture.[143] The Human Rights Committee also rejected an enumerative approach.[144] Such a list could never be completely inclusive. The human imagination for cruelty stuns us all.[145] Interestingly, the recent U.S. report to the U.N.

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n_congress.

139. United States of America, *Second Periodic Report to the U.N. Committee Against Torture* [hereinafter *CAT Report*], ¶ 11, U.N. Doc. No. CAT/C/48/Add.3 (June 29, 2005).

140. This too should make human rights advocates cautious when making arguments against using the word terrorism because of a claimed insufficiency in the definition.

141. U.N. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, G.A. Res. 173, U.N. GAOR, 43d Sess., 76th plen. mtg., U.N. Doc. A/RES/43/173 (Dec. 9, 1988).

142. U.N. Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G. A. Res. 3452, at 91, art. 1(2), U.N. GAOR, 30th Sess., Supp. No. 34, U.N. Doc. A/10034 (Dec. 9, 1975).

143. *See* BURGERS & DANELIUS, *supra* note 137, at 70.

144. General Comment 20 (Article 7), U.N. GAOR, Hum. Rts. Comm., 44th Sess., ¶ 4, U.N. Doc. HRI\GEN\1\Rev.1 (1992).

145. Just to list some of the findings of the Taguba report detailing torture at Abu Ghraib illustrates this point. Methods of torture and ill-treatment that Major General Taguba reported included, "Breaking chemical lights and pouring the phosphoric liquid on detainees; pouring cold water on naked detainees; beating detainees with a broom handle and a chair; threatening male detainees with rape; . . . sodomizing a detainee with a chemical light and perhaps a broom stick, and using military working dogs to frighten and intimidate detainees with threats of attack, and in one instance actually biting a detainee." Report of Major General Antonio M. Taguba as *cited in* Seymour Hersch, *Torture at Abu Ghraib*, NEW YORKER, May 10, 2004, *available at* wysiwyg://186/http://www.newyorker.com/printable/?fact/040510fa.

Committee against Torture does not critique the concept of CIDTP. Rather, the report restates the "commitment of the United States . . . to prevent and prosecute serious abuses, whether or not they fall within these definitions of torture or cruel, inhuman or degrading treatment or punishment."[146]

Here, skepticism about an overly literal approach to rules may be appropriate. This critical stance should not override the rules, but rather shape our interpretive process, especially where the legal principles in question are difficult to apply. As Rosalyn Higgins has rightly suggested, where specific rules alone cannot answer every question, the lacuna should be filled by a decisional process that meets the goals of the normative system of international law.[147] For this process to work, however, there must be some shared understanding of, and a real commitment to, these goals. If President Bush is actually as unclear about the meaning of "outrages upon human dignity," as he claimed to be in the controversy over Common Article 3 of the Geneva Convention, we face a major problem in realizing such a process with regard to torture and CIDTP.[148]

Despite all these definitional debates, we can conclude from the brief overviews above that both terrorism and torture are defined sets of practices that are unequivocally prohibited and criminalized by a range of international treaties and principles of customary international law. This reality is also reflected in both national and international case law. Though more can be done to refine our understanding of the terms "terrorism" and "torture," both concepts already have strong legal grounding. Philosophically, these terms are also symbiotic, as noted above. Consequently, as discussed below, the absolute prohibition of one can only be sustained in today's world by the absolute approach to the other.

IV.
TORTURED LEGAL ARGUMENTS

Notwithstanding this interrelationship between the norms against terrorism

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146. *CAT Report*, *supra* note 139, ¶ 18.

147. *See* ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 1-12 (1995).

148. President George W. Bush, Press Conference of the President (Sept. 15, 2006), *available at* http://www.whitehouse.gov/news/releases/2006/09/20060915-2.html. See also the "glossary of the unique Bush administration definitions" related to torture and CIDTP in David Luban, *Torture, American-Style*, WASH. POST, Nov. 27, 2005, at B01. Luban asks:

> What does humane mean? Not much, it seems. Amazingly, the Army's Schmidt report declared that none of the tactics used in Guantanamo were 'inhumane.' Along similarly minimalist lines, Gonzales defined 'humane treatment' as requiring nothing more than providing food, clothing, shelter and medical care. In the Bush lexicon, therefore, sexual humiliation, acute sleep deprivation and threats to have a detainee's mother kidnapped and imprisoned are humane.

Id. Attorney General Michael Mukasey's "refusal to declare waterboarding to be torture" during his confirmation hearings fits into the same category. *See Mukasey Stays Vague on Waterboarding*, CNN.com, Oct. 30, 2007, http://www.cnn.com/2007/POLITICS/10/30/senate.mukasey/index.html.

and those against torture, in the "war on terror" we have seen many methods deployed in the name of defeating terrorism that instead echo its rationale. As a result, terrorism has won a great victory in the last six years, because some of the world's leading democracies have proved willing, in the face of terrorism, to undermine the rule of law in a manner that terrorists could never have achieved by themselves. Fearing more attacks against civilians in the post-September 11 era, states, including liberal democracies, have curtailed a range of human rights protections, both de jure and de facto.[149]

There are many examples of these assaults on human rights. Perhaps the worst from a normative perspective is the undermining of the peremptory norms banning torture and CIDTP.[150] This questioning of legal norms is also reflected in practice. We know now that torture and CIDTP are widespread in the context of the "war on terror."[151] Deaths in custody in Bagram Air Base in Afghanistan and an alarming suicide attempt rate in Guantanamo Bay confirm that such detention practices are taking their toll.[152]

A. Post-September 11 Justifications of Torture

Some legal academics have contributed to the environment that facilitates such abuses by assaulting the absolute position against torture, often while claiming to oppose the practice in general. Famously, Harvard Law Professor Alan Dershowitz has hypothetically suggested the use of dental drills on unanaesthetized teeth *à la* the Nazi dentist of The Marathon Man in the interrogation of certain terrorist suspects.[153] Rather than being denounced, he appears

149. *See, e.g.*, Amnesty International, USA: *Five Years on 'the Dark Side': A Look Back at 'War on Terror' Detentions*, AI Index: AMR 51/195/2006, Dec. 13, 2006, *available at* http://web.amnesty.org/library/Index/ENGAMR511952006?open&of=ENG-USA.

150. For a thorough overview of these norms, see Mary Ellen O'Connell, *Affirming the Ban on Harsh Interrogation*, 66 OHIO ST. L. J. 1231 (2005).

151. *See, e.g.*, Detainee Abuse and Accountability Project, *By the Numbers: Findings of the Detainee Abuse and Accountability Project*, (Apr. 26, 2006) (Human Rights Watch Index No. G11802), *available at* http://hrw.org/reports/2006/ct0406/ct0406web.pdf; the Online Archive of Documents on Prisoners of the War on Terror Posted by the University of Minnesota's Center for Bioethics and Human Rights Center, www1.umn.edu/humanrts/OathBetrayed/index.html (last visited Nov. 17, 2007).

152. *See, e.g.*, Amnesty International, *Terror and Counter-Terror: Defending Our Human Rights* (Aug. 26, 2006) (AI Index No. ACT 40/009/2006), *available at* http://web.amnesty.org/library/Index/ENGACT400092006?open&of=ENG-313; Amnesty International, *Worldwide Appeal, Afghanistan: Detained at Bagram* (Nov. 2004), *available at* http://web.amnesty.org/appeals/index/afg-010704-wwa-eng; International League for Human Rights, *Human Rights Groups Write to Bush on Abuse of Iraqi Prisoners* (May 7, 2004), *available at* http://64.233.169.104/search?q=cache:qaXhyRaX5NQJ:www.ilhr.org/ilhr/regional/centasia/protests/abu_graib.htm+human+rights+watch+suicide+bagram+air+base+detainees&hl=en&ct=clnk&cd=6&gl=us (alleging that "[n]umerous detainees have been killed or attempted suicide in custody in Afghanistan, Iraq and Guantanamo Bay prompting unprecedented expressions of concern by the International Committee of the Red Cross . . . ").

153. ALAN DERSHOWITZ, WHY TERRORISM WORKS 144 (2002).

everywhere, and Nobel Prize winner Elie Wiesel has even lauded his book.[154] Dershowitz has gone so far as to call for judicial torture warrants that would legalize the use of some torture in what he sees as extreme cases.[155] Though the Harvard Professor is most famous for this, Oren Gross of the University of Minnesota Law School has expressed a similar view. In his oral presentation at the American Society of International Law (ASIL) 2005 Annual Meeting, he urged his audience to confess that if *their* children were kidnapped, they would want the abductors tortured to elicit information that could locate them.[156]

I thought about Gross's argument when I saw the film *El Manara* several months later in Algiers. The impulse he ascribed to his audience was exactly that which led Fawzi to apply a blow torch to Ramdane in the movie, to disastrous effect.[157] How dangerous it is to suggest that the extreme human emotions provoked by unbearable risks to our own families become official policy. Much like the attempt to force Michael Dukakis in his 1988 debate with George H.W. Bush to endorse the death penalty for his wife's hypothetical rapist and murderer, Gross at the ASIL meeting exhorted his audience to show they cared (about their children) by embracing brutality—a frequent refrain in this debate.[158] He insisted, as do many who make similar arguments, that we all really want exceptions to the ban on torture if we truly search our hearts.[159] And thus the completely understandable reactions of individual family members were conflated with acceptable responses of the state, much like what happened so tragically in *El Manara.*

Yet, paradoxically, Gross insisted that he was otherwise in complete agreement with Nigel Rodley, former U.N. Special Rapporteur on torture, with whom he shared the podium at the ASIL meeting.[160] Alan Dershowitz too claims that he does not advocate torture, while suggesting scenarios in which sterile needles could be inserted under terror suspects' fingernails during inter-

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154. *Id.* at back cover.

155. *Id.* at 156-60.

156. Oren Gross, Remarks on Panel: Torture, Violence and the Global War on Terror, Washington, DC (Apr. 2, 2005) (notes of oral presentation on file with the author). The print version, which uses different language, is available in Oren Gross, *Lecture Commentary by Oren Gross*, 99 AM. SOC'Y INT'L L. PROC. 407 (2005).

157. *El Manara*, *supra* note 1.

158. Transcript of Second Bush-Dukakis Presidential Debate, Los Angeles, CA, (Oct. 13, 1988), *available at* http://www.presidency.ucsb.edu/showdebate.php?debateid=14. Journalist Bernard Shaw asked: "Governor, if Kitty Dukakis were raped and murdered, would you favor an irrevocable death penalty for the killer?" *Id.*

159. Gross, *supra* note 156; *Lecture Commentary*, *supra* note 156, at 408.

160. Unlike Dershowitz, Gross supports an absolute ban on torture in law. But in exceptional cases, he holds that the ticking time bomb scenario should provide a basis for the mitigation of punishment of official perpetrators of torture. Gross, *supra* note 156; *Lecture Commentary*, *supra* note 156, at 409. As Nigel Rodley indicated on the same panel, to codify such an approach provides an invitation to torture. Remarks on Panel, *supra* note 156. While Gross's stance maintains the absolute ban in law—which is important—it renders this ban a fiction. *See also* Nigel Rodley, *Torture, Violence and the Global War on Terror*, 99 AM. SOC'Y INT'L L. PROC. 402, 406 (2005).

rogation.[161] In the pre-September 11 environment, such intellectual justifications of torture were largely recognized as outside the parameters of decency, ineluctably an affront to human dignity.[162] However, among its many terrible legacies, September 11 has shifted those parameters.

Media commentators from left and right demonstrate this sad reality. For example, in November 2001, the liberal columnist Jonathan Alter wrote a much-discussed piece for *Newsweek* entitled *Time to Think About Torture*. In this article, he suggested we should not be too squeamish about interrogation practices (though he protested that he was not actually condoning torture) and he actually advocated the consideration of what have become known as "extraordinary renditions."[163] In 2005, after the Abu Ghraib scandal had broken, after serious allegations of U.S. human rights abuses surfaced in the *Washington Post*[164] and elsewhere, the *Wall Street Journal* published a commentary on U.S. detention practices in the "war on terror," by conservative author Heather MacDonald, called *Too Nice for Our Own Good*. In it, she railed:

> Our terrorist enemies have declared themselves enemies of the civilized order. In fighting them, we must hold ourselves to our own high moral standards—without succumbing to the utopian illusion that we can prevail while immaculately observing every precept of the Sermon on the Mount.[165]

Here, in the name of exigency, we see undermined the basic notion that

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161. *See, e.g.*, Alan Dershowitz, *Tortured Reasoning in* TORTURE: A COLLECTION 257, 266 (Sanford Levinson ed., 2004). To be fair to Dershowitz, he suggests that allowing for judicial warrants to engage in torture in exceptional situations will lead to less torture than currently used. Alan Dershowitz, *Torture Without Visibility and Accountability is Worse Than With It*, 6 U. PA. J. CONST. L. 326 (2003-2004). As he argues, "[i]f we are to have torture, it should be authorized by the law." Alan Dershowitz, *Is There a Torturous Road to Justice?*, LA TIMES, Nov. 8, 2001, at 19. However, this accepts torture as a moral and effective practice. It also sidesteps the issue of the terrible harm to victims. He briefly notes the use of torture by France in Algeria during the 1954-62 war, quoting a French general who said, "The best way to make a terrorist talk when he refused to say what he knew was to torture him." Alan Dershowitz, *The Torture Warrant: A Response to Professor Strauss*, 48 N.Y.L. SCH. L. REV. 275, 293 (2003-2004). However, Professor Dershowitz omits discussion of the terrible suffering of Algerians who were systematically tortured by the French Army. For the story of one such young Algerian woman, see SIMONE DE BEAUVOIR, DJAMILA BOUPACHA (1962). On the utility of using torture, Dershowitz overlooks the fact that the moral outrage over the practice hurt France domestically and internationally, and ultimately, the Algerian FLN won the war.

162. *See, e.g.*, SCHULZ, *supra* note 118, at 157; José Alvarez, *Torturing the Law*, 37 CASE W. RES. J. INT'L L. 175 n.1 (2006), and Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1684-87 (2005).

163. Jonathan Alter, *Time to Think About Torture*, NEWSWEEK, Nov. 5, 2001, at 45. On renditions, he wrote, "[W]e'll have to think about transferring some suspects to our less squeamish allies, even if that's hypocritical." *Id.*

164. *See, e.g.*, Dana Priest & Barton Gellman, *U.S. Decries Abuse But Defends Interrogations; 'Stress and Duress' Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities*, WASH. POST, Dec. 26, 2002, at A1.

165. MacDonald, *supra* note 66. In a similar vein, see David Rivkin, Jr. and Lee A. Casey, *Getting Serious About 'Torture'*, Oct. 22, 2007, WALL STREET J., at A19. Even more extreme, see the argument in Charles Krauthammer, *The Truth About Torture*, WKLY. STANDARD, Dec. 5, 2005, *available at* http://www.weeklystandard.com/Content/Public/Articles/000/000/006/400rhqav.asp.

human dignity is not only technically non-derogable, but also an essential value, a timeless and central goal and as such non-negotiable. This notion is all too *à propos* when Congress passed legislation in 2006 that may or may not have legalized certain acts of torture and CIDTP,[166] but at the very least has clearly excised the judicial safeguards that might prevent these practices.[167]

In such a universe, only an absolute rejection of torture constitutes any opposition to the practice at all. Just as there is no room in a definition of terrorism for a "freedom fighters" exception, there is no room for exceptions in the definition of torture, even—and perhaps especially—in fighting terror. For the most part, in most situations, it is precisely in the allegedly "exceptional" moments (albeit sometimes writ large) that torture is used: on political opponents who pose "unique" threats to order, on particularly evil criminals who are concealing especially vital information, on the much discussed suspect with information about ticking bombs. (This last is a hypothetical I have never understood because, except on television, we will never know for sure whether we are in such a situation until after the fact, and in any case, nowadays most bombs do not tick.[168])

The ticking bomb hypothetical is a deeply flawed device used to shift the moral high ground away from those who oppose torture.[169] This rhetorical tool is persuasive to many despite the fact that torture is understood by a plethora of experts—including those who authored a 1983 CIA interrogation manual[170]—to

166. *See* McCoy, *supra* note 138.

167. *See The U.S. Senate Has Passed Controversial Legislation Endorsing President George W. Bush's Proposals to Interrogate and Prosecute Foreign Terror Suspects*, BBC News Online, Sept. 29, 2006, http://news.bbc.co.uk/2/hi/americas/5390848.stm. This concern is magnified by the recent opinion of the United States Court of Appeals for the District of Columbia which upheld the provision of the Military Commissions Act of 2006 that strips the rights of all Guantanamo detainees to have their habeas corpus petitions heard in U.S. federal courts. *See* Boumediene v. Bush, No. 05-5062, 2007 U.S. App. LEXIS 3682 (D.C. Cir. 2007). The Supreme Court heard oral argument in the appeal of *Boumediene v. Bush*, consolidated with another case, on Dec. 5, 2007. *See* Center for Constitutional Rights, *Press Release: Guantánamo Attorneys to Justices: Restore the Constitution*, Dec. 5, 2007, *available at* http://ccrjustice.org/newsroom/press-releases/guant%C3%A1namo-attorneys-justices%3A-restore-constitution.

168. Bob Cochrane, co-creator of the popular television show "24," admits, "Most terrorism experts will tell you that the 'ticking time bomb' situation never occurs in real life . . . But on our show it happens every week." Jane Mayer, *Whatever It Takes*, NEW YORKER, Feb. 19, 2007, *available at* www.newyorker.com/printables/fact/070219fa_fact_mayer. This dramatic representation has become dangerous in the real world, as according to top U.S. military officials, DVDs of "24" circulate among American soldiers in Iraq, some of whom have emulated the frequent and gruesome torture on the show on real detainees. *Id.* As a result, top military officials recently met with the producers of "24" to implore them to change their plot lines, and for example "do a show where torture backfires." *Id.*

169. *See* Henry Shue, *Torture in Dreamland: Disposing of the Ticking Bomb*, 37 CASE W. RES. J. INT'L L. 231 (2006) (Symposium: "Torture and the War on Terror").

170. According to excerpts of the "Human Resource Exploitation Training Manual," reprinted in Harper's Magazine, "Intense pain is quite likely to produce false confessions, fabricated to avoid additional punishment. This results in a time-consuming delay while an investigation is conducted and the admissions are proven untrue." *Psychological Torture, CIA-Style*, HARPER'S MAG., Apr.

be ineffective at producing reliable information in such a situation.[171] It is also incredibly dangerous to assume one is actually in the hypothetical situation in the real world of torture.[172] The many mistakes, especially those on the basis of discrimination, that have allegedly been made in pursuit of terror suspects in the last few years starkly underscore the incredible danger of giving in to this alleged exception.[173] Moreover, it is the first push down a dangerous slippery slope of abhorrent human behavior. Quite simply, there is no way to cabin the practice. Torture spreads "like a cancer."[174]

Finally, the ticking bomb hypothetical shifts the argument away from the key question of the morally repugnant nature of the violence called torture, to questions of effectiveness. Human rights advocates are then forced to respond to the discourse of effectiveness by arguing that torture is not productive. They grapple with whether or not to even engage in this debate. Such a line of argument can be persuasive with the public, but it is also a major concession because it obscures the peremptory nature of the international ban on torture and the moral reasons for the ban. In other words, if it could be proved to be effective, would we then have to accept it?

B. Arguments for Torture, Arguments for Terror

To allow for torture in exceptional situations is quite simply to allow tor-

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1997, at 23-24.

171. U.S. Army Brigadier General Patrick Finnegan, the dean of the United States Military Academy at West Point, has argued that torturing in a "ticking time bomb case" is "particularly pointless," as the suspect would be even less willing to talk. "They know if they can simply hold out several hours, all the more glory—the ticking time bomb will go off!" Mayer, *supra* note 168. Top FBI interrogator Joe Navarro has also asserted that "torture was not an effective response." *Id.* (as paraphrased).

172. Even after a full trial, in numerous capital cases defendants have been found to be wrongfully convicted, frequently on discriminatory grounds. *See, e.g.*, Michael Radelet, Hugo Adam Bedau & Constance Putnam, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21 (1987), and FROM LYNCH MOBS TO THE KILLING STATE: RACE AND THE DEATH PENALTY IN AMERICA (Charles J. Ogletree, Jr. & Austin Sarat eds., 2006).

173. Consider the case of Maher Arar, a Canadian national of Syrian origin who was arrested on suspicion of Al Qaeda membership while traveling through the United States. He was subsequently sent to Syria where he was detained and tortured for more than a year. The Canadian government later concluded that Arar had no connection to terrorism. *See Maher Arar: Timeline*, Jan. 26, 2007, cbc.ca, http://www.cbc.ca/news/background/arar/. During an October 2007 House Foreign Affairs Committee hearing on Arar's rendition, Secretary of State Condoleezza Rice admitted that the U.S. government mishandled his case. *U.S. Handling of Arar Case "by no means perfect,"* CBC News Online, Oct. 24, 2007, http://www.cbc.ca/world/story/2007/10/24/rice-arar.html. *See also* Adam Liptiak & Leslie Eaton, *Mistrial is Latest Terror Prosecution Misstep for U.S.*, N.Y. TIMES, Oct. 24, 2007, *available at* http://www.nytimes.com/2007/10/24/washington/24justice.html?_r=1&ref=us&oref=slogin.

174. Oxford Professor Henry Shue has argued that though initially defended as an exceptional measure, torture spread through the French security apparatus during Algeria's war of independence "like a cancer" until it became normal practice. *See* Alex Bellamy, *No Pain, No Gain? Torture and Ethics in the War on Terror*, 82 INT'L AFF. 122, 142 (2006).

ture.[175] Hence, absolute opposition to it remains essential. As the Convention against Torture sets out in one of its most important articles,

> No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.[176]

The choice of language here is deliberate. Without it, we have no real prohibition of torture. This is precisely the sort of norm whose literal language we need to protect in the current moment.

However, like many international lawyers,[177] I subscribe to an ethical, humanist understanding of this prohibition, beyond literal language. My commitment to combating these practices is both a rules-based and a values- and goals-driven one. Still, it is not necessary for others to share my underlying reasoning to arrive at the same conclusion. There are additional, pragmatic reasons to champion the absolute ban on torture. Playing the counter-terrorism game outside the rules of international law often makes the situation worse as a practical matter.[178] The most recent and worrying example of this is found in the view of U.S. intelligence agencies that the "war on terror" as fought in Iraq has increased the risk of terrorism.[179] Respect for international norms could have helped to avoid or mitigate that outcome.

Undoubtedly, the absolute position against torture is also integral to absolute positions against terrorism. The two halves of terror/torture are interdependent. Though they are set out in opposition to one another in the war against terrorism-era debate about torture, they are much the same at root. As noted above, both torture and terror are based on the identical philosophical assumption: the permissibility of instrumentalizing severe and deliberate human suffering. Similarly, the rejections of terrorism and of torture also share the same premise: that there is something *apart* about intentionally inflicting such suffering. There can be no room for justifications of either half of terror/torture; apologia for one provokes and sustains apologia for the other.

Another shared aspect of the two practices is the unbridled coerciveness of

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175. Gross's attempt to both rebut Dershowitz's suggestion of using torture warrants by defending an absolute legal ban, and simultaneously suggest official action in contravention of that ban in extreme situations, while commendable for its extraordinary gymnastics, is not a solution either. Oren Gross, *Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience*, 88 MINN. L. REV. 1481 (2003/04). His logic is akin to that of defenders of terrorism who argue that such violence is "tragic," but necessary to save lives, or end murderous occupations. *See infra* note 188 and accompanying text.

176. U.N. Convention against Torture, *supra* note 134, at art. 2(2).

177. *See, e.g.*, David Luban, *Essay: Liberalism, Torture and the Ticking Bomb*, 91 VA. L. REV. 1425 (2005), and Richard Bilder & Detlev Vagts, *Speaking Law to Power: Lawyers and Torture*, 98 AM. J. INT'L L. 689 (2004).

178. For an eloquent critique of the "war against terrorism" as a "war without rules," see Fitzpatrick, *supra* note 22, at 248.

179. On the NIE leaks, see Paul Reynolds, *Terror Report Clouds Bush Narrative*, BBC News Online, Sept. 27, 2006, http://news.bbc.co.uk/2/hi/americas/5384548.stm.

both terror and torture.[180] Both the High Level Panel definition of terrorism and the Convention against Torture definition of torture turn on notions of intimidation, compulsion, and coercion. As sociologist Lisa Hajjar has argued, the right not to be tortured "invests people, regardless of their social status, their political identity or affiliations, with a kind of sovereign right over their bodies and minds . . . ."[181] This right is implicated by one of McDougal's explanations of his understanding of human dignity, that is that it "refers to a social process . . . in which private choice, rather than coercion, is emphasized as the predominant modality of power."[182] Such a social process then can leave no room whatsoever for terror or torture.

To get around these absolutes, the distinction sometimes made is that the victims of terror are "innocent" whereas the victims of torture, we are assured by the proponents of its use in exceptional cases, are "guilty," or at least possess guilty knowledge. Of course terrorists and *their* apologists often suggest that the "innocent" civilian victims are somehow culpable, whether because they voted for governments, or failed to overthrow them, or benefit from those governments' policies which the terrorists claim to oppose, or perhaps they are guilty merely by identity.[183] The latter is an unspoken assumption made by the justifiers of torture as well. In the current moment, when we talk about torture as a tool of counter-terror, we often assume we are discussing treatment to be meted out to brown-skinned foreign Muslim men, after all. Discrimination may then shape notions of "guilt" and indeed of acceptable conduct toward terror suspects. What is essential about both norms against torture and those against terrorism is that they reject these extra-legal categorizations of innocent versus guilty and deem instead that certain treatment cannot be meted out to any per-

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180. Rhonda Copelon similarly focused on such commonalities when she made her influential argument that in certain circumstances gross patterns of domestic violence were like torture and should be categorized as such. Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture*, 25 COLUM. HUM. RTS. L. REV. 291, 337 (1993-1994).

181. Lisa Hajjar, *Torture and the Future*, MIDDLE E. REP., May 2004, http://www.merip.org/mero/interventions/hajjar_interv.html.

182. MYRES MCDOUGAL, STUDIES IN WORLD PUBLIC ORDER 16 (1960).

183. *See, e.g.*, Posting of Ward Churchill, "Some People Push Back," On the Justice of Roosting Chickens, http://www.kersplebedeb.com/mystuff/s11/churchill.html (last visited Nov. 15, 2007). In this infamous selection Churchill considers the attacks of September 11 in turn.

> As to those in the World Trade Center . . . . True enough, they were civilians of a sort. But innocent? Gimme a break . . . . They formed a technocratic corps at the very heart of America's global financial empire . . . to which the military dimension of U.S. policy has always been enslaved—and they did so both willingly and knowingly . . . . If there was a better, more effective, or in fact any other way of visiting some penalty befitting their participation upon the little Eichmanns inhabiting the sterile sanctuary of the twin towers, I'd really be interested in hearing about it.

Id. Just as Dershowitz protests that he does not advocate torture, Churchill has said that he does not actually believe that the twin towers were a legitimate target. *See* DemocracyNow.org, The Justice of Roosting Chickens: Ward Churchill Speaks, http://www.democracynow.org/article.pl?sid=05/02/18/157211 (last visited Nov. 16, 2007). Nevertheless, his rhetoric here is reminiscent of the rhetoric of terrorism.

son, or at least in the case of some terrorism rules, to any civilian.[184] They embrace the absolute and universal nature of human dignity.

Furthermore, these same distinctions of guilt and innocence, read as good motives versus bad, provide no license for any would-be perpetrators of either practice. Righteousness is no requirement for protection from torture or terror, nor is it a justification for performing either. Any arguments that break down these holistic constructs vis-à-vis torture give ammunition to those who seek to insert analogous distinctions in definitions of terrorism (such as the attempts to carve out "freedom fighter" exceptions in the Comprehensive Convention's definition of terrorism).

Whatever the values they seek to defend, the intellectual proponents of weakening the absolute ban on torture in order to confront terror fail to grasp that, as explained above, diluting the prohibition of torture inherently destabilizes the notion of terror and why it is wrong. In a transnational debate, we cannot convince the requisite broad constituency to oppose a practice selectively, on the mere basis of shared ideas about innocence or guilt of the victims; but rather only on the basis that, as profoundly simple as it sounds, human beings must not do certain things to other human beings, no matter what. I think back to the film *El Manara*. Ramdane, the young fundamentalist who raped his abducted friend Asma, had himself been tortured during a previous detention by the state. Fawzi, who had previously denounced state torture while a young activist, became a torturer himself when confronted with the horror of his wife's captivity. Easy assumptions about guilt and innocence cannot help us out of this morass.

Instead, in the context of the "war on terror," it is imperative that we staunchly reject utilitarian justifications for deliberately inflicting severe suffering.[185] Such a rejection is an essential part of defusing potential ticking time bomb situations in the first place. Furthermore, it is the only universalizable position, a truth that becomes starkly obvious when one recognizes the likeness and interconnection between terror and torture. The same arguments can be made by many terrorists and torturers to justify their violence: the argument that severe instrumental violence against an individual or a group of individuals, though perhaps regrettable, is necessary to save the lives, or protect the rights, of

184. The fact that terrorism definitions are often limited to attacks on civilians, suggests an approach which is not entirely absolutist. This underscores that armed conflict and the legal rules that govern it already represent a problematic acceptance of the infliction of some extreme suffering for instrumental reasons. However, this broad topic goes far beyond the scope of this paper. For more discussion, see Bennoune, *supra* note 47.

185. Utilitarian justifications of torture have a long history. Jeremy Bentham wrote in the mid 1770s that there were "two Cases in which Torture may with propriety be applied," both of which involve inducing the victim to take action in the public interest. *See Bentham on Torture* (W.L. Twining & P.E. Twining eds.), 24 N. IRELAND LEG. Q. 305, 314 (1973). Stanley Cohen, co-founder of the Public Committee Against Torture in Israel argues that "The defence of necessity as a moral and legal justification for torture is, of course, as old as the phenomenon itself . . . torture always has to be justified in instrumental, utilitarian terms . . . ." Stanley Cohen, *The Social Response to Torture in Israel*, *in* MEDICAL ETHICS AND THE CASE OF ISRAEL, *supra* note 48, at 20-22.

many more.[186] As D.H. Munro wrote in his critique of ethical egoism, "[O]ther people are likely to feel justified in treating us as we treat them, so that the actual consequence of adopting a particular policy is, as a rule, to be on the receiving end of it."[187] Ultimately, utilitarian rationalizations of torture in the name of fighting terror fail because they are not universalizable. The utilitarian argument here is not only morally repugnant, but it will justify the very practice that its proponents claim they seek to combat.[188] More torture may produce more ticking bombs in the long run, just as more hypothetical ticking time bombs will produce more torture.

V.
THE OTHER END OF THE SPECTRUM: *TERROR*/TORTURE

Turning to the other end of the spectrum, those international lawyers who position themselves primarily as opponents of torture and other state counter-terror abuses often fail to fully reflect on or engage with the exigencies of terrorism.[189] Though different from those critiqued above in that they do not seek to *justify* terror, their understating of the impact of terrorism is also destabilizing. All too often, they overlook the fact that the actual struggle to end terrorism is itself a human rights struggle, even though leaders with terrible human rights

186. In both cases we may well question the factual basis for such assertions, but the claims made often echo one another. I am not arguing that terrorism is a direct result of human rights violations, like torture, as a general rule, though this may be a contributing factor in certain circumstances. *See infra* notes 270–274 and accompanying text. However, one justificatory discourse can easily bolster the terms of reference of the other, especially in the eyes of communities to which terrorists look for support and legitimacy. Osama bin Laden has tried to justify Al Qaeda crimes as follows: "Just as you violate our security, we violate yours. Whoever toys with the security of others, deluding himself that he will remain secure, is nothing but a foolish thief." Osama Bin Laden, *Speech Addressed to the American People* (Oct. 29, 2004), *in* AL QAEDA NOW: UNDERSTANDING TODAY'S TERRORISTS 242 (Karen Greenberg ed., 2005). Cumulatively, these instrumental rationalizations of severe, deliberate suffering can shred what remains of the basic and universal notions of decency and fundamental considerations of humanity, ideas that are so necessary today.

187. D.H. MONRO, EMPIRICISM AND ETHICS 232 (1967). As Munro suggested, "[O]ne useful way to explore the implications of a policy is to ask ourselves whether we would be prepared to accept the role of any of the persons affected by such a policy." *Id.* See also his discussion of universalizability, *Id.* at 147-207.

188. Bin Laden has used the following specific justification for Al Qaeda atrocities:

> As I was looking at those destroyed towers in Lebanon [by Israel and the United States during the 1982 Israeli invasion and its aftermath], I was struck by the idea of punishing the oppressor in the same manner and destroying towers in the U.S., to give it a taste of what we have tasted and to deter it from killing our children and women.

AL QAEDA NOW, *supra* note 186, at 242-43. While one can question indeed whether this is Bin Laden's real motivation, it is a frequent refrain in his justificatory discourse. See also the assertion by Sidney Jones that "atrocities in Abu Ghraib and other U.S.–controlled detention centers, "ghost" prisons, and other horrors unquestionably helped the jihadist cause." Sidney Jones, *Asking the Right Questions to Fight Terror*, JAKARTA POST, Jan. 9, 2006, *available at* http://www.crisisgroup.org/home/index.cfm?id=3863.

189. For a notable, highly principled exception, see SCHULZ, *supra* note 119, at 173-94.

records sometimes claim to champion this cause.

Some may argue that governments already pay sufficient attention to the problem of terrorism, and therefore the human rights movement and its intellectual compatriots need to utilize their limited resources to complement that picture by focusing exclusively on the "other" side of the problem. There is no question that this is a moment of extreme difficulty for the human rights movement.[190] However, to fail to account fully for the human rights impact of terrorism itself means overlooking serious and widespread human suffering, appearing partial and, ultimately, being less effective.

I recall the words of an Algerian woman journalist I interviewed in Algiers in 1994 during a terrible phase in that country's armed conflict. She was faced with the government's closure of her newspaper and also with constant threat of brutal murder at the hands of armed groups. Despairing over the lack of international solidarity in the face of armed group terrorism in Algeria, she said:

> I am no intellectual, but I believe other people were told elsewhere in other times that the evil and fear around them would pass. As far as I know, it did not pass. It got worse. I believe it will get worse unless someone hears us.[191]

The human rights community, as a matter of basic principles of human rights, must hear (and respond to) the voices of victims of terrorism, their survivors, and all those who live in fear of such violence—just as it hears and responds to the voices of victims of counter-terror, their survivors and all those who live in fear of that violence. Condolences and condemnations are not enough. As Kofi Annan, then U.N. Secretary-General, said of victims of terrorism:

> To all victims around the world, our words of sympathy can bring only hollow comfort. They know that no one who is not so directly affected can truly share their grief . . . . We must respect them. We must listen to them. We must do what we can to help them. We must resolve to do everything in our power to spare others from meeting their fate. Above all, we must not forget them.[192]

Furthermore, a human rights lens on the problem of terrorism can illuminate aspects not highlighted in governmental security discourses, such as the impact of terrorism on women, discussed below. A human rights analysis of terrorism centers the discussion on victims and human dignity, instead of only on national security.

A. Terrorism as a Violation of Human Rights

Terrorism should be understood as a human rights violation,[193] something

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190. *See supra* notes 18 and 31-32 and accompanying text.

191. Bennoune, *supra* note 6, at 201 (citing Fatima B).

192. Annan, *supra* note 122.

193. For discussion of this point, see William G. O'Neill, *Terrorism and Human Rights*, *in* HUMAN RIGHTS, THE UNITED NATIONS AND THE STRUGGLE AGAINST TERRORISM 1, 3 (International Peace Academy 2003); *see also* William G. O'Neill, *Appendix I: Conference Concept Paper*, *in*

which might shock only the most old-school international human rights lawyers who still defend the notion that only states can violate human rights. Terrorist attacks, depending on the nature of a particular incident, have the potential to decimate human dignity and to violate human rights across all categories: civil, cultural, economic, political and social rights, as well as individual and group rights, women's rights, and children's rights. Those rights most often affected include the rights to life and to security of person, the rights to be free from torture and ill-treatment and arbitrary detention, the right to humane treatment, the right to be free from discrimination, the rights to be free from violence against women and to free consent in marriage, the rights to freedoms of opinion and expression and assembly and conscience and religion and belief and movement, the rights to take part in public affairs and to vote, the right to health, the right to education, the right to work, the right to take part in cultural life, the right to protection of the family, the right to development, and the right to peace. Specifically, the U.N. General Assembly has recently agreed that "every person, regardless of nationality, race, sex, religion or any other distinction, has a right to protection from terrorism and terrorist acts."[194]

That reality notwithstanding, some human rights lawyers do continue to insist that non-state actors are not legally capable of violating human rights,[195] and thus terrorism by non-state actors cannot be considered to do so. However, a general trend toward understanding terrorism as a human rights violation is unmistakable in the resolutions of some U.N. and regional[196] bodies, in interna-

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HUMAN RIGHTS, THE UNITED NATIONS AND THE STRUGGLE AGAINST TERRORISM, *supra*, 9, 10-12, *available at* http://www.ipacademy.org/pdfs/HUMAN_RIGHTS.pdf.

194. G.A. Res. 59/195, ¶ 13, U.N. Doc. A/RES/59/195 (Mar. 22, 2005). Note, however, that the vote on this resolution was 127 to 50, with 8 abstentions. *See* U.N. GAOR, 59th Sess., 74th plen. mtg. at 19, U.N. Doc. A/59/PV.74 (2004).

195. *See* Fédération Internationale des ligues des droits de l'Homme, *in* REPORT: INTERNATIONAL FACT-FINDING MISSION, MEXICO, THE NORTH AMERICAN FREE TRADE AGREEMENT: EFFECTS ON HUMAN RIGHTS 19 (2006) (indicating that among the lawyers on Mexico's National Commission of Human Rights "the attitude exists . . . that only states can violate human rights"); Mary Aileen Diez-Bacalso, A Convention Protecting Persons from Enforced Disappearances – An Imperative, www.afad-online.org/voice/may_05/internationallobby.htm (last visited Nov. 17, 2007) (recounting that during the negotiations of the new international treaty to prevent forced disappearances some "delegations opposed inclusion of non-state actors on the basis that only states can violate human rights"); Amnesty International, Amnesty International Response to Andrés Ballesteros, Jorge A. Restrepo, Michael Spagat, Juan F. Vargas, The Work of Amnesty International and Human Rights Watch: Evidence from Colombia, CERAC, Colombia, February 2007, AI Index: AMR 23/00602007, Feb. 21, 2007. The latter document states that "AI's position . . . is that non-state actors "abuse" human rights . . . while state actors "violate" human rights (because only states are party to human rights treaties). . . . Although such language may appear legalistic . . . it does correspond to legal definitions in international human rights law . . . ."

196. For example, in the 1995 Declaration of Quito, the Organization of American States condemned terrorism on the grounds that "it violates basic human rights." Final Declaration of the Ninth Meeting of Heads of State and Government of the Rio Group, held in Quito on 4 and 5 September, U.N. GAOR, 50th Sess., ¶ 5, U.N. Doc. A/50/425-S/1995/787 (Sept. 13, 1995), *available at* http://www.un.org/documents/ga/docs/50/plenary/a50-425.htm. This language was "recalled" in the subsequent Declaration of Lima to Prevent, Combat and Eliminate Terrorism, Apr. 26, 1996, *avail-*

tional legal scholarship, and beyond. As early as 1993, the U.N. Sub-Commission on the Promotion and Protection of Human Rights (the Sub-Commission) condemned "all acts, methods and practices of terrorism in all its forms and manifestations as gross violations of human rights."[197] This is a substantial statement. Other actors in the contemporary international decision process have also labeled such acts violations. For example, the World Conference on Human Rights "expresse[d] its dismay and condemnation" in regards to what it called "gross and systematic violations and situations that constitute serious obstacles to the full enjoyment of all human rights . . . includ[ing] . . . terrorism . . . ."[198]

The U.N. High Commissioner for Human Rights has noted that "[t]errorism is a *threat* to the most fundamental human right, the right to life."[199] The precise distinction between threat and violation is not made clear, but seems to imply that such non-state conduct, however lamentable, is not carried out by actors that have direct legal responsibility under international human rights standards.

Euphemisms of "obstacle" and "threat" aside, many today see terrorism as a human rights *violation*. This has very different implications from conceiving of it as a threat to international peace and security, as the issue has been framed by the Security Council in repeated resolutions.[200] It prioritizes the human concern over the statist concern. Given the understanding of terrorism as a human rights violation, both U.N. and regional human rights bodies have demanded that governments prevent it, always emphasizing the role of international law as the parameter of this effort. The Sub-Commission "call[ed] . . . upon Governments, in accordance with international standards of human rights and internationally recognized principles of due process, to take all necessary and effective measures to prevent and combat terrorism."[201]

The General Assembly's 2004 resolution on human rights and terrorism combines these concerns in a holistic manner. Its preamble recalls "the reference . . . of the [U.N.] Secretary-General . . . to the fact that terrorism is itself a violation of human rights and must be combated as such and that efforts at combating

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able at http://www.yale.edu/lawweb/avalon/terrorism/t_0013.htm.

197. U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm'n on Human Rights, *Consequences for the Enjoyment of Human Rights of Acts of Violence Committed by Armed Groups that Spread Terror among the Population*, ¶ 1, Res. 1993/13, U.N. ESCOR, 26th mtg. (1993) (adopted without a vote).

198. World Conference on Human Rights, June 14-25, 1993, *Vienna Declaration and Programme of Action*, ¶ 30, U.N. Doc. A/CONF.157/23 (July 12, 1993).

199. U.N. Econ. & Soc. Council, High Commissioner for Human Rights, *Report of the United Nations High Commissioner for Human Rights and Follow-Up to the World Conference on Human Rights, Human Rights: A Uniting Framework*, ¶ 2, U.N. ESCOR, 58th Sess., Agenda Item 4, U.N. Doc. E/CN.4/2002/18, (2002) (emphasis added).

200. *See, e.g.*, Threats to International Peace and Security Caused by Terrorist Acts, S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

201. Sub-Comm'n on Human Rights Resolution 1993/13, *supra* note 197, ¶ 2.

it must be pursued . . . in full compliance with established international norms . . . ."[202] In fact, the Sub-Commission's outgoing Special Rapporteur on terrorism and human rights recently noted that "all General Assembly and Commission [on Human Rights] Resolutions on 'human rights and terrorism', as well as some of the early Sub-Commission resolutions under the same title, speak of terrorism as a violation of human rights."[203] Still, she submits that "the exact meaning . . . and legal implications" of such an assertion "remain very controversial."[204]

While some U.N. and regional bodies were characterizing terrorism as a human rights violation as far back as 1993, human rights NGOs have generally remained wary of using the terminology of violations even after September 11, 2001. Other constructs have been used to describe the problem. For example, the International Commission of Jurists' Berlin Declaration states that, "Terrorism poses a serious threat to human rights."[205] Similarly, Human Rights Watch has noted that "[c]ontemporary terrorism and government responses to it pose a major threat to human rights values."[206] Notwithstanding this "major threat," in practice, most international human rights NGOs have focused largely on the human rights violations associated with counter-terror rather than those associated with terrorism itself. For example, sixteen of the first twenty hits for the term terrorism on the website of Human Rights Watch yield criticisms of counter-terror.[207] As the U.N. Sub-Commission's outgoing rapporteur on terrorism and human rights[208] related in her final report, "the overall human rights

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202. *Human Rights and Terrorism*, G. A. Res. 59/195, U.N. GAOR, 59th Sess., preamble, U.N. Doc. A/RES/59/195 (2004).

203. Kalliopi Koufa, *Final Report of the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights*, Terrorism and Human Rights, U.N. ESCOR, ¶ 54, U.N. Doc. E/CN.4/Sub.2/2004/40, (2004).

204. *Id.*

205. International Commission of Jurists, *The Berlin Declaration: The ICJ Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism*, preamble (Aug. 28, 2004), *available at* http://www.icj.org/news.php3?id_article=3503?=en.

206. Human Rights Watch, Job Posting, Terrorism/Counterterrorism Project Director, www.hrw.org/jobs/prog_projectdirector-tct2005-06-30.htm (last visited Sept. 14, 2005).

207. *See* www.hrw.org (last visited Oct. 10, 2007). This is an improvement from March 1, 2007 when the first twenty hits produced by the same search all focused on counter-terror. A similar search on the website of Amnesty International, also using the term "terrorism," still yields 20 hits out of the first 20 that pertain to critiques of counter-terror. *See* www.amnesty.org (last visited Nov. 2, 2007).

208. In fact, her successor, Martin Schenin, the new U.N. Special Rapporteur on the promotion and protection of human rights while countering terrorism, interprets his mandate to refer largely to the human rights violations committed by states while countering terrorism, rather than the impact of terrorism itself on human rights. His mandate, enumerated in CHR Resolution 2005/80, focuses on counter-terrorism. However, his reports could be important in developing a human rights approach to terrorism itself if he interpreted that mandate holistically. U.N. Commission on Human Rights Resolution 2005/80, *Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, ¶ 14, (July 2, 2005). In his initial report, the rapporteur did note that "States' obligation to protect and promote human rights requires them to take effective measures to combat terrorism."

movement may have been concentrating, possibly for too long, on the repressive measures adopted by Governments only, without paying much attention to the means used by those opposing them."[209]

Fortunately, most organizations are aware that this is a problem, and some are starting to address it.[210] This process should be accelerated and intensified.

While the international lawyer cannot overlook the particular nature of governmental obligation in the human rights realm, or the fact that states are the only parties formally bound by most human rights treaties, we need to revisit the refusal to label terrorism a "violation."[211] To recognize terrorism in this way is consistent with a view of human rights centered on the rights holders instead of on the perpetrators and recognizes the severity of the harm.[212] In fact, in some

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Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, ¶ 2, appended to U.N. Doc. A/60/370 (Sept. 21, 2005). He also envisaged a possible future thematic study on "the threat of suicide attacks as a specific challenge to the protection and promotion of human rights . . . while countering terrorism." *Id.* ¶ 10.

209. Here she is, *inter alia*, quoting as important a human rights figure as Asbjorn Eide. Kalliope Koufa, *Final Report of the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights*, U.N. ESCOR, 56th Sess., Agenda Item 6(c), ¶ 55, U.N. Doc. E/CN.4/Sub.2/2004/40 (2004). Some leading human rights activists have described this problem as a pattern in which two sentences are spent criticizing terrorism, while pages are dedicated to cataloguing government counter-terrorist violations. For an abbreviated example of this, see Human Rights First, Human Rights First Statement on the Fifth Anniversary of September 11 (Sept. 8, 2006).

210. Note, for example, the recent conference of experts organized by Amnesty International USA at New York University Law School which, for the first time, brought together leading human rights groups, including AI, Human Rights Watch, and Human Rights First, to develop a human rights approach to terrorism. The conference, Navigating Between Scylla and Charybdis: Confronting Terrorism as a Human Rights Issue, convened February 16-17, 2007, *available at* http://www.amnestyusa.org/Local_Events/Roundtable_Discussion/page.do?id=1102220&n1=5&n2=50. Currently, the International Council on Human Rights Policy is undertaking a major study of the international human rights movement's engagement with the issue of terrorism, complete with recommendations for better tackling the issue in future. INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY, TALKING ABOUT TERRORISM – RISKS AND CHOICES FOR HUMAN RIGHTS ORGANISATIONS (forthcoming 2008).

211. Failing to recognize terrorism as a human rights violation when committed by non-state actors evokes the often-criticized formalism of the state action doctrine in U.S. constitutional jurisprudence. As Edwin Chemerinsky has opined, "under any theory of rights—positivism, natural law, or consensus—the requirement for state action makes no sense . . . ." Edwin Chemerinsky, *Rethinking State Action*, 80 NW. U.L. REV. 503, 519 (1985). "[E]liminating the state action doctrine enhances protection of liberty by focusing attention directly on the valued rights." *Id.* at 540. Justice Harlan indicates in his dissent in the Civil Rights Cases that the requirement risks giving a green light for powerful private actors to deprive people of rights. The Civil Rights Cases, 109 U.S. 3, 25-62 (1883) (Harlan, J., dissenting). While other legal concepts can be used to oppose non-state terrorism, exclusion of these acts from the category of human rights violation risks seeming to deprioritize the gravity of the threat they pose to human rights.

212. *See, e.g.*, August Reinisch, *The Changing International Legal Framework for Dealing With Non-State Actors*, *in* NON-STATE ACTORS AND HUMAN RIGHTS 37 (Philip Alston ed., 2005). He notes a "new awareness of the need to protect human rights, beyond the classic paradigm of the powerful state against the weak individual, to include protection against increasingly powerful non-state actors." *Id.* at 38. In other words, as Stephanie Farrior, former legal director at Amnesty International's International Secretariat, has argued, "[i]f human rights are rights that we all hold by virtue of being human, then human rights law can and should provide protection against violations of

instances, such as the September 2001 attacks in the U.S., Amnesty International has characterized these events as "the gravest abuses of fundamental human rights,"[213] and that is often how victims experience them.[214]

Picayune linguistic distinctions between "abuses," "threats" and "violations" must not appear to minimize the seriousness of the underlying acts, nor to unintentionally display ambivalence toward terrorism, nor to lower the level of urgency needed to address such practices. Efforts to be legally precise should not obscure the basic nature of human rights. To consider only one concrete example, the hideous mass trampling of nearly 1,000 Shiite pilgrims in Baghdad on August 30, 2005, in response to the rumor of the presence of suicide bombers in their midst, shows just what damage successive terrorist attacks can do to the collective psyche and how terrible a toll the fear they cause may take upon basic human rights to life and security of the person.[215]

Moreover, what human rights advocates say about terrorism also has implications for what they can say about other non-state action in the future, like corporate abuses or "private" violence against women. Some of these practices have already been labeled violations, indeed "particularly grave human rights violation[s]."[216] Referencing the responsibility of the state remains an important paradigm for human rights. However, the reality in the globalized world is that many other actors are increasingly powerful and hence pose particular risks for human rights.[217] Human rights law cannot today be reduced simply to a critique

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those rights—not just by the state, but by any other power-holder." Stephanie Farrior, Unpublished lecture on terrorism as a human rights violation (copy on file with the author). See also Philip Alston's warning that "[a]n international human rights regime which is not capable of effectively . . . ensuring that private actors are held responsible, will not only lose credibility in the years ahead but will render itself unnecessarily irrelevant in relation to important issues." Philip Alston, *The 'Not-a-Cat' Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?*, *in* NON-STATE ACTORS AND HUMAN RIGHTS, *supra*, at 1, 19. Finally, in a report about torture, the NGO Redress has underscored what is at stake in this debate beyond terminology: "The question whether and if so how, human rights should apply directly to non-state actors is significant in responding to violations such as torture. From the victims' perspectives, it is important to acknowledge conceptually that individual and collective rights have been *violated*. However, it is even more critical that mechanisms will be put in place at all levels that offer genuine protection, combat impunity and provide effective remedies for *violations*." LUTZ OETTE, NOT ONLY THE STATE: TORTURE BY NON-STATE ACTORS 11 (Carla Ferstman ed., REDRESS 2006) (emphasis added).

213. AMNESTY INTERNATIONAL, USA: AMNESTY INTERNATIONAL APPALLED AT DEVASTATING ATTACKS AGAINST CIVILIANS (2001), *available at* http://web.amnesty.org/library/print/ENGAMR511342001.

214. *See, e.g.*, *The Madrid Declaration*, *supra* note 128.

215. *See 965 Dead in Baghdad Stampede*, CNN.com, Aug. 31, 2005, http://www.cnn.com/2005/WORLD/meast/08/31/iraq.main/.

216. AMNESTY INTERNATIONAL, MAKING RIGHTS A REALITY: THE DUTY OF STATES TO ADDRESS VIOLENCE AGAINST WOMEN 11 (2004), *available at* http://web.amnesty.org/library/pdf/ACT770492004ENGLISH/$File/ACT7704904.pdf (emphasis added).

217. Note for example the claim by the new US intelligence chief that Al Qaeda represents the most serious threat to US interests. *Al-Qaeda the 'worst threat' to US*, BBC News Online, Feb. 27, 2007, http://news.bbc.co.uk/2/hi/americas/6401427.stm. The U.N. High Level Panel also highlighted

of government counter-terrorism projects if it is to fulfill its own claims to universality. It must also be the basis for a human rights-based approach to counter-terrorism.

B. The Relevant Legal Framework

The terminological quagmire described above springs from the larger question of whether human rights law can be applied directly to non-governmental entities. The traditional view among some human rights lawyers has been that human rights law applies only to states and not to non-state armed groups, because only states can be parties to most human rights treaties. However, counter-practice shows increasing application of general human rights standards to armed opposition groups.[218] For example, Bacre N'diaye, former U.N. Special Rapporteur on extrajudicial, summary or arbitrary executions, called on both the Sri Lankan government and the armed opposition group fighting against it, the Liberation Tigers of Tamil Eelam (LTTE), to "comply with . . . human rights standards."[219] The discussion of LTTE abuses by Philip Alston, current U.N. Special Rapporteur on extrajudicial, summary, or arbitrary executions, has been very progressive in this direction. He noted that his mission to Sri Lanka "clarified both the complexity and the necessity of applying human rights norms to armed groups,"[220] and he has explicitly called on the LTTE to "refrain from *violating* human rights."[221] The Inter-American Commission on Human Rights has called on Colombian armed groups to respect the right to life of hostages.[222] Even the U.N. Security Council has called on Afghan armed groups to "end . . . violations of human rights . . . and to adhere to the internationally accepted norms and standards in this sphere."[223]

However, human rights experts use this language predominantly, as these examples illustrate, in situations of armed conflict, especially where the groups in question control territory. With regard to terrorism happening outside the

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Al-Qaeda as a particular threat to the United Nations. High Level Panel, *supra* note 82, ¶ 146.

218. LIESBETH ZEGVELD, THE ACCOUNTABILITY OF ARMED OPPOSITION GROUPS IN INTERNATIONAL LAW 47 (2002). For general discussion about the "Direct Accountability of Non-State Actors under International Law and before International Tribunals", see Reinisch, *supra* note 212, at 82-87.

219. *See* ZEGVELD, *supra* note 218 at 48.

220. Extrajudicial, Summary or Arbitrary Executions, Report submitted by Special Rapporteur Philip Alston, Mission to Sri Lanka, U.N. Doc. E/CN.4/2006/53/Add.5, para. 26.

221. *Id.* at para. 85, emphasis added. Here he specifically references the rights to freedom of expression, peaceful assembly, freedom of association, family life and the right to vote. *Id.* Note also his more general assertion that "in some contexts it may be desirable to address the activities of [armed] groups within some parts of the human rights equation." Extrajudicial, Summary or Arbitrary Executions, Report submitted by Special Rapporteur Philip Alston, U.N. Doc. E/CN.4/2005/7, para. 76.

222. Annual Report of the Inter-American Commission on Human Rights 1996, OEA/Ser.L/V/II.95, doc. 7, rev., (March 14, 1997) at 818-19.

223. S.C. Res. 1193, ¶ 14, U.N. Doc. S/RES/1193 (Aug. 28, 1998).

scope of an armed conflict, they remain reticent to do so. Creative legal thinking is needed to develop an effective response to the grave human rights violations being perpetrated by terrorists in such contexts also. Mary Robinson argued in 2002 that "human rights should act as a unifying framework within which we can address the human insecurity that results from terrorism . . . ."[224] This can only happen if lethal acts of terrorism are recognized as contravening human rights norms. The Universal Declaration of Human Rights preamble provides a crucial starting point when it proclaims that "every individual and every organ of society . . . shall strive . . . to promote respect for these rights and freedoms . . . and . . . to secure their universal and effective recognition and observance . . . ."[225] This grounds a human rights approach to non-governmental abuses, but offers little in the way of specifics. Much more legal thinking is needed here, bringing together, *inter alia*, soft law, relevant principles of customary international law, general principles of law, and a forward-looking approach to the interpretation of all human rights standards.

International humanitarian law (IHL) and international criminal law concepts like crimes against humanity have been deployed, as an alternative to human rights law, to characterize and critique terrorism. With regard to the former, IHL does not apply outside the realm of armed conflicts.[226] With regard to the latter, the term "crimes against humanity," while conveying the gravity of the acts in question, has neither the same popular resonance nor the exact same set of legal consequences as "terrorism," making it an insufficient alternative.

Hence, human rights lawyers must construct an approach to terrorism as a human rights violation. Such a naming would reflect the values and goals associated with the fundamental principles of human rights at stake, and would recognize this very real manifestation of threats to human dignity today. As noted above, the importance of a human rights approach to terrorism includes its ability to focus attention on neglected but essential aspects of these threats to dignity, such as the impact of terrorism on women's human rights, to which the article now turns.[227]

C. The Gender Dimension of Terror/Torture

Opponents of recognizing women's rights as human rights often used the

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224. Mary Robinson, U.N. High Commissioner for Human Rights, Introductory Statement, U.N. ESCOR, Comm'n on Hum. Rts., 58th Sess., Agenda Item 4 (Mar. 20, 2002).

225. Universal Declaration of Human Rights, *supra* note 47.

226. The Geneva Conventions of August 12, 1949, Common Article 2, Oct. 21, 1950, 75 U.N.T.S. 31. A few provisions do apply in peacetime such as the obligation to disseminate the Conventions.

227. The absence of discussion about the specific impact of terrorism on women is mirrored in the argued absence of women's voices in debates about terrorism. *See, e.g.*, Jennifer L. Pozner, *Missing Since 9-11: Women's Voices*, NEWSDAY, Dec. 13, 2001, *available at* http://www.commondreams.org/views01/1213-04.htm.

same arguments now proffered to exclude non-state terrorism from the human rights framework.[228] Thus, it is no accident that some of the most vocal proponents of developing a human rights approach to terrorism have been women's human rights advocates.[229] Over time, the trajectory of women's human rights has begun to change the contours of mainstream human rights discourse, including the discourse about torture.[230] Hopefully, we are on the cusp of a similar development with regard to terrorism and human rights. Just as a women's human rights perspective has changed our thinking about torture,[231] so it can change our thinking about terror. The intersection of terrorism and women's lives, then, is a useful place to focus attention.

Women are frequent targets of terrorist activity, either as part of the civilian population generally, or when particularly targeted as women. Gender-based terrorism, such as attacks on women's health clinics that perform abortions or killings of women based on their refusal to conform to "dress codes," should be of particular concern to the human rights movement, especially because these issues are often downplayed or neglected altogether within the security paradigm of terrorism.[232] Governments and the media rarely label such acts as terrorism.

Women face particular consequences of terrorism, consequences to which all actors have paid inadequate attention.[233] Terrorism exacerbates other viola-

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228. *See* Catherine MacKinnon, *Are Women Human?*, *in* REFLECTIONS ON THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 171 (Barend van der Heijden & Bahia Tahzib-Lie eds., 1999). These arguments included the fact that the perpetrators are often not states and therefore the acts are not classical human rights violations; that tackling these abuses will muddle human rights and that the human rights movement does not know how to work on these kinds of acts. No matter how grave the suffering, it occurred outside the accepted paradigm and hence was to be overlooked or de-emphasized.

229. *See, e.g.*, Gita Sahgal, Speech for Public Roundtable, AIUSA Meeting: "Navigating Between Scylla and Charybdis: Confronting Terrorism as a Human Rights Issue," Feb. 16, 2007 (on file with the author). Sahgal is the director of Amnesty International's gender unit, and a founding member of Women Against Fundamentalisms.

230. *See, e.g.*, Report of the first U.N. Special Rapporteur on Violence against Women, U.N. Doc. E/CN.4/1996/53, at 12 (arguing that international law experts consider reconceptualizing severe forms of domestic violence as torture). The explicit inclusion of numerous gender-specific harms in the statute of the international criminal court is also the direct result of women's human rights advocacy. *See* HILARY CHARLESWORTH & CHRISTINE CHINKIN, *supra* note 45, at 309-37.

231. *See* Copelon, *supra* note 180.

232. *See, e.g.*, Anissa Hélie, *The U.S. Occupation and Rising Religious Extremism: The Double Threat to Women in Iraq*, June 24, 2005, ZNet.org, http://www.zmag.org/content/showarticle.cfm?SectionID=41&ItemID=8158. She details attacks by an Iraqi group, the Council of Fighters, against unveiled Iraqi women and Iraqi Christian women.

233. Work within the mainstream human rights movement to combat violence against women has produced some important documentation of terrorism against women by non-state armed groups, though not necessarily using the label of terrorism. Amnesty International's campaign to Stop Violence Against Women is one example of such work. *See, e.g.*, AMNESTY INTERNATIONAL, COLOMBIA: "SCARRED BODIES, HIDDEN CRIMES": SEXUAL VIOLENCE AGAINST WOMEN IN THE ARMED CONFLICT (2004), *available at* http://web.amnesty.org/library/print/ENGAMR230402004. The challenge is to bring the insights from this body of work into the work on the "war on terror," a merger which has not happened thus far.

tions of women's human rights and tends to create an environment that threatens those rights. For example, Women's International League for Peace and Freedom has argued that terrorism, along with other factors like armed conflict, forces increasing numbers of women to turn to prostitution.[234] As women are displaced, forced to leave rural areas and abandon other jobs, they may have fewer options to sustain their families. Furthermore, such terrorism-caused displacement puts them at a higher risk of sexual violence and exploitation.[235] Of course, sexual violence and torture may themselves constitute forms of terrorism against women, similar to Asma's experience in *El Manara*

Feminist international lawyers have argued that violence against women should be seen as a warning sign for armed conflict.[236] The same may be said of terrorism. Groups that engage in these sorts of attacks on civilians as a whole often pursue misogynist agendas and carry out, or advocate, severe forms of violence against women. For example, some argue that had effective action been taken to end the Taliban's gender apartheid, such action could well have disrupted the activities of Al Qaeda or brought them to light, and conceivably September 11 might have been avoided.[237] Furthermore, women's organizations are often among the first to document and warn of the rise of terrorist organizations. For example, Women Living Under Muslim Laws, an international NGO active on women's human rights issues in the Muslim world and diaspora communities, had "been warning since at least the early 1990s about the existence of an 'Islamist international' with the organizational, human, financial, and military means to threaten secularists, feminists and democrats."[238] They further identified Saudi Arabia as a prime sponsor of such groups. The world failed to heed their warning, to disastrous effect.

Empowering women is purported to be a vital way of combating terrorism. It offers a kind of counter-terror method that is antithetical to those based on human rights abuses, like torture. As Valentine Moghadam, head of the gender unit at UNESCO, has written, "Women's peace movements in particular constitute an important counter-movement to terrorism, and they should be encouraged and funded."[239] Most security efforts and much counter-terrorism are con-

234. Women's International League for Peace and Freedom, *Terrorism and War Increases Prostitution*, June 22, 2005, *available at* www.peacewomen.org/news/International /July05/TERRORISM.html.

235. *Id.*

236. For an elaboration of this thesis, see Felicity Hill, *Women's Contribution to Conflict Prevention, Early Warning and Disarmament*, *in* UNITED NATIONS INSTITUTE FOR DISARMAMENT RESEARCH, DISARMAMENT FORUM (2003), *available at* http://www.unidir.org/pdf/Gender/4%20Hill.pdf.

237. *See* Amy Caiazza, *Why Gender Matters in Understanding September 11: Women, Militarism and Violence*, I908 Inst. for Women's Pol'y Res Briefing Paper 1 (2001).

238. Valentine Moghadam, *Violence and Terrorism: Feminist Observations on Islamist Movements, States and the International System*, ALTERNATIVES: TURKISH J. INT'L REL., Summer 2002, at 20.

239. *Id.* at 16.

ceived of in decidedly masculinist ways.[240] Using a women's human rights lens to unpack such approaches, even while similarly deconstructing terrorist projects, can be a useful critical tool.

Thoughtful women's human rights analysis takes us closer to the position we must occupy in the current historical moment: a position of true radical universalism that rejects terror and torture, and has high standards for all actors. Rosalind Petcheskey's speech in New York City two weeks after September 11 provides an excellent example of this sort of theorizing. She said:

> I [do not] believe we should succumb to the temptation of casting our current dilemma in the simplistic, Manichean terms of cosmic Good vs. Evil. Currently, this comes in two opposed but mirror-image versions: the narrative, advanced not only by the terrorists and their sympathizers but also by many on the left in the U.S. and around the globe, that blames U.S. imperialism and economic hegemony for the 'chickens coming home to roost'; versus the patriotic right-wing version that casts U.S. democracy and freedom as the innocent targets of Islamist madness. Both these stories erase all the complexities that we must try to factor into a different, more inclusive ethical and political vision. The Manichean, apocalyptic rhetorics that echoed back and forth between Bush and Bin Laden in the aftermath of the attacks—the pseudo Islamic and the pseudo Christian, the jihad and the crusade—both lie.[241]

VI.
A BRIEF NOTE ON MUSLIM FUNDAMENTALIST TERRORISM[242]

This brings us to the question of specifically what or whom governments are fighting in the current "war on terror." Very few authors in international law make this clear.[243] While I appreciate the intention of many writers not to single out Islamist groups or to stereotype Muslims as perpetrators, and to attempt to include the many other terrorisms—in places like Sri Lanka and Colombia—in

240. For gendered analyses of responses to terrorism, see Ratna Kapur, *Un-Veiling Women's Rights in the 'War on Terrorism'*, 9 DUKE J. GENDER L. & POL'Y 211 (2002); Catherine MacKinnon, *Women's September 11th: Rethinking the International Law of Conflict*, 47 HARV. INT'L. L. J. 1 (2006), and Hilary Charlesworth & Christine Chinkin, *Sex, Gender and September 11*, 96 AM. J. INT'L L. 600 (2002).

241. Rosalind Petcheskey, *Phantom Towers: Feminist Reflections on the Battle between Global Capitalism and Fundamentalist Terrorism*, *in* NOTHING SACRED, *supra* note 4 at 357, 358.

242. For further discussion of these questions, see Karima Bennoune, *Book Review: Enforcing International Law Norms Against Terrorism*, 100 AM. J. INT'L L. 507 (2006); HAIDEH MOGHISSI, FEMINISM AND ISLAMIC FUNDAMENTALISM: THE LIMITS OF POSTMODERN ANALYSIS (1999), and MANSOOR MOADDEL, ISLAMIC MODERNISM, NATIONALISM AND FUNDAMENTALISM: EPISODE AND DISCOURSE (2005).

243. For an exception to this rule, see Michael Reisman, Plenary Speech to the Inaugural Meeting of the European Society of International Law, International Law in the Shadow of Empire: The Shadows Looming over International Law (May 2004), *in* 6 BALTIC Y.B INT'L L. 7, 12 (2006). While I could not agree with some of his conclusions and assertions—the most objectionable of which was that Osama Bin Laden may know more about Islam than George Bush or Tony Blair when the latter heads of state assert that radical jihadists do not represent the religion—Reisman's naming of the problem was useful.

this discussion, the fact that the "war on terror" targets an enemy whose name we dare not speak has clouded our thinking. Hence, a brief discursion on the "other" side in this "war" is warranted.

A. Contemporary Transnational Fundamentalist Terrorism

There is much violence that could be labeled "terrorism" happening in the many armed conflicts around the world, but now when we talk about *international* terrorism, we very often must confront the violence of certain fundamentalist[244] Muslim jihadi groups. Today, the acts of such groups are those that most often incite, or serve as the justification for, the undermining of basic international norms by governments around the world, including norms on torture.[245] Furthermore, such groups have repeatedly committed acts of violence across many regions, including in Morocco, Algeria, Tunisia, Egypt, Israel/Palestine, Iraq, Afghanistan, Pakistan, Bangladesh, Indonesia, and beyond.[246] This phenomenon is too pervasive and has too great an impact on human rights to be ignored. However, the human rights consequences of Muslim fundamentalism and fundamentalist terrorism represent complex topics that should be the subject of a much longer study. They can only be addressed here in a schematic way, focusing on the unique challenges these phenomena pose today for a holistic discussion of terror/torture.

Merieme Hélie-Lucas has defined fundamentalisms as "political movements of the extreme right, which, in a context of globalization . . . manipulate religion . . . in order to achieve their political aims."[247] The term refers to vari-

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244. While some object to the use of this term, many opponents of such movements from within the Muslim world prefer this label. It is seen as more accurate than "Islamist" which is both derogatory of Islam and privileges "Islamist" claims of authenticity. *See* Bennoune, *supra* note 4, *at* 76. Furthermore, the term "fundamentalist" situates such movements in a broader global context. Others who use the term "fundamentalist" still recognize that it is potentially laden with negative meanings, and has been used pejoratively by some only to talk about Muslims or to refer to all or most Muslims. *See, e.g.*, Amrita Basu, *Hindu Women's Activism in India and the Questions It Raises*, *in* APPROPRIATING GENDER: WOMEN'S ACTIVISM AND POLITICIZED RELIGION IN SOUTH ASIA 167, 167 (Routledge 1997).

245. Reminiscent of Nagel's prognosis, these groups in turn subsequently benefit from increased recruitment. Paul Reynolds, *Iraq War 'Helped al-Qaeda Recruit'*, BBC News Online, Oct. 19, 2004, http://news.bbc.co.uk/2/hi/middle_east/3756650.stm.

246. For discussion of efforts to recruit for such groups in the United States, see Michael Moss & Souad Mekhennet, *An Internet Jihad Aims at U.S. Viewers*, N.Y. TIMES, Oct. 15, 2007, *available at* http://www.nytimes.com/2007/10/15/us/15net.html?ex=1350100800&en=9d040360579f3a9b&ei=5088&partner=rssnyt&emc=rss.

247. Marieme Hélie-Lucas, *What is Your Tribe? Women's Struggles and the Construction of Muslimness*, DOSSIER 23-24, *available at* http://www.wluml.org. Scottish sociologist Steve Bruce has written that "fundamentalisms rest on the claim that some source of ideas, usually a text, is inerrant and complete . . . fundamentalists also claim the existence of some perfect social embodiment of the true religion of the past." *What is Fundamentalism?*, *in* STEVE BRUCE, FUNDAMENTALISM 13-14 (2000).

ous theocractic projects found in all of the world's religious traditions, though here we focus especially on those in the Muslim context. Though not without its own set of difficulties, the importance of the terminology of fundamentalisms is that it speaks across religious boundaries about movements within many traditions.[248] Many in the women's human rights community, and others who oppose fundamentalisms, have roundly criticized human rights organizations for failing to recognize and respond to the unique challenges posed by these movements.[249] While nearly all these movements and their component parts push agendas that threaten human rights, not all of them engage in violence or terrorism.[250] Ultimately, however, we will have to confront both these ideologies and the tactic of terror that their proponents sometimes employ if we are to rise to the significant human rights challenge that they together pose.

Among Muslim fundamentalist groups that engage in terrorism, many are related to (however loosely) or inspired by Al Qaeda, and share a lethal mix of purported legitimate grievances, fascist[251] and misogynist ideology, nihilism, and frightening levels of funding, training and technological prowess. In circular fashion, they use and justify terror and torture, even as they elicit governmental torture and terror (both of which they claim to be responding to). Al Qaeda itself has now splintered into a thousand shards of glass, each still capable of inflicting serious injury such as attacks like the Madrid train bombing.[252] Prominent new Al Qaeda affiliates—for example Al Qaeda in the Islamic Maghreb, which seeks to rekindle the horrors of Algeria's civil war as depicted in *El Manara*—demonstrate their emergence with new acts of terror.[253]

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248. *See, e.g.*, FUNDAMENTALISMS AND HUMAN RIGHTS, *supra* note 7.

249. This includes the Hindu right, portions of which has been involved in atrocities against Muslims in Gujarat; the fundamentalist portion of the Jewish settler movement in the West Bank and Gaza some of whom have been involved in attacks on Palestinians; and Christian fundamentalists in the United States (who are among the most politically powerful fundamentalists in the world) some of whose most extreme partisans have engaged in terrorism against women's health clinics: *See* FUNDAMENTALISMS OBSERVED (Martin Marty & R. Scott Appleby eds., 1991); KEVIN PHILLIPS, AMERICAN THEOCRACY: THE PERIL AND POLITICS OF RADICAL RELIGION, OIL AND BORROWED MONEY (2006); CHETAN BHATT, LIBERATION AND PURITY: RACE, NEW RELIGIOUS MOVEMENTS AND THE ETHICS OF POSTMODERNITY 77-107 (1997).

250. For a useful typology of Muslim fundamentalist groups, see Awaaz – South Asia Watch, *The Islamic Right – Key Tendencies*, June 2006, *available at* http://www.awaazsaw.org/awaaz_pia4.pdf.

251. This is a word with powerful historical connotations. Nevertheless, critics of such movements from within the Muslim world have been using this term to describe extremist movements. For example, in the wake of the London bombings, the Arabic-language international media, like *Asahrq al Awsat* and the website *Elaph*, published articles by Arab writers about "Islamic fascism." *See Un fascime musulman? Un tabou est tombé*, COURRIER INT'L, July 13-20, 2005, at 12.

252. *See* Lee Keath, *Bin Laden Wants 'Caravan' of Martyrs*, ASSOCIATED PRESS, Sept. 11, 2007, *available at* http://apnews.myway.com/article/20070911/D8RJ8QL81.html ("the network is growing in strength, intensifying its efforts to put operatives in the United States and plot new attacks.")

253. *Un camion piégé fait 34 morts et 60 blessés à Dellys*, EL WATAN, Sept. 9, 2007 (detailing a series of bloody attacks by this group in Algeria during 2007). *'Dozens killed' in Algeria blasts*,

Most international lawyers, including human rights lawyers, have failed to grapple with the specific challenges to international law posed by such movements.[254] Despite valid concerns about the very real problems of Islamophobia[255] in the current moment and about discriminatory conduct of counter-terrorism initiatives, we must specifically recognize these Muslim fundamentalist terrorist groups as a particular threat to human rights. However, such a discussion needs to be conducted with self-criticism and impartiality, and without discriminatory overtones. Ordinary Muslims or the Muslim religion as a whole must not be confused with these specific fundamentalist political or armed movements and their adherents. Most usefully, international lawyers should conceptualize the problem of Muslim fundamentalism in the context of tackling the human rights implications of fundamentalisms more globally. ASIL's willingness to host a panel on human rights and fundamentalisms at its recent centennial meeting indicates some movement in this direction, but international lawyers must give much more consideration to these issues.[256]

On the other hand, some responses to these Muslim fundamentalist groups suffer from what B.S. Chimni has called a kind of hegemonic construct of human dignity.[257] Some use their critique of Muslim fundamentalist violence and ideology as a springboard for racist discourses about Muslims and the Muslim world writ large,[258] or as a justification for human rights violations, like torture.

BBC News Online, Dec. 11, 2007, http://news.bbc.co.uk/2/hi/africa/7137997.stm.

254. The major exception has been scholarship in the women's human rights field. *See, e.g.*, RELIGIOUS FUNDAMENTALISMS AND THE HUMAN RIGHTS OF WOMEN (Courtney Howland ed., 2001).

255. The term denotes hostility towards Islam and Muslims generally, often resulting in assaults and restriction of civil rights. *See* COMMISSION ON BRITISH MUSLIMS AND ISLAMOPHOBIA, ISLAMOPHOBIA: ISSUES, CHALLENGES, AND ACTION 7-8 (2004), *available at* http://www.insted.co.uk/islambook.pdf, and Commission on Human Rights Resolution 2004/6, Combating Defamation of Religions, ¶¶ 6, 16, U.N. Doc. E/CN.4/RES/2004/6 (Apr. 13, 2004). However, some prominent dissidents of Muslim heritage have staunchly criticized the concept of Islamophobia as "confus[ing] criticism of Islam as a religion and stigmatization of those who believe in it." *See, e.g.*, *Writers Issue Cartoon Row Warning*, BBC News Online, Mar. 1, 2006, *available at* http://news.bbc.co.uk/1/hi/world/europe/4763520.stm.

256. For the proceedings of this panel, see *Human Rights and Fundamentalisms*, *supra* note 7.

257. B.S. CHIMNI, INTERNATIONAL LAW AND WORLD ORDER: A CRITIQUE OF CONTEMPORARY APPROACHES 120 (1993). For an example of this sort of flawed critique of Muslim fundamentalism, see Wedgwood, *supra* note 13, at 103.

258. "Islamo-fascism Awareness Week," organized on U.S. college campuses in October 2007 by conservative activist David Horowitz, provides a prime example. The subject of its critique slips easily and mistakenly from fundamentalist terrorists to "Islam." For a description of this event by its protagonists, see http://www.terrorismawareness.org/islamo-fascism-awareness-week/ (last visited Oct. 26, 2007). For criticism of this event, see Ali Eteraz, *Laughing at Islamo-Fascism Awareness Week*, Oct. 8, 2007, http://www.huffingtonpost.com/ali-eteraz/laughing-at-islamofasci_b_67565.html. To critique such an event is not to deny that there are some Muslim fundamentalist armed groups that could be labeled fascist, as noted above. *See supra* note 251. Unfortunately, the absence of a systematic and principled human rights based critique of these movements at the international level has left the terrain vacant, to be filled by discourses like those associated with Islamo-fascism Awareness Week.

Again, in renewed circular fashion, we see that apologies for torture weaken criticism of terror. Such a hypocritical approach to Muslim fundamentalism narrows the space for legitimate critiques of these movements, including of their resort to terrorism, which then are deemed to risk blending in with the hegemonic discourses. The latter narratives lack self-consciousness about a range of failings closer to home including human rights violations in the "war on terror," the role of other religious fundamentalisms in liberal democracies, and Western contributions to the rise of Muslim fundamentalism.

B. The Causes of a "Disease Masquerading as a Cure"

The problem of fundamentalist movements in the Muslim world, especially those that engage in terrorism, has both endogenous and exogenous causes. Both the current encounter with globalization and past encounters with colonialism arguably contributed to its emergence.[259] Furthermore, initial support for such ideological movements from many of the governments that are now fighting terrorism greatly exacerbated the situation. Western powers long believed, whether in the context of colonialism or of the Cold War, that they could nourish fundamentalists in the Arab and Muslim world as a counterbalance to secular nationalists and leftists whom they perceived as posing a greater threat to their interests.[260]

The classic example of this is the now-infamous training, supported by the U.S. (with significant British, Pakistani and Saudi involvement), of anyone willing to fight the Soviet Union in Afghanistan—no matter how extreme their ideology.[261] The Afghan war is crucial to understanding how this problem metastasized so quickly. Many of those founding or leading terror cells from the Philippines to Morocco fought in Afghanistan, where they built a sophisticated and dangerous network, and then took their training home with them.[262] Today, we must remember that failed U.S. Cold War policy was partially responsible for the emergence of these terrorist movements in the first place—a historical fact with which we have utterly failed to come to terms. Such proof of the law of unintended consequences also suggests a pragmatic reason to proceed with great caution in determining current policy.

The other major contributing factor from outside the Muslim world, par-

259. Olivier Roy, *Why Do They Hate Us? Not Because of Iraq*, N.Y. TIMES, July 22, 2005, at A21.

260. *See, e.g.*, Richard Sale, *Analysis: Hamas History Tied to Israel*, UNITED PRESS INT'L, June 18, 2002; HUMAN RIGHTS WATCH, BACKGROUNDER ON AFGHANISTAN: HISTORY OF THE WAR (2001), *available at* http://www.hrw.org/backgrounder/asia/afghan-bck1023.pdf, and ROBERT DREYFUSS, DEVIL'S GAME: HOW THE UNITED STATES HELPED UNLEASH FUNDAMENTALIST ISLAM (2005).

261. *See, e.g.*, AFGHANISTAN: INTERNATIONAL RESPONSIBILITY FOR HUMAN RIGHTS DISASTER, supra note 15

262. *See* Godfrey Jansen, *The "Afghans" – an Islamic Time Bomb*, MIDDLE E. INT'L, Nov. 20, 1992, at 16.

ticularly to recruitment and sympathy for Muslim fundamentalist armed groups, and the apologetics on their behalf from various quarters, is that of disastrous Western policies toward Muslim countries. Examples include 2003's illegal invasion of Iraq[263] and failure to equitably resolve the Palestinian-Israeli conflict.[264] Many international human rights activists recognize the legitimacy of grievances about these policies, and the bases for some of these grievances in international law. However, these causes are latched on to by fundamentalist movements that seek to advance their own agendas.[265] Their project rather is to construct theocratic, despotic states of their own that would deny the human rights of women,[266] minorities, and freethinking members of the majority.[267] As Algerian anthropologist Mahfoud Bennoune often said, such an ideology is "a disease masquerading as a cure."[268] While the underlying sources of frustration must be addressed, including by and with international human rights law, these movements represent a grave threat to international human rights themselves. Furthermore, endogenous causes of fundamentalism in the Muslim world must not be forgotten, such as bad governance, lack of adequate religious reform, discriminatory attitudes about women and non-Muslims, as well as lack of enjoyment of human rights.[269]

Any struggle against terrorism that does not seek to comprehend and address its causes and context is doomed to failure. There is no question that we must address the root causes that contribute to the decision of some to turn to terrorism or of others to support that violence. However, we must not forget that extremist ideology is also to blame. And we should be wary of drawing a straight causal line between poverty or other human rights problems and a proclivity for terrorism.[270] Many who turn to fundamentalist terrorism are not the most downtrodden, but frustrated middle class professionals and educated persons.[271] Moreover, as Wilder Tayler, former Legal and Policy Director for Human Rights Watch, reminds us, terrorism is always a choice; it is not inevita-

263. On the legality of the war, *see* Thomas Franck, *What Happens Now? The United Nations After Iraq*, 97 AM. J. INT'L L. 608 (2003).

264. *See, e.g.*, THE IRAQ STUDY GROUP REPORT 54-55 (2006).

265. *See, e.g.*, Nahda Younis Shehada, *The Rise of Fundamentalism and the Role of the 'State' in the Specific Political Context of Palestine*, *in* WARNING SIGNS OF FUNDAMENTALISMS 135 (Ayesha Imam et. al. eds., 2004), and BHATT, *supra* note 248, at 136-45.

266. For an argument about the impact of fundamentalist movements on women's human rights, see Courtney Howland, *The Challenge of Religious Fundamentalism to the Liberty and Equality Rights of Women: An Analysis under the United Nations Charter*, 35 COLUM. J. TRANSNAT'L L. 271 (1997) (especially 305-16).

267. *See, e.g.*, BHATT, *supra* note 248, at 107, and Moghissi, *supra* note 242, at 64-76.

268. *See* Karima Bennoune, *supra* note 4.

269. Marc Saghie, *Un Siècle d'Islam Politique*, June 15, 2003, COURRIER INT'L, *available at* http://www.mafhoum.com/press5/150S22.htm.

270. *See* Sidney Jones, *Asking the Right Questions to Fight Terror*, JAKARTA POST Jan. 9, 2006, *available at* http://www.crisisgroup.org/home/index.cfm?id=3863.

271. PETER MANSFIELD, A HISTORY OF THE MIDDLE EAST 377-78 (2d ed. 2003).

ble.[272] Many who seek to combat and end the most egregious human rights violations do not make this choice.[273]

International lawyers must neither overlook the terrible toll that terrorism has exacted within societies in the global South, nor make easy assumptions about attitudes and priorities in the broader Muslim and Arab worlds and communities. Many in those communities are hardcore opponents of terrorism and fundamentalism,[274] and have looked to the international community to recognize the threats that they themselves face from such movements.[275] For them, this is not an East-West clash of civilizations, but a political struggle within their own community over the human rights framework of society. As a group of dissident Muslim intellectuals, including Salman Rushdie, recently wrote in response to the controversy regarding Danish cartoons of the Prophet Mohamed:[276] "It is not a clash of civilisations nor an antagonism between West and East that we are witnessing, but a global struggle that confronts democrats and theocrats."[277]

C. The Radical Universalist Response

In such an environment, advocates of international human rights law need to make clear that human rights law protects proponents of fundamentalist views from torture and other human rights abuses, but *at the same time* protects women, religious minorities and freethinkers from the terror of any such proponents who employ it. For example, these advocates must support protection of the human rights of Palestinians from the Israeli military and of Israeli civilians from suicide bombings by Palestinian armed groups; they must be outraged both by U.S. torture at Abu Ghraib and armed group murders of Iraqi civilians, and

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272. Wilder Tayler, Notes on the Human Rights Movement and the Issue of Terrorism, presented at the International Council on Human Rights Policy, International Meeting on Human Rights and Political Violence, Lahore, May 20-22, 2005, at para. 71 (citing Bill O'Neill), *available at* http://www.ichrp.org/public/workingpapers.phplang=FR&search_auteur=wilder+tayler&search=go.

273. O'Neill, *Conference Concept Paper*, *supra* note 193, at 11.

274. See the words of Mohammed Sayed Tantawi, the Grand Imam of Egypt's al-Azhar, on Sept. 12, 2001. "[K]illing civilians is a horrific, hideous act that no religion can condone." Quoted in James Reston Jr., *Seeking Meaning from a Grand Imam*, WASH. POST, Mar. 31, 2002, at B04. See also the writing of Algerian journalist Mohamed Sifaoui, including, MOHAMED SIFAOUI, INSIDE AL QAEDA, HOW I INFILTRATED THE WORLD'S DEADLIEST TERRORIST ORGANIZATION (2004), and *Oui, c'est cette terreur que nous avons vécue seuls et isolés: Le témoignage accablant de Cherifa Kheddar*, Speech by Cherifa Kheddar, Director of the Djazairouna Association of the Families of Victims of Terrorism, to the International Conference Against Terrorism, Paris, Sept. 11, 2007. In part, recognizing terrorism as a human rights violation is an important means of offering support for such voices.

275. *See* Charaf Eddine, *supra* note 78.

276. For a definitive description and analysis of the cartoon controversy, see JEANNE FAVRET-SAADA, COMMENT PRODUIRE UNE CRISE MONDIAL AVEC DOUZE PETITS DESSINS (Les Prairies ordinaries 2007).

277. *Writers Issue Cartoon Row Warning*, supra note 255.

they must campaign actively against both.[278] This is the radical universalism needed to weather the dark days of post-September 11 polarization.

International human rights lawyers cannot afford to be (or to appear) naïve about the identities and agendas of *some* of the victims on whose behalf we work in the context of human rights and counter-terrorism. Some of these same individuals in other situations have been, or will be, or seek to be, perpetrators or advocates for grave abuses (such as violence against women, or discrimination, or indeed, attacks on civilians). That does not mean that we should not defend their non-derogable human rights, but rather that human rights theorists must be thoughtful and balanced about the broader context of our work and must responsibly consider the arguments regarding proposed derogations of derogable rights.

For an example of a key issue of balance, while human rights advocates are right to express concerns that governments will use counter-terrorism laws to weaken asylum law and invalidate or slow legitimate asylum claims,[279] we must also recognize and take into account that refugee status is not available for those who have participated in human rights violations.[280] *Non-refoulement* protection may still be available, preventing the individual's return should he or she be able to establish a risk of abuse.[281] However, if we are demanding *non-refoulement* of individuals who may have participated in human rights abuses such as terrorism, we must systematically demand that, though the person not be returned and their human rights be protected from torture and the like, they still must be investigated and brought to justice in accordance with international standards in a jurisdiction that will respect their human rights.[282] This allows us to stand by both sets of victims and to take seriously our own impunity claims—that there should not be exemption from punishment for grave human rights abuses. Human rights advocates must remember those claims and combat impunity, whether the abuses in question are acts of terror, or of torture.

The human rights movement must begin to work with victims of terrorism,

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278. Human rights organizations have done some very good work documenting the non-state abuses mentioned in this litany, even if not labeling them as terrorism or as human rights *violations*. *See, e.g., supra* note 107 and *infra* note 289. However, much remains to be done, especially in the campaigning sphere.

279. HUMAN RIGHTS FIRST, ABANDONING THE PERSECUTED: VICTIMS OF TERRORISM AND OPPRESSION BARRED FROM ASYLUM (2006), *available at* www.humanrightsfirst.info/pdf/06925-asy-abandon-persecuted.pdf.

280. Article 1(F) of the Convention Relating to the Status of Refugees stipulates, in relevant part, that "[t]he provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that : a) He has committed a crime against peace, a war crime, or a crime against humanity . . . c) He has been guilty of acts contrary to the purposes and principles of the United Nations." Convention Relating to the Status of Refugees, art. 1(F), July 28, 1951, 19 U.S.T. 6223, 189 U.N.T.S. 150.

281. *See, e.g.*, U.N. Convention against Torture, *supra* note 134, at art. 3.

282. For further discussion of these issues, see Rene Bruin & Kees Wouters, *Terrorism and the Non-derogability of Non-refoulement*, 15 INT'L J. REFUGEE L. 5 (2003).

recognizing them as victims of human rights violations, and using many of the tools developed to defend other victims to defend their rights to truth, justice and rehabilitation.[283] In the current moment, this requires a willingness to deal in complexity rather than simplicity. As Cherifa Kheddar, the director of Djazairouna—an Algerian association of the families of victims of terrorism—recently said at the International Conference Against Terrorism, held in Paris on Sept. 11, 2007, "neither the cowardice of institutions, nor their simple condemnations of terrorist acts, will end fundamentalist violence, in the absence of a courageous politics, both at the regional and international levels."[284]

There have been some important efforts in this direction. For example the Spanish section of Amnesty International reportedly sent observers to parts of the trial of the perpetrators of the Madrid bombings not only to make sure that the rights of the defendants were being respected, but also to show solidarity with victims and determine whether their needs were being taken into consideration.[285] Such models should be repeated and elaborated. The best response to the particularist approach of some governments that only recognize the threats from terrorism, and not from unfettered counter-terrorism, is not a particularist human rights response that focuses only on the damage wrought by counter-terrorism. Instead, the best response is a radical universalist approach that brings attention to both halves of terror/torture. This does not mean that human rights advocates should soften their critique of government counter-terrorism. Both critiques spring from the very same set of commitments: opposition to the deliberate, instrumental infliction of severe suffering on human beings.

VII.
CONCLUSION: THINKING THE NEW

In the wake of September 11, philosopher and political scientist Seyla Benhabib challenged intellectuals to "think the new."[286] The international legal

283. The human rights movement has focused much attention on these rights in general in recent years. *See, e.g., The Basic Principles and Guidelines on the Right to a Remedy and to Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, Commission on Human Rights, Resolution 2005/35, Apr. 19, 2005.

284. Kheddar, *supra* note 274, at 5 (translated from French by the author).

285. Conversation with Esteban Beltrán, Director of Amnesty International – Spain, Aug. 2007 (notes on file with the author).

286. Seyla Benhabib, *Unholy Wars*, *in* NOTHING SACRED, *supra* note 4 at 397, 397. Here she was calling for creative engagement with the challenges posed by transnational fundamentalist terror networks. This is not to be confused with discourses that suggested abandoning fundamental precepts of international law in the wake of September 11, exemplified by writers like Michael Glennon. *See, e.g.*, Michael Glennon, *Why the Security Council Failed*, FOREIGN AFF, May/June 2003. There have indeed been some important attempts to push international human rights law thinking forward. *See, e.g.*, NON-STATE ACTORS IN THE HUMAN RIGHTS UNIVERSE (George Andreopoulos et. al. eds., 2006). However, as a discipline, we have yet to come to terms with the challenge of terrorism. As Susan Waltz notes in her blurb on the back cover of the Andreopoulos volume,

academy has struggled to meet this challenge. If international human rights lawyers, in particular, do not do so, we risk, as Benhabib presages, continuing with a "tired paradigm,"[287] easily criticized as dating from the prelapsarian time before September 11.

Classically-minded human rights lawyers need to carefully rethink their reified emphasis on the state to the extent that it minimizes the threats to human rights from other actors. In fact, we must grapple with a complicated contemporary landscape in which globalization and a range of transnational threats (like terrorism) mean that, in some situations, some non-state actors may be more powerful relative to the state—and even more so relative to victims—than we have heretofore seen, and hence may pose a significant threat to human rights. The state/non-state actor power differentials vary widely, as do the actual risks from terrorism versus government representations of such risks. In many situations we continue to face truly uneven power differentials and need to be careful of artificial equivalencies. Still, new thinking is warranted, given that some non-state entities like Al Qaeda and related groups may have as much destructive power as some states, and as much ability to shape international events and harm human rights.

Speaking of Al Qaeda and related groups, Benhabib argued that a novel approach is necessary because

> [t]he emergence of non-state agents capable of waging destruction at a level hitherto thought to be only the province of states and the emergence of a supranational ideological vision with an undefinable moral and political content, which can hardly be satisfied by ordinary political tactics and negotiations, are the unprecedented aspects of our current condition.[288]

Rigid legal rules, and the thinking that goes with them, confined to the old international model, will be relatively useless to confront this reality.

As Algeria's civil war—chronicled in *El Manara*—underscores, we are now often genuinely between Scylla and Charybdis, and must employ creativity and a rigorously principled universality to navigate between—and confront—both. Even as some opponents of terror have neglected the torture side of ter-

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"[s]cholarship has not kept pace with the politics . . . ." *Id.* at back cover.

287. Benhabib, *supra* note 286. In Benhabib's words, "[t]his is the task at which Susan Sontag, Fred Jameson, and Slavoj Zizek have failed us by interpreting these events along the tired paradigm of an anti-imperialist struggle by the 'wretched of the earth.' Neglecting the internal dynamics and struggle within the Islamic world and the history of regional conflicts in Afghanistan, Pakistan, India, and Kashmir, these analyses assure us that we can continue to grasp the world through our usual categories . . . . These analyses help us neither to grasp the unprecedented nature of the events unfolding since September 11, 2001 nor to appreciate the internal dynamics within the Arab-Muslim world which had given rise to them." *Id* (footnote omitted). For this Article, the challenge of "thinking the new" also arises in regard to security discourses (and their purveyors) whose worldview is a sort of negative of the one Benhabib critiques. These security discourses project the image of an undifferentiated mass of "Muslim" terrorists facing off against Western liberators, the latter being empowered by their opposition to the former to use exceptional means outside of ordinary law and morality. *See supra* notes 163-165 and 257-258 and accompanying text.

288. Benhabib, *supra* note 286, at 401.

ror/torture, some human rights advocates have downplayed the terror side and *its* profound threat to human rights. *Some* very good work has been done by some human rights organizations on the human rights impact of terrorism itself.[289] Many organizations are developing their work in this area, which is positive (though most still fail to reckon with the particular challenge from jihadist movements). Still, the full development of what Gita Sahgal has called "a human rights account of terrorism"[290] remains an outstanding task.

On the security side, there can be no minimizing the horrors suffered by the victims of terrorism and their families whether on September 11, 2001, or on too many similar though smaller-scale dates that we may not remember. Yet to respond to inhumanity with inhumanity, to meet lawlessness with lawlessness, to oppose terror with torture, can lead nowhere that we want to go. We must find other effective means—that are in accordance with national and international law and do not but create more victims—to prevent and punish terrorist atrocities. We are legally, morally and practically bound to say an absolute no to torture, as to terror. Human Rights Watch's statement, issued on September 12, 2001 from its office in the tallest building left standing in New York City, eloquently sums up this view:

> People committed to justice and law and human rights must never descend to the level of the perpetrators of such acts. . . . There are people and governments in the world who believe that in the struggle against terrorism, ends always justify means. But that is also the logic of terrorism. Whatever the response to this outrage, it must not validate that logic. Rather, it must uphold the principles that came under attack yesterday, respecting innocent life and international law. That is the way to deny the perpetrators of this crime their ultimate victory.[291]

Ultimately, "thinking the new" should lead intrinsically to a novel and fuller discourse on the intersection of security, terrorism and human rights: a discourse that consistently recognizes and addresses the threats of both halves of terror/torture, even as it absolutely rejects both.

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289. *See* Sahgal, *supra* note 229; HUMAN RIGHTS WATCH, ERASED IN A MOMENT: SUICIDE BOMBING ATTACKS AGAINST ISRAELI CIVILIANS (2002); INTERNATIONAL WOMEN'S HUMAN RIGHTS LAW CLINIC, THE CENTER FOR CONSTITUTIONAL RIGHTS AND THE INTERNATIONAL LEAGUE FOR HUMAN RIGHTS, SHADOW REPORT ON ALGERIA SUBMITTED TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE (1999), *available at*, http://www.ilhr.org/ilhr/reports/shadow/; Amnesty International, Sri Lanka: A Climate of Fear in the East, Feb. 3, 2006, AI Index: ASA 37/001/2006. Note that this work is often done outside of the paradigm of "terrorism." See also the discussion of *Jane Doe v. Islamic Salvation Front and Anwar Haddam*, a groundbreaking case in which the Center for Constitutional Rights represented nine Algerian women and an Algerian women's organization in their ultimately unsuccessful civil suit against an Algerian fundamentalist group and one of its leaders, *available at* http://ccrjustice.org/ourcases/current-cases/doe-v.-islamic-salvation-front-(fis)-and-anwar-haddam.

290. Sahgal, *supra* note 229. at 3.

291. Human Rights Watch, *Response to Attacks on the U.S.*, Sept. 12, 2001, *available at* http://hrw.org/english/docs/2001/09/13/usint2106.htm.

VIII.
EPILOGUE: RETURN TO EL MANARA

At the end of the film *El Manara*, Asma has fled as a refugee to France. She has run from both her former friend Ramdane, who terrorized and tortured her, and her former husband Fawzi, who became a torturer on her behalf. She is a victim and survivor of both halves of terror/torture. Alone, she has given birth to a daughter from her wartime rape. Finally, she receives an anonymous message. "Come back to El Manara." Here "El Manara" is a reference both to the North African version of the celebration of the birthday of the Prophet Mohamed, deemed heretical by fundamentalists, and to the Arabic word for lighthouse, specifically the one which stands outside the Algerian coastal town of Cherchell, from which she, Fawzi, and Ramdane all originate. Thus the message is a timely exhortation to come back to light, to carefully navigate dangerous waters, to hold to one's values even after horror. I think it is significant that we are never told for sure whether the source of the message is Fawzi or Ramdane, a repentant torturer or a repentant terrorist. Whatever the source, "come back to El Manara," is a reminder of which we are all in need today.

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Convicting the Innocent in Transnational Criminal Cases: A Comparative Institutional Analysis Approach to the Problem

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Convicting the Innocent in Transnational Criminal Cases: A Comparative Institutional Analysis Approach to the Problem*

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ABSTRACT

The adjudication of transnational criminal cases is burdened by a very narrow compulsory process mechanism known as Mutual Legal Assistance Treaties. These treaties regularize foreign evidence gathering for prosecutors and explicitly prevent their use by criminal defendants. The danger of inaccurate verdicts and wrongful convictions that may result from unequal access to evidence highlights the need to resolve this flawed transnational adjudication process, and specifically, its evidentiary method. Building on the works of Neil Komesar, Ronald Coase, and Mancur Nelson, the author utilizes a comparative institutional analysis approach to consider the question of how to obtain parity between the prosecution and the defense in the ability to compel foreign evidence in transnational criminal cases. The issue is of great importance in a post-9/11 world, where the fairness and accuracy norms that underpin criminal prosecutions are increasingly ephemeral and illusory. The comparative framework illumes the important considerations for identifying the institution best suited to achieve the norm of parity. No criminal process scholar explicitly utilizes the comparative institutional analysis framework. This oversight is a mistake. The comparative framework provides an ideal theory to dissect criminal process questions. Explicit institutional comparison, rather than simplistic single institutional considerations, should underlie all criminal process

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scholarship addressing fairness and equity norms.

> My question is: Why should American citizens accused of a crime. . .be stuck with a process that the Justice Department itself has called "cumbersome and ineffective?"[1]
>
> At the core of the legal objections is the belief that it is improper in our adversarial system of justice to deny defendants compulsory process and other effective procedures from[sic] compelling evidence abroad if those procedures are available to the prosecution. . ..
>
> Senator Jesse Helms[2]

PROLOGUE

This Article begins with two scenarios drawn from actual cases. They help describe and contextualize the disparity in the ability to compel foreign evidence that exists in the adjudication of transnational criminal cases as a result of the powerful Mutual Legal Assistance Treaties (hereinafter MLATs). MLATs regularize foreign evidence gathering for prosecutors and explicitly prevent their use by criminal defendants. The facts highlight how the treaties create a compulsion disparity between the government and defendants in their ability to gather foreign evidence. Underlying these facts is the dark premise that the transnational criminal adjudication process in the United States, particularly its evidentiary method, is deeply flawed.

A. Scenario One: The Unlucky Driver[3]

Mr. Atkins is long haul truck driver who lives in Canada. He makes his living delivering items to or picking up items from the United States. He is barely able to make ends meet. He uses all the money he makes to care for his wife and two children. Because of his limited resources, he does not possess his own truck. Instead, he works for a number of trucking companies that allow him to use their trucks when they hire him.

One evening, Mr. Atkins received a telephone call from Gary, the dispatcher for one of the trucking companies. Gary and Mr. Atkins were well acquainted since Mr. Atkins had worked for that trucking company many times in the past. Gary asked if he was available to pick up a load of steel pipes from the United States early the next morning. Mr. Atkins was happy to agree. There

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1. *Mutual Legal Assistance Treaty Concerning the Cayman Islands, Report of the Committee on Foreign Relations*, U.S.-Cayman Is., at 175, Mar. 19, 1990, S. EXEC. DOC. NO. 101-8, (1989) [hereinafter Cayman Islands] (quoting Senator Jesse Helms).

2. *Quoted in* Marian Nash (Leich), *Contemporary Practice of the United States Relating to International Law*, 91 AM. J. INT'L L. 93, 101 (1997).

3. This scenario is loosely based on the facts of a criminal case in which the author was involved. The names and facts have been slightly altered to protect the privacy of the parties involved and to better illustrate the dangers of the lack of compulsion parity in transnational criminal cases.

was nothing unusual about the conversation. He would be paid his normal fee and, as usual, the truck would be waiting for him in the company's locked and secure yard. The keys would be in the ignition and everything he needed to pick up the load would be on the truck, including tarps.

At 4 a.m. the next morning, Mr. Atkins arrived at the trucking company. He met John, an employee who guarded the yard, at the locked gate. He knew John from his prior work for the company. The two chatted for a few minutes and then John unlocked the gate and led Mr. Atkins to the flatbed truck he would be driving. Mr. Atkins inspected the truck to make sure that everything he needed was there. He noticed that there were tarps rolled up and secured to the back of the trailer. Everything appeared to be in order so Mr. Atkins drove to the border.

When Mr. Atkins arrived at the border, he was sent by a border patrol agent to secondary inspection. He was told that it was just a routine inspection. Mr. Atkins was not surprised. Since September 11th, he had been sent to secondary inspection before. He went to the waiting room, drank some coffee and read the paper while waiting for agents to complete the inspection. Meanwhile, border patrol agents conducted a thorough search of the truck. They unrolled the tarps that were secured on the back of the trailer. They found 100 kilograms of marijuana carefully hidden inside.

Mr. Atkins was arrested on the spot and taken into federal custody. He was subsequently charged with possession with intent to deliver a controlled substance in federal district court. His defense was that he did not know the marijuana was in the tarps. Pretrial, Mr. Atkins asked the Court to subpoena Gary, the dispatcher, and John, the guard of the trucking yard. If called as a witness, John would testify that Mr. Atkins had not been in the truck yard until he arrived early one morning to drive the truck to the United States and that Mr. Atkins did not touch or unroll the tarps before he left the truck yard that morning. John did not want to voluntarily travel to the United States to testify because he feared that his company would fire him if he testified on Mr. Atkins' behalf. John believed that someone from the company may have known about the drugs that were in the tarps. He did not want to lose his job. He would only appear if he received a subpoena.

The judge denied Mr. Atkins' request. Although he determined that the testimony of Gary and John would be material and relevant, the judge stated that his subpoena power did not extend beyond the border. If Mr. Atkins wanted to present the testimony of his witnesses, the judge stated that he would be willing to send a diplomatic request to a Canadian court asking it to take the testimony of the two witnesses in Canada. However, this diplomatic process, known as letters rogatory, could take years to complete and there was no guarantee the Canadians would agree.

Mr. Atkins then asked the government for help. The government had the power to compel the appearance of Mr. Atkins' witnesses in the United States under the provisions of the Mutual Legal Assistance Treaty between the United States and Canada. The treaty requires the signatories to provide evidence,

including witness testimony, for use in a foreign jurisdiction upon a proper government request. In other words, the treaty creates transnational compulsory process. The government refused to make the request on Mr. Atkins' behalf. However, the government did invoke the treaty to obtain its own evidence from Canada.

Because Mr. Atkins was in custody and had no funds to post bail, he had an untenable choice to make: remain in custody for what could be years while the diplomatic process proceeded, or go to trial without his witnesses. He proceeded to trial, and testified on his own behalf. However, in the face of his uncorroborated testimony, he was convicted.

B. Scenario Two: The Man with a New Suitcase[4]

John Smith was exhausted but happy to arrive back home in Seattle after a two-week vacation in Mexico. The past 24 hours had been rough. His suitcase had been stolen the night before his departure, leaving him desperately searching for new luggage in the few hours remaining before his flight home. Luckily, he found the time to purchase new luggage at a large open air market and to file a police report for his lost luggage in Mexico. He had noticed a chemical smell emanating from his new suitcase, but he did not have time to be picky. He dismissed the smell, chalking it up to the suitcase being new. A Mexican citizen named Michael Ortiz had first-hand knowledge of these events. Ortiz had helped Smith place an advertisement in a Mexican newspaper requesting return of his stolen luggage and had helped Smith pack the new suitcase.

While drinking a coffee during a layover in Texas, Smith did not know that airport officials were checking all in-transit luggage for contraband. As he dreamt about sleeping in his own bed for the first time in two weeks, his suitcase aroused suspicion because of a strong chemical odor emanating from it. The police opened his suitcase but found nothing unusual inside. The police then tested a fragment of the suitcase itself. That fragment tested positive for cocaine. The police checked the identification tag and found Smith's name and address. Upon exiting his plane at the Seattle-Tacoma airport, John Smith was arrested. He was subsequently charged with knowingly importing cocaine into the United States.

Pretrial, Smith requested the aid of the prosecutor and the Court in compelling the testimony of Ortiz and the police report from Mexico. The prosecutor refused. He said that he was under no obligation to utilize the existing treaty between the United States and Mexico to request evidence on Smith's behalf. The Court stated that although the requested evidence was relevant and material, his subpoena power did not extend to Mexico and thus, he could not compel Ortiz to appear or the Mexican government to release the

4. The inspiration for this scenario originated from the facts of *United States v. Filippi*, 918 F.2d 244 (1st Cir. 1990).

police report. The Court suggested that Smith request the evidence through diplomatic channels, although the Court acknowledged it might be years before the Mexican government responded, if it responded at all.

Smith proceeded to trial without the witness or the document. He testified to these facts, but his testimony was uncorroborated. The jury convicted him.

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The danger of inaccurate verdicts and wrongful convictions that result from unequal access to evidence highlights the need to resolve this flawed transnational adjudication process, and specifically, its evidentiary method. Failure to do so results in cognizable deprivations to our system of criminal justice in general and to defendants in particular, whether the high-profile alleged "terrorist" or the less provocative, but far more common, truck driver or traveler. As recognized by the Supreme Court over 30 years ago:

> To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.[5]

MLATs create inequities in evidence-gathering capabilities that affect the accuracy of criminal trials by distorting the evidence available to fact-finders. When the ability to compel evidence is unequal, accuracy and fairness norms, such as punishing the guilty and freeing the innocent, can be illusory.

I.
INTRODUCTION

How to attain equity and fairness in an adversarial system is a perennial question of criminal procedure in the United States. Scholars seeking an answer often turn to social norm theory,[6] legal liberalism,[7] or formalism. No criminal process scholar explicitly utilizes the comparative institutional analysis framework to examine criminal process questions. While these other theories can identify aspirational social justice and equality norms, only comparative

5. United States v. Nixon, 418 U.S. 683, 709 (1974).

6. For example, a social norm theorist would argue that the courts should not restrict the ability of a frictionless political process to define the appropriate limits of law enforcement behavior. *See, e.g.*, Tracey L. Meares and Dan M. Kahan, *The Wages of Antiquated Procedural Thinking: A Critique of Chicago v. Morales*, 1988 U. CHI. LEGAL F. 197 (1998), Dan M. Kahan and Tracey L. Meares, *The Coming Crisis of Criminal Procedure,* 86 GEO. L.J. 1153 (1998). When the political process has struck the balance between individual rights and effective law enforcement, courts should not substitute their decision-making for that of the political process.

7. A legal liberalist would argue that the courts must define the appropriate limits of political action. *See generally* William H. Simon, *Solving Problems vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism*, 46 WM. & MARY L. REV. 127 (2004) (critiquing legal liberalists' reliance upon the courts). For both social norm and legal liberalism theorists, it is the goal that animates institutional choice.

institutional analysis determines whether the courts, the political process, or the market is the best institution to achieve them. The examination of criminal process questions in the United States should be enlightened by understanding each institution's competence and ability compared to that of the others and understanding the interactions amongst them.

Resolving the disparity in the ability to compel foreign evidence is difficult in light of relative congressional indifference and the lasting reverberations of the terrorist attacks of September 11, 2001. Scholars argue that inequities in the power to produce evidence created by MLATs violate the Constitution.[8] Scholarly approaches, however, either fail to explore the question of institutional choice or consider it as an afterthought.[9] This Article considers how comparative institutional analysis can inform the question of how to obtain compulsion equity in transnational criminal cases adjudicated in the United States. The relevant decision-makers for purposes of comparison are the Senate, which ratifies the treaties, the executive[10] that negotiates them, the courts, and the evidence gathering market.[11] This Article concludes that the best solution for remedying the compulsion disparity in transnational evidence gathering is for courts to establish a moderate right to compulsion parity.

Compulsion disparities undermine the very legitimacy of the criminal justice system. In the absence of parity, there can be no confidence that criminal adjudications result in reliable outcomes. By analyzing the question of unequal access to evidence in transnational cases, this Article demonstrates the utility of comparative institutional analysis for analyzing criminal process issues generally, by illuminating institutional considerations that transcend this particular setting.

The Article proceeds in six parts. Part II describes the comparative

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8. *See, e.g.*, Ian Conner, *Peoples Divided: The Application of United States Constitutional Protections in International Criminal Law Enforcement*, 11 WM. & MARY BILL RTS. J. 495 (2002).

9. *See, e.g.*, Frank Tuerkheimer, *Globalization of U.S. Law Enforcement: Does the Constitution Come Along?* 39 HOUS. L. REV. 307 (2002); 3 MICHAEL ABBELL & BRUNO A. RISTAU, INTERNATIONAL JUDICIAL ASSISTANCE, CRIMINAL, OBTAINING EVIDENCE: CRIMINAL, §12-3-3, at 87 (1990).

10. The executive is shorthand for federal prosecutors, State Department officials, representatives from the Attorney Generals office, and various administrative agencies, all of whom were involved in negotiating these treaties. *See* ETHAN A. NADELMANN, COPS ACROSS BORDERS: THE INTERNATIONALIZATION OF U.S. CRIMINAL LAW ENFORCEMENT 324 (1997).

11. The term market is employed to describe the actions parties in a criminal case take to meet their demand for foreign evidence and to affect the supply of evidence available to the other party. The manner in which these parties interact with each other and with domestic or foreign entities to negotiate the provision of evidence can be termed "transactions" since they involve the transfer of goods, for example, evidence. In the evidence-gathering market, each party is acting selfishly, but from these actions there "emerges a structure that affects and constrains them all. Once formed, a market becomes a force in itself, and a force that the constitutive units acting singly or in small numbers cannot control." Kenneth N. Waltz, THEORY OF INTERNATIONAL POLITICS 24-26 (1979) *cited in* Jeffrey L. Dunoff & Joel P. Trachtman, *Economic Analysis of International Law*, 24 YALE J. INT'L L. 1, 13 (1999).

institutional analysis framework and its application to criminal process questions. Part III contextualizes application of the framework by exploring the norm of compulsion parity. Part IV discusses Mutual Legal Assistance Treaties (MLATs), a mechanism for regularizing foreign evidence-gathering, and explains how the treaties create a compulsion disparity in the United States between the government and criminal defendants in their ability to gather foreign evidence. Part V examines the relative merits and disadvantages of the market, the political process, the executive, and the courts for resolving the compulsion disparity created by MLATs. Finally, Part VI concludes with a recommendation for the institutional approach best suited to rectify the current disparity in the transnational criminal process.

II.
THE VALUE OF CHOICE: COMPARATIVE INSTITUTIONAL ANALYSIS AND ITS RELATIONSHIP TO CRIMINAL PROCESS QUESTIONS

A. The Framework in General

As developed by Neil Komesar, the comparative institutional analysis framework addresses the question of how to decide which institution[12] is best equipped to achieve a desired policy or goal.[13] Rather than focusing on what the best policy is or what the law should be,[14] the framework spotlights the

12. The term "institution" is used in this Article in its narrow sense to describe "large-scale social decision-making processes—markets, communities, political processes, and courts." NEIL K. KOMESAR, LAW'S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS 31 (2001) [hereinafter LAW'S LIMITS]. An alternative view held by institutional economists and social scientists, understands institutions as the rules that govern or constrain decisions. Under this view, institutions have three primary characteristics: formal rules (for example, judicial or political rules), informal rules (for example, custom) and enforcement mechanisms for enforcing those rules. *See, e.g.*, DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE (1990). These characteristics of institutions are the determinants of market activity.

13. Komesar draws from the works of Ronald Coase and Mancur Olsen. *See* NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS AND PUBLIC POLICY 8, 29-30 (1994) [hereinafter IMPERFECT ALTERNATIVES]. Coase's work demonstrates that public policy analysis which assumes a frictionless market or government response is not useful since perfect (frictionless) institutional choices do not exist. Ronald H. Coase, *The Problem of Social Cost,* 3 J. L. & ECON 1 (1960). According to Coase,

> [T]here is no reason to suppose that government regulation is called for simply because the problem is not well handled by the market or the firm. Satisfactory views on policy can only come from a patient study of how, in practice, the market, firms and governments handle the problem of harmful effects.

Id. at 18. According to Komesar, the "call for comparative institutional analysis inherent in Coase's work seems not to have been heeded." IMPERFECT ALTERNATIVES, *supra* note 13 at 29. Komesar's emphasis on the distribution of stakes can be traced to Olsen's work on collective action. *See* LAW'S LIMITS, *supra* note 12, at 30-31 n.23, (citing MANCUR OLSEN, THE LOGIC OF COLLECTIVE ACTION (1965)); IMPERFECT ALTERNATIVES, *supra* note 13 at 8 n.3 (same).

14. Comparative institutional analysis does not inform goal choice. IMPERFECT

institutions that make the decisions. Institutional choice should play a central role in determining how to attain a desired goal because it will determine the efficacy of the approach to that goal.

The framework takes for granted that all institutions are imperfect—that there is no universal first and best institutional choice for every desired goal or legal problem.[15] Rather, all institutions are affected by similar dynamics because "institutions tend to move together."[16] The same systemic factors that cause malfunctions or failures in one institution may similarly cause malfunctions in others.[17] Accepting that all institutions can fail under similar circumstances, the choice amongst them requires a comparison to determine which is least likely to fail in a given context.

Under comparative institutional analysis, the appropriate question is not whether a particular institution works better in one setting than in another.[18] Rather, the correct question is whether, in any given setting, one institution is better or worse than its available alternatives.[19] Once a goal is identified, "the task is to choose among imperfect alternatives" on the basis of comparison.[20] Sometimes application of the framework will reveal an obvious institutional choice. At other times, when the issues are complex and involve large numbers of relevant participants,[21] the answer may entail difficult institutional compromises. Thus, comparative analysis does not always provide easy answers.[22] However, defining a role for an institution in the absence of a comparative approach may exacerbate existing institutional malfunctions or may lead to counter-intuitive results.

ALTERNATIVES, *supra* note 13, at 4-5, 48, 49-50. Rather, application of the framework usually occurs after an analyst has already identified a desired policy or value. Some scholars have critiqued the framework on this basis. *See, e.g.*, William W. Buzbee, *Sprawl's Dynamics: A Comparative Institutional Analysis Critique*, 35 WAKE FOREST L. REV. 509, 514 n.22 (2000) ("Komesar gives only limited attention to how goal choices are made and how they fit into the process of policy analysis."); Thomas W. Merrill, *Institutional Choice and Political Faith*, 22 L. & SOC. INQUIRY 959, 988 (1997) (critiquing Komesar's failure to emphasize goal choice as a critical component to comparative institutional analysis). Others have applied the framework to the question of goal choice. *See, e.g.*, Nancy J. Knauer, *The Recognition of Same-Sex Relationships: Comparative Institutional Analysis, Contested Social Goals, and Strategic Institutional Choice*, 28 HAWAII L. REV. 23 (2005) (arguing that the choice of social goals is contested and can be analyzed utilizing a comparative institutional analysis framework). This Article does not join this discussion.

15. LAW'S LIMITS, *supra* note 12, at 174-75.

16. *Id.* at 23-29, 176; IMPERFECT ALTERNATIVES, *supra* note 13, at 23.

17. LAW'S LIMITS, *supra* note 12, at 3, 4, 176.

18. IMPERFECT ALTERNATIVES, *supra* note 13, at 6.

19. *Id.*

20. Edward L. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393, 1407 (1996).

21. Institutional performance is linked to variation in the numbers of relevant participants and the complexity of the issues involved. Increases in numbers and complexity adversely affect the performance of most institutions. LAW'S LIMITS, *supra* note 12, at 23, 25.

22. *Id.* at 177-180.

B. The Role of Courts

Courts play a critical role in institutional choice because they determine which institution will decide a particular issue through the doctrinal rules or standards they create. Sometimes a court's institutional choices are explicit. More often, however, they are implicit in the court's decision.[23]

Courts make institutional decisions by defining the character of rights.[24] They can create strong rights, moderate rights or no rights at all. The character of the right represents a different institutional choice.

1. Strong Rights

A court creates "strong rights and certain remedies"[25] when it chooses to undo a decision made by another institution in favor of its own judgment.[26] When courts define strong rights, they create easily applied doctrinal rules[27] and then leave implementation to other institutions. In the criminal process context, the rule that indigent defendants have a right to appointed counsel in all criminal prosecutions is an example of a strong right with a certain remedy.[28] If counsel is not provided, the conviction will be reversed. The decision of how to implement the right is left to the political process.[29] Strong rights entail "significant judicial activism"[30] because the court substitutes its decision for those made by other institutions without creating a concomitant increase in its workload, thus leaving the task of how to effectuate the right to other institutions.[31]

2. Moderate Rights

A court defines moderate rights when it decides that it is better suited to

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23. *Id.* at 4-5, 19-20.

24. *Id.* at 5.

25. *Id.*

26. *Id.*

27. *Id.* at 19. Komesar likens the distinction between judicial activism and judicial activity to the traditional dichotomy between rules and standards. *Id.* at 5. Both the strongest and weakest judicial activism are found in rules that involve limited judicial activity. These rules allocate significant responsibility away from the courts to other institutions such as the market or the political process. *Id.* Moderate rights involve standards and judicial balancing and therefore require the most judicial activity. *Id.*

28. *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335 (1963).

29. In this case, state legislatures had to determine how to fund indigent defense counsel in order to effectuate this newly created right.

30. LAW'S LIMITS, *supra* note 12, at 5. For example, in *Gideon*, 372 U.S. 335, the Court held that an indigent defendant had a right to counsel in all criminal prosecutions despite a Florida law that only allowed for the appointment of counsel to indigents in capital cases.

31. LAW'S LIMITS, *supra* note 12, at 5.

determine how to implement the right than other institutions.[32] Instead of employing a doctrinal rule, it creates a more flexible standard that it will apply on a case by case basis.[33] The Supreme Court's jurisprudence regarding the reach of the Fourth Amendment's exclusionary rule is an example of a moderate right.[34] Rather than creating a rule that all violations of the Fourth Amendment require suppression of evidence in all instances, the Court created a standard which balances the "costs" of exclusion against the "benefits" derived from that exclusion.[35] The court's workload increases because it conducts the balancing case by case. As such, the right is weaker and there is more uncertainty about the law.[36]

3. No Rights

Finally, a court can take a hands-off approach and decide not to create any rights or remedies at all, leaving decision-making entirely to other institutions.[37] The rule that criminal defendants have no constitutional right to discovery is an example of a doctrinal rule with no concomitant right.[38] Courts frequently create a rule without a right[39] because their limited resources and personnel prevent them from reviewing all governmental action.[40] In the "no rights" situation, both judicial activism and judicial activity are at their lowest.[41]

C. Application to Criminal Process Questions

Outside the criminal procedure context, scholars recognize comparative institutional analysis as a useful theory for analyzing law, rights, and the role of courts in supplying the demand for law and rights.[42] However, no criminal

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32. *Id.* at 5, 19.

33. *Id.*

34. *See, e.g.*, United States v. Leon, 468 U.S. 897 (1984).

35. *Id.*

36. LAW'S LIMITS, *supra* note 12, at 19.

37. *Id.* at 19-20.

38. *See, e.g.*, Weatherford v. Bursey, 429 U.S. 545 (1977).

39. LAW'S LIMITS, *supra* note 12, at 11. ("Judges are asked to decide who will decide basic substantive decisions. Rather than directly addressing these substantive decisions, courts funnel most of them elsewhere.")

40. *Id.* at 3, 4, 176; *See also* Neil K. Komesar, *A Job for the Judges: The Judiciary and the Constitution in a Massive and Complex Society*, 86 MICH. L. REV. 657, 663 (1988) [hereinafter *A Job for Judges*] ("The physical capacity of the courts to review governmental action is simply dwarfed by the capacity of governments to produce such action."); IMPERFECT ALTERNATIVES, *supra* note 13, at 128-38; LAW'S LIMITS, *supra* note 12, at 26.

41. LAW'S LIMITS, *supra* note 12, at 19-20.

42. *See, e.g.*, Dunoff & Trachtman, *supra* note 11 (international law); Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U. CIN. L. REV. 1061 (2000) (corporate law); Daniel H. Cole, *The Importance of Being Comparative*, 33 IND. L. REV. 921 (2000) (environmental law); Larry I. Palmer, *Patient Safety, Risk Reduction, and the Law*,

process scholar explicitly utilizes comparative institutional analysis to examine criminal process questions. Instead, some scholars are quick to propose a doctrinal rule to serve a procedural goal without considering whether the adjudicative process is best equipped to achieve that goal.[43] Others suggest ways in which different institutions could achieve a desired policy without comparing the relative merits of those institutions.[44] Simply cataloging the available institutions without engaging in any comparison amongst them leaves unanswered the question of which institution will best serve the desired policy. Other scholars simply ignore questions of institutional choice. This oversight is a mistake. The comparative framework is an ideal methodology for analyzing criminal process issues.

The lack of attention to the comparative framework by criminal process scholars could be "animated by a deep aversion to a particular institution and a deep conviction that the goal they have espoused will insulate them from this institution."[45] For example, some criminal process scholars believe the political process rarely protects the rights of criminal defendants.[46] They are more confident that the courts are the best champions of justice for unpopular groups.[47] While evidence exists to support this view, overburdened courts may perform no better than the malfunctioning political process to meet the demand for rights.

The question of institutional choice often seems obvious in the criminal

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36 HOUS. L. REV. 1609 (1999) (patient's rights); David S. Schwartz, *The Case of the Vanishing Protected Class: Reflections on Reverse Discrimination, Affirmative Action, and Racial Balancing*, 2000 WIS. L. REV. 657 (2000) (affirmative action); Victoria Nourse, *The Vertical Separation of Powers*, 49 DUKE L.J. 749 (1999) (separation of powers); Kenneth G. Dau-Schmidt, *Employment Security: A Comparative Institutional Debate*, 74 TEX. L. REV. 1645 (1996) (labor law); Arti K. Rai, *Intellectual Property Rights in Biotechnology: Addressing New Technology*, 34 WAKE FOREST L. REV. 827 (1999) (intellectual property); Nancy J. Knauer, *Domestic Partnership and Same-Sex Relationships: A Marketplace Innovation and a Less than Perfect Institutional Choice*, 7 TEMP. POL. & CIV. RTS. L. REV. 337 (1998) (family law); Peter C. Carstensen & Paul Olszowka, *Antitrust Law, Student-Athletes, and the NCAA: Limiting the Scope and Conduct of Private Economic Regulation*, 1995 WIS. L. REV. 545 (1995) (sports law); Buzbee, *supra* note 14 (urban sprawl); Ted Schneyer, *Legal Process Scholarship and the Regulation of Lawyers*, 65 FORDHAM L. REV. 33 (1996) (legal ethics); Andrew S. Gold, *A Decision Theory Approach to the Business Judgment Rule: Reflections on* Disney, *Good Faith, and Judicial Uncertainty*, 66 MD. L. REV. 398 (2007) (business judgment rule).

43. *See, e.g.*, Lenese C. Herbert, *Bete Noir: How Race-Based Policing Threatens National Security*, 9 MICH. J. RACE & L. 149 (2003).

44. *See, e.g.*, Tuerkheimer, supra note 9.

45. LAW'S LIMITS, *supra* note 12, at 174. For the legal liberalist, mistrust of the political process makes it unnecessary to analyze whether that institution would be better suited to achieve the desired goal in certain situations. For the social norm theorist, the belief that the courts hinder communities of color from political self-determination in attempting to control the violence in their communities obviates the need to determine whether the adjudicative process could better serve the desires of these communities.

46. *See, e.g.*, David Cole, *Foreword: Discretion and Discrimination Reconsidered: A Response to the New Criminal Justice Scholarship*, 87 GEO. L.J. 1059 (1999).

47. *Id.*

process context because defendants in a criminal case are already before the courts and will remain there until the case is resolved. Thus, the courts appear to be the clear institutional choice to attain a desired criminal process goal. In seeking ways to protect individual rights against government overreaching, criminal process scholars often examine ways in which the courts can provide the necessary protection without explicitly considering whether the courts are the institution best equipped to do so. This decision makes sense because courts have traditionally been the bulwark against excesses of government power.

However, courts make institutional choices when they define the character of rights.[48] Courts may not create the strong right that is sought because of their institutional limitations. Instead of turning blindly to the courts to address criminal process questions, scholars must compare several alternative decision-makers. Depending upon the goal sought, the institutions of criminal process include the political process, the courts, the executive (including prosecutors), defendants, juries, and administrative agencies. It is critical to examine and compare the competence of these institutions to resolve a process issue because this analysis may reveal that an institution other than the court is best suited to achieve the desired policy or goal.

Achieving compulsion parity between prosecutors and defendants in their ability to gather evidence located outside the United States is an important criminal process goal in the era of global crime. Currently, MLATs only allow prosecutors to obtain foreign evidence. This Article considers how the comparative framework would approach and resolve the question of attaining compulsion equity in transnational criminal cases. Since the framework does not address the question of goal choice,[49] Part III discusses the importance of the norm of compulsion parity by examining its historical and current formulations.

III.
THE NORM OF COMPULSION PARITY

It is an "ancient proposition" that in a trial, "the public . . . has a right to every man's evidence, except for those persons protected by a constitutional, common-law, or statutory privilege."[50] The "very integrity" of the judicial process as well as public confidence in the system depends upon full disclosure of evidence.[51] For these reasons, both prosecutors and defendants have the right to compulsory process. Eliminating this right has the "effect of suppressing the truth."[52] To ensure that the criminal process can reliably free the innocent and punish the guilty, both parties should have compulsion parity, for example, the

48. *See supra* notes 23-41 and accompanying text.

49. *See supra* note 14.

50. United States v. Nixon, 418 U.S. at 709 (citations omitted).

51. *Id.* at 708-9.

52. Washington v. Texas, 388 U.S. 14, 20 (1967).

equal ability to compel the production of evidence that is relevant and material so that it can be presented to the trier of fact.[53] Subpart A addresses the historical evolution of the norm of compulsion parity and Subpart B addresses its current formulation.

A. Historical Evolution

Compulsion parity is a value deeply rooted in our constitutional history.[54] In England, before the establishment of coercive means for securing the presence of favorable witnesses, innocent defendants went to their deaths.[55] The English parliament remedied this injustice in 1695 when it passed a statute granting defendants charged with treason the same subpoena power available to the prosecution.[56] The principle of parity was well-established by the time Blackstone wrote his Commentaries on the Laws of England shortly before the American Revolution. He wrote, "[the defendant] shall have the same compulsive process to bring in his witnesses for him, as was usual to compel their appearance against him."[57]

The American colonists brought with them memories of the dangers of a justice system without compulsion parity.[58] William Penn's experience in England provides a compelling example. Penn was arrested in 1670 for delivering a sermon to an unlawful assembly of Quakers.[59] His trial proceeded in his absence after he was removed from the courtroom. He had attempted to defend himself without the assistance of an attorney and without the ability to compel the testimony of witnesses on his behalf. Penn was eventually acquitted by a jury that ignored the judge's instructions to convict. Later, when he became

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53. The international community likewise recognizes the importance of compulsion parity. Article 14(3)(e) of the International Covenant on Civil and Political Rights provides: "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him." International Covenant on Civil and Political Rights art. 14(3)(e), *entered into force* Mar. 23, 1976, 999 U.N.T.S. 171. The United States became a party the Covenant in 1992.

54. *See* Akhil Amar, *Twenty-Fifth Annual Review of Criminal Procedure: Foreward: Sixth Amendment First Principles*, 84 GEO. L. J. 641, 699 (1996) ("Though the words of the Compulsory Process Clause do not, on their face, demand a parity reading, the established Anglo-American right that the clause meant to declare was clearly defined in terms of subpoena parity"); Richard A. Nagareda, *Reconceiving the Right to Present Witnesses*, 97 MICH. L. REV. 1063, 1072 (1999) ("The Compulsory Process Clause, at the very least, requires the government to permit criminal defendants to avail themselves of the same rules of process—in the literal sense of service of process to compel the attendance of witnesses in court—as are available to the prosecution").

55. Peter Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71, 85 (1974).

56. *Id.* at 89. This "landmark English Treason Act of 1696 gave defendants 'the like Processe. . . to compell their Witnesses. . . as is usually granted to compell Witnesses to appeare against them....'" *See* Amar, *supra* note 56, at 699-700 (citation omitted).

57. Westen, *supra* note 57, at 90 (citation omitted).

58. *Id.* at 97-98 & n.114.

59. *Id.* at 91.

founder of the Pennsylvania colony, Penn included both compulsory process and compulsion parity in that state's Charter of Liberties.[60] The provision provided that "all criminals shall have the same Privileges of Witnesses and Counsel as their prosecutors."[61]

Most state constitutions protected the right to compulsory process, including parity.[62] New Jersey's State Constitution of 1776, for example, gave the accused "the same privileges of witnesses . . . as their prosecutors are or shall be entitled to."[63] The common principle in early American formulations of the right to compulsory process was that defendants should have at least the same rights as the prosecution to compel witnesses to testify on their behalf.[64]

Compulsory process, including parity, was so important to the states that it was protected in the Constitution under the Sixth Amendment.[65] The Compulsory Process Clause provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor."[66] Though the Clause's language does not explicitly require parity, its history demonstrates that parity is implied. When James Madison drafted the clause, most state provisions emphasized the defendant's right to present evidence on a par with the prosecution. Only two states, Massachusetts and New Hampshire, emphasized the subpoena power.[67] Madison, a consensus builder, likely drafted the Clause to specifically emphasize the minority view so as to ensure it would not be overlooked. He believed his language would implicitly protect the "more conspicuous and common aspects of the defendant's right to present witnesses in his favor[,]" including parity.[68]

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60. He also included a provision in the governing laws protecting the right of defendants to present a defense. *Id.* at 91-92.

61. *Id.* at 92-93 (citing Act of May 31, 1718, 1 Laws of Pennsylvania, ch. 236 sec. 4 (Bioren ed. 1810).

62. Westen, *supra* note 57, at 90-91, 94-95; Amar, *supra* note 56, at 699-700.

63. Westen, *supra* note 57, at 95; Amar, *supra* note 56, at 699-700.

64. Westen, *supra* note 57, at 95.

65. *Id.* at 94-95 (footnotes omitted) ("[State provisions] all reflected the principle that the defendant must have a meaningful opportunity, at least as advantageous as that possessed by the prosecution, to establish the essential elements of his case. The states pressed the principle so vigorously that the framers of the federal Bill of Rights included it in the sixth amendment in a distinctive formulation of their own.").

66. For a brief discussion of the history of the Compulsory Process Clause, see Lisa Graver, *The Current Value of Compulsory Process: Can a Defendant Compel the Admission of Favorable Scientific Testimony?* 48 CASE W. RES. L. REV. 865, 868-870 (1998).

67. Westen, *supra* note 57, at 94-95 nn.96 & 99.

68. *Id.* at 99-100. The language of the compulsory process clause was widely publicized. If state representatives from the majority states had thought the language was narrowly limited to the subpoena power, they likely would have raised the issue. *Id.* at 100. None did because of their belief that Madison's language was implicitly as broad as their comparable state provisions. *Id.*

When the first congress statutorily implemented the compulsory process clause in 1790, it gave the clause a broader meaning than the subpoena power. *Id.* The statute provided that a person accused of treason:

B. Current Formulation

There are very few cases construing the Sixth Amendment's compulsory process clause. *Washington v. Texas* is the first.[69] In *Washington*, two Texas statutes barred persons charged or convicted as co-participants in the same crime from testifying for each other. However, the statute did not bar their testimony on behalf of the prosecution because of the belief that co-accuseds would lie only when called by the defense. Finding this reasoning arbitrary, the Court held that Washington was denied his compulsory process right to put a witness on the stand whose testimony would be relevant and material to the defense.[70] In so holding, Chief Justice Warren wrote,

> [T]he Framers of the Constitution felt it necessary specifically to provide that defendants in criminal cases should be provided the means of obtaining witnesses so that their own evidence, as well as the prosecution's, might be evaluated by the jury.[71]

> shall be allowed and admitted in his said defence to make any proof that he or they can produce, by lawful witness or witnesses, and shall have like process of the court where he or they shall be tried, to compel his or their witnesses to appear at his or their trial, as is usually granted to compel witnesses to appear on the prosecution against them.

Act of April 30, 1790, ch 9, 29, 1 Stat. 112, 119, *cited in* Richard A. Nagareda, *supra* note 56, at 1117.

Westen concludes, "compulsory process by 1791 represented the culmination of a long-evolving principle that the defendant should have a meaningful opportunity, at least on a par with that of the prosecution, to present a case in his favor through witnesses." Westen, *supra* note 57, at 77-78. According to Wigmore, in his Treatise on Evidence at Common Law, the reference to "compulsory process" in the Sixth Amendment "provided nothing new or exceptional"; it merely "gave solid sanction, in the special case of accused persons, to the procedure ordinarily practised and recognized for witnesses in general." 3 John Henry Wigmore, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW 2190, 2965 (1st ed. 1904).

69. 388 U.S. 14 (1967).

70. *Id.* at 23.

71. *Id.* at 20. In his concurrence in Washington, Justice Harlan viewed the case, not as one implicating compulsory process rights, but rather, one implicating due process guarantees. He concluded that the Texas statute violated due process because the State recognized the relevance and competence of a co-accused's testimony, but arbitrarily barred the defendant from being able to use this testimony. *Id.* at 23. As with the compulsory process clause, non-arbitrary exclusion of defense evidence does not violate due process. *See also* Montana v. Egelhoff, 518 U.S. 37, 53 (1976) ("The introduction of relevant evidence can be limited by the State for a 'valid' reason...").

When defendants are deprived of their ability to present a defense, absent a persuasive reason, the courts have found a violation of due process, *see, e.g.*, Webb v. Texas, 409 U.S. 95 (1972); compulsory process, *see, e.g.*, Washington, 388 U.S. 14; or both, *see, e.g.*, Crane v. Kentucky, 476 U.S. 683 (1986). In *Crane*, the state was able to present the defendant's confession but the defense was excluded from presenting evidence that would have tested the confession. Because neither the judge nor the prosecution could provide a rational justification for the exclusion, due process and compulsory process were violated. *Id.* at 690, 691. In *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), Ritchie claimed he was prevented from learning the names of witnesses in his favor as well as other evidence because of the trial court's failure to disclose the contents of an agency's child abuse file. He claimed entitlement to the State's assistance in uncovering arguably useful information. The Court stated that the applicability of the Sixth Amendment's Compulsory Process Clause to this type

The Supreme Court has not explicitly held that compulsion parity is required by the Compulsory Process Clause. However, the Court acknowledges that the Clause's history reflects the Framers' intent to provide an accused with rights equal to that of the prosecution to compel witnesses and evidence.[72]

The Compulsory Process Clause is an essential safeguard for protecting the innocent and pursuing the truth in our adversarial system of criminal justice.[73] It not only grants defendants the right to compel witnesses to appear, but also the right to present their testimony[74] and to compel documentary and physical evidence.[75] The Clause implicitly requires parity between defendants and

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of claim was unsettled. Instead, the Court adopted a due process analysis since its precedents addressing fundamental fairness of trials established a clear framework for the analysis. The Court stated, "[o]ur cases establish, at a minimum, that criminal defendants have the right to the government's assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilt." *Id.* at 56. It does not matter whether it is the prosecution (*see, e.g.*, *Crane*, 476 U.S. 673), the judge (*see, e.g.*, Webb, 409 U.S. 95), or a statute (*see, e.g.*, Washington, 388 U.S. 14, Chambers v. Mississippi, 410 U.S. 284 (1973)) that denies defendants their ability to present a defense. The denial still violates due process.

72. *See, e.g.*, Taylor v. Illinois, 484 U.S. 400, 408 n. 13 (1988) (citing Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71, 94-95 (1974) (footnotes omitted) ("[State provisions] all reflected the principle that the defendant must have a meaningful opportunity, at least as advantageous as that possessed by the prosecution, to establish the essential elements of his case. The states pressed the principle so vigorously that the framers of the federal Bill of Rights included it in the sixth amendment in a distinctive formulation of their own."). In *Taylor*, the Court upheld a trial court's order precluding a defense witness because of the lawyer's failure to give the government sufficient notice of his witness as required by statute. The Court found that witness preclusion under the circumstances of this case did not violate the Compulsory Process Clause. However, the Court did acknowledge:

> [T]he conviction of our time [is] that the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the court. . . . [W]e believe that [this] reasoning [is] required by the Sixth Amendment.
>
> *Id.* at 408 (citation omitted)(edits in original).

73. *See* Amar, *supra* note 56, at 642 (1996) ("The deep principles underlying the Sixth Amendment's three clusters and many clauses [and, I submit, underlying constitutional criminal procedure generally] are the protection of innocence and the pursuit of truth.").

74. *Washington*, 388 U.S. at 23 (The framers of the Sixth Amendment "did not intend to commit the futile act of giving to a defendant the right to secure the attendance of witnesses whose testimony he had no right to use.").

75. The use of the word "witnesses" in the Clause includes both witnesses who furnish evidence through testimony as well as those who furnish evidence by producing documents and other items. *See, e.g.*, United States v. Hubbell, 530 U.S. 27, 49-55 (2000) (Thomas, J. concurring). According to Justice Thomas, this "broad view of the term 'witness' in the compulsory process context dates back at least to the beginning of the 18th century. *Id.* at 54 n.4 (citation omitted). *See also* United States v. Burr, 25 F. Cas. 30 (No. 14,692d) (CCD Va. 1807), *cited with approval in* Hubbell, 530 U.S. at 54-55. During his treason trial, Aaron Burr sought the issuance of a subpoena *duces tecum* to compel President Jefferson to provide the letter that purported to contain incriminating evidence against Burr. Chief Justice Marshall, presiding as a circuit judge, rejected the government's argument that the Sixth Amendment's Compulsory Process Clause only permitted the defendant to compel witness testimony, but not documents. The court held that the right to compulsory process included the right to secure papers material to the defense. *Id.* at 55.

prosecutors. However, as discussed in Part IV, the norm of compulsion parity has not kept pace with the rise of global crime[76] as a result of the powerful MLAT.

IV.
MUTUAL LEGAL ASSISTANCE TREATIES AND THE RETRENCHMENT OF COMPULSION PARITY

Mutual Legal Assistance Treaties are bi-lateral treaties that facilitate the gathering of evidence from foreign locales. However, MLATs fail to achieve accuracy and reliability in criminal adjudications because they create transnational compulsory process solely for prosecutors. Subpart A discusses the necessity of MLATs in an era of global crime and Subpart B describes their function.

A. Necessity of MLATs

Long before the global war on terror began in earnest after the events of September 11, the exponential growth of transnational crime was a government concern.[77] That concern has not abated. In a June 2006 speech in Israel, former

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76. Advances in technology and modes of travel facilitate the commission of crimes across international borders. *See* Nancy Guffey-Landers, *Establishing an International Criminal Court: Will it do Justice?*, 20 MD. J. INT'L L. & TRADE 199 (1996) (arguing that technology and advanced modes of travel have increased the possibility of crimes being committed across borders such as drug trafficking, money laundering, terrorism and human rights violations). Drug trafficking, money laundering, and international organized crime are just a few of the crimes that are increasingly perpetrated on global scale. *See, e.g.*, Abraham Abramovsky and Jonathan I. Edelstein, *Time for Final Action on 18 U.S.C. sec 3292*, 21 MICH. J. INT'L L. 941, 946 (2000) (establishing that the three factors most cited for explaining the growing globalization of crime are narcotics, banking secrecy and technology); Ellen Podger, *Globalization and the Federal Prosecution of White Collar Crime*, 34 AM. CRIM. L. REV. 325 (1997) (discussing the expansion of federal white collar prosecutions involving international activities); Thomas G. Snow, *Prosecuting White-Collar Crime: The Investigation and Prosecution of White Collar Crime, International Challenges and the Legal Tools Available to Address Them*, 11 WM. & MARY BILL RTS. J. 209, 209-210 (2002) (noting that contemporary white collar crime is now a transnational crime because of increased use of international financial systems to commit the crime); United States v. Verdugo-Urquidez, 110 S. Ct. 1056 (1990) (Brennan, J., dissenting) ("Particularly in the past decade, our Government has sought, successfully, to hold foreign nationals criminally liable under federal laws for conduct committed entirely beyond the territorial limits of the United States that nevertheless has effects in this country."). *See also* Christopher M. Pilkerton, *The Bite of the Apple: The Use of Narcotics-Related Foreign Wiretap Evidence in New York City Courts*, 11 INT'L LEGAL PERSP. 103 (2001) ("The global trade of drug trafficking currently poses the most serious threat U.S. law enforcement has ever had to combat.").

77. *See, e.g.*, The White House, INTERNATIONAL CRIME CONTROL STRATEGY 15-25 (1998) (describing international crime threat resulting from transnational drug trafficking, smuggling of illegal goods and undocumented immigrants, money laundering, and piracy of intellectual property) *cited in* Diane Amann, *Harmonic Convergence? Constitutional Criminal Procedure in an International Context*, 75 IND. L.J. 809, 820 n.75 (2000). Former Attorney General Dick Thornburgh stated, "Often, more than 50 percent of my day is devoted to some matter relating to our

Attorney General Alberto R. Gonzales articulated a vision that remains committed to stomping out transnational crime:

> [D]espite the tremendous demands on the Department in the post-9/11 world, our commitment to fighting crime has never been stronger. We are cooperating with our international partners to fight everything from organized crime and drug trafficking to cybercrime, human trafficking, corruption and intellectual property crimes. We are working as a team, and we are making good progress.[78]

Domestic prosecution of transnational crime presents challenges. The parties commonly require evidence located in a foreign jurisdiction in a form admissible in American courts. Prosecutors and law enforcement officials on the one hand and accused individuals on the other must both contend with issues of national sovereignty and alien legal systems that impede their ability to acquire that evidence. When evidence necessary to effectively prosecute or defend is located in a foreign jurisdiction, there exist two significant hurdles to obtaining it. The first obstacle is the need to respect sovereignty. Absent a treaty or other agreement between nations, the jurisdiction of law enforcement agents does not extend beyond a nation's borders.[79] Laws often forbid unilateral law enforcement activities by foreign agents.[80] Beyond U.S. borders, American subpoenas for evidence have no effect. Hence, sovereignty hinders law enforcement's ability to gather and seize foreign evidence.

The second obstacle is the difficulty of harmonizing[81] different legal systems, cultures, and customs. For example, nations differ in the acts they decide to criminalize,[82] the techniques law enforcement can utilize,[83] the laws

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international involvement in fighting drug trafficking, money laundering, international organized crime and business fraud, environmental depredations, terrorism or espionage." Address by Attorney General Dick Thornburgh, American Bar Association annual meeting (Aug. 8, 1989), *quoted in* Michael Burke, *United States v. Salim: A Harbinger for Federal Prosecutions Using Depositions Taken Abroad*, 39 CATH. U. L. REV. 895, n.4 (1990).

78. Excerpted from Prepared Remarks of Attorney General Alberto R. Gonzales at Malka Brender Hall "Kes Hamishpat" Trubowitz Law Building, Tel Aviv University (June 27, 2006), http://www.usdoj.gov/ag/speeches/2006/ag_speech_060627.html.

79. NADELMANN, *supra* note 10, at 5.

80. *Id.* at 5, 331. *See, e.g.*, Art. 271 of the Swiss Penal Code (*cited in* NADELMANN, *supra* note 10, at 331 n.47):

> Whoever, on Swiss territory, without being authorized so to do, takes on behalf of a foreign government any action which is solely within the province of a [Swiss] government authority or a [Swiss] government official, whoever does anything to encourage such action, . . . shall be punished by imprisonment, in serious cases in the penitentiary. . . .

For a discussion of similar restrictions in other nations, see Sharon DeVine and Christine M. Olsen, *Taking Evidence Outside of the United States*, 55 B.U. L. REV. 368, 386 (1975).

81. Nadelmann describes harmonization as a concept that incorporates three processes: the "*regularization* of relations among law enforcement officials of different states, [the] *accommodation* among systems that retain their essential differences, and [the] *homogenization* of systems toward a common norm." NADELMANN, *supra* note 10, at 10 (emphasis in original).

82. Many American tax and securities law violations are not criminal in other nations.

83. Typical techniques used in the United States such as wire-tapping and undercover

and legal procedures available for obtaining evidence, and the infrastructures governing whether evidence will be provided. MLATs were negotiated with foreign nations to overcome these obstacles.

B. Function of MLATs

MLATs create transnational compulsory process between nations.[84] They are bi-lateral in order to specifically tailor each treaty to account for differing legal systems and law enforcement priorities.[85] MLATs mandate mutual cooperation between nations in the investigation and prosecution of transnational crime. The parties can deny assistance only on the bases explicitly set forth in the treaty.[86] The primary motivation of the United States to negotiate

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operations are either forbidden or strictly constrained elsewhere. *Id.* at 7, 209, 225-235, 239-246. Many civil law countries operate under the "legality principle," requiring the prosecution of anyone known to have committed a crime, and preventing law enforcement from turning individuals into informants. *See id.* at 216, 218-19.

84. MLATs are not the sole means of obtaining evidence abroad. Executive agreements can provide limited assistance to investigate specified types of crimes. Executive agreements with foreign governments are signed by the President without Senate ratification and bind the country. *See* U.S. CONST. art. II, § 2; Guffey-Landers, *supra* note 78, at 209.

In addition to MLATs and executive agreements, various multilateral arrangements exist. For example, the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances provides for mutual legal assistance in Article 7. This treaty entered into force in 1988. Under the Convention, a nation may request mutual legal assistance for the following reasons:

> Taking evidence or statements from persons; effecting service of judicial documents; executing searches and seizures; examining objects and sites; providing information and evidentiary items; providing originals or certified copies of relevant documents and records, including bank, financial, corporate or business records; identifying or tracing proceeds, property, instrumentalities or other things for evidentiary purposes.

United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 7(2), *opened for signature* Dec. 20, 1988, 28 I.L.M. 493, 508. The UN Convention is silent as to the ability of criminal defendants to use the treaty to obtain evidence on their behalf. *See* Michael Abbell, *DOJ Renews Assault on Defendant's Right to Use Treaties to Obtain Evidence from Abroad,* THE CHAMPION, AUG. 21, 1997, at 21, *available at* http://www.nacdl.org/champion/articles /97aug02.htm. These other methods are of limited utility because they only cover certain specified crimes.

85. Diane Marie Amann, *A Whipsaw Cuts Both Ways: The Privilege Against Self-Incrimination in an International Context*, 45 UCLA L. REV. 1201, 1265 (1998) ("[MLATs] help us bridge the gulfs of language, culture and disparate legal systems that in the past hampered cooperation in criminal law enforcement" and thus "have vastly improved international collaboration in combating crime"); Abraham Abramovsky, *Prosecuting the "Russian Mafia": Recent Russian Legislation and Increased Bilateral Cooperation May Provide the Means*, 37 VA. J. INT'L L. 191, 207 (1996). MLATs were structured to streamline and make more effective the process of obtaining foreign evidence. *See* Treaty with Austria on Mutual Legal Assistance in Criminal Matters, U.S.-Austria, at 2, S. Exec. Rep. No. 104-24 (1996) [hereinafter *Austria*] *citing Worldwide Review of Status of U.S. Extradition Treaties and Mutual Legal Assistance Treaties: Hearings Before the House Committee on Foreign Affairs*, 100th Cong. 36-37 (1987) (statement of Mark M. Richard, Deputy Assistant Attorney General, Criminal Division).

86. Each MLAT explicitly sets forth the situations in which the requested country can deny assistance under the treaty, usually in Article 3. Typically, they allow for the denial of requests that appear to involve military or political offenses not recognized under the criminal laws of the

these treaties is to facilitate obtaining foreign evidence in a form admissible in United States courts.[87]

While each MLAT is the product of individual negotiations,[88] they do contain some similarities. MLATs typically provide for the taking of testimony, the production of records, evidence, and information, the service of judicial orders, and the transfer of persons in custody for testimonial purposes.[89] MLATs also permit any other assistance not prohibited by the laws of the requested nation, allowing the treaties to evolve over time.[90]

MLATs call for the creation of a "Central Authority" in each nation to facilitate treaty requests.[91] By making requests directly to the Central Authority, the courts and diplomatic channels are avoided, and the time required to secure evidence is significantly reduced.[92] The Office of International Affairs (OIA) in the Criminal Division of the United States Department of Justice serves as the Central Authority for the United States.[93] The OIA was created in 1979, after

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requested state or that would violate the constitution of the requested state. They also permit denials when the request would violate the national security or basic public policy of the requested state.

87. A significant motivation for foreign nations' willingness to negotiate MLATs was a desire to reduce unilateral actions taken by the United States to obtain evidence. *See, e.g.*, NADELMANN, *supra* note 10, at 367 (description of Canadian MLAT).

88. For an in-depth discussion of the negotiation history, *see id.* at 345-384; Tuerkheimer, *supra* note 9, at 358.

89. Some types of assistance, such as the transfer of persons in custody for testimonial purposes, were not always available through other processes like the diplomatic letters rogatory. The types of assistance required by an MLAT are usually documented in the first Article. *See, e.g.*, Austria, *supra* note 87, at 6, providing for the following types of assistance: (1) the taking of testimony or statements of persons; (2) service of documents; (3) execution of requests for searches and seizures; (4) the provision of documents and other articles of evidence; (5) locating and identifying persons; and (6) the transfer of individuals in order to obtain testimony or for other purposes. The earliest treaties, like the one with Switzerland, allowed the denial of assistance if the crime was not specifically enumerated in the treaty. Harris, Asia Crime Prevention Foundation (ACPF) Lecture: Mutual Legal Assistance Treaties: Necessity, Merits, and Problems Arising in the Negotiation Process (2000) [hereinafter Harris Lecture]. Experience proved this limitation to be too restrictive, so later treaties included the requirement of dual criminality (the act committed would be an offense in both jurisdictions). This too proved to be too restrictive. Most current treaties do not provide dual criminality as a basis for denial of assistance. *Id.*

90. *Id.*

91. *See, e.g.*, Treaty for Mutual Assistance in Criminal Matters, U.S.-Switz., art. 28, May 25, 1973, 27 U.S.T. 2019 [hereinafter Swiss MLAT].

92. NADELMANN, *supra* note 10, at 319. *See* Austria, *supra* note 87, at 1. The process for MLAT requests is incorporated in 28 U.S.C. § 1782.

93. The Central Authority for the United States is the Attorney General or his designee. *See, e.g.*, Austria, *supra* note 87, at 14. The OIA was designated as the Central Authority for purposes of making and receiving MLAT requests pursuant to 28 C.F.R. § 0.64-1. This section states:

> The Assistant Attorney General, Criminal Division . . . shall have the authority and perform the functions of the "Central Authority" or "Competent Authority" (or like designation) under treaties and executive agreements between the United States of America and other countries on mutual assistance in criminal matters that designate the Attorney General or the Department of Justice as such authority. The Assistant Attorney General, Criminal Division, is authorized to re-delegate this authority to the

the first MLAT was signed.[94] Every U.S. Attorney's Office in the country has an "international security coordinator" who is responsible for handling requests to or from foreign nations.[95]

MLATs have many advantages. First, evidence can be obtained quickly because requests bypass the courts and diplomatic channels.[96] Second, MLATs establish a procedural framework for ensuring that the evidence will be admissible in domestic courts.[97] Third, they can provide a mechanism for circumventing the financial secrecy laws that so often frustrate American investigations.[98] Without MLATs, frustration with these laws frequently leads the United States to resort to unilateral actions to obtain foreign evidence.[99] Fourth, MLATs can require that the request and the evidence provided be kept

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Deputy Assistant Attorneys General, Criminal Division, and to the Director and Deputy Directors of the Office of International Affairs, Criminal Division.

The OIA negotiates MLATs with the State Department. www.usdoj.gov/criminals/oia.html. The staff of OIA consists of nearly eighty men and women in Washington, D.C. as well as attorneys and associated staff in six foreign countries. Harris Lecture, *supra* note 91. On any given day, they handle about 6,000 requests to and from the U.S, about two thirds of which are requests for mutual assistance. *Id.* The number of requests grows every year. *Id.*

The OIA helps local, state and federal prosecutors make MLAT requests. They will provide model requests and help with drafting. UNITED STATES ATTORNEYS' MANUAL, Title 9, Criminal Resource Manual 276 (1997). Once a draft is complete, the OIA sends the final request to the requested country's Central Authority. *Id.* Usually, the OIA will only send the request after it has been translated. *Id.*

94. NADELMANN, *supra* note 10, at 342. The first MLAT was negotiated with the Swiss. *See infra* notes 182-212 and accompanying text.

95. UNITED STATES ATTORNEY'S MANUAL, § 9-90.050 (2004). Any local, state or federal prosecutor who needs overseas evidence can make an MLAT request. To make the request, the prosecutor contacts an OIA attorney who will work with the prosecutor to draft the request. Snow, *supra* note 78 at 227-28.

Requests must generally be in writing, though more recent treaties allow requests in another form in urgent circumstances. Requests must contain: the name of the authority conducting the investigation; a description of the evidence sought and the purpose for which it is sought; applicable legal provisions (with their texts), the name and location of the persons sought, and any procedures for obtaining or authenticating the foreign evidence that will assist in its admissibility in the U.S. *Id.* at n.70. After the request is translated, the OIA forwards the MLAT request directly to the other country's Central Authority. Many countries have statutes which provide procedures for responding to foreign MLAT requests. Similar to the process followed in the United States, foreign prosecutors will obtain subpoenas or other compulsory orders from their courts. Once the requested evidence is obtained, it is returned by the Central Authority of the requested country to the OIA. The OIA then forwards the evidence directly to the prosecutor. *Id.* The evidence gathered generally cannot be used for purposes other than those stated in the request without the prior consent of the requested State. Some treaties permit the use of information for any purpose once it becomes public. *Id.*

96. *See* Cayman Islands, *supra* note 1, at 166 (testimony of Pisani) ("[R]equests made via MLATs can often be turned around and received in a matter of weeks, and, in some cases, even shorter.").

97. NADELMANN, *supra* note 10, at 319.

98. *Id.*

99. *See infra* notes 117-124 and accompanying text.

confidential,[100] preventing suspects from learning of the request and attempting to hide, obscure, or destroy evidence. Fifth, they can permit requests to be made prior to the institution of criminal proceedings. This allows administrative agencies and grand juries to request evidence under the treaty.[101] Sixth, MLATs can require the provision of evidence in cases where no "dual criminality"[102] exists.

Despite their many advantages, MLATs contain one serious flaw. The vast majority explicitly exclude criminal defendants from the benefits of the compulsory process provisions. Prosecutors are guaranteed access to foreign evidence while defendants are not.

As of October 1, 2005, the United States has signed 61 MLATs and the number continues to grow.[103] All but the three earliest contain language restricting defense access.[104] This is significant because MLATs are negotiated with those nations that pose a significant transnational crime problem. As a result, in the majority of cases where defendants require foreign evidence to

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100. NADELMANN, *supra* note 10, at 319. The United States wanted to limit the amount of information necessary to support an MLAT request to prevent targets from learning of the investigation and trying to undermine United States' evidence gathering efforts by either legal recourse or illicit intimidation and bribery. *Id.* at 361. These efforts were not always successful. The Swiss treaty, for example, requires that "[u]pon receipt of a request for assistance, the requested State shall notify . . . any person from whom a statement or testimony or documents, records, or articles of evidence are sought;" *See* Swiss MLAT, *supra* note 93, at art. 36(a). This provision warns suspects that they are under investigation at an earlier stage of the investigation than is required under the Federal Rules of Criminal Procedure, giving them greater opportunities to shift their funds and otherwise hide evidence. Another problematic provision from the point of view of the United States requires that requests for assistance include not only "the subject matter and nature of the investigation or proceeding" but also "a description of the essential acts alleged or sought to be ascertained"; *see id.* Art. 29(1)(a). As a consequence of this provision, suspects learn the prosecution's theory at an early stage in the investigation. In the United States, the defendant often does not discover that theory until the indictment. The United States was successful in maintaining secrecy in the Italian MLAT. That treaty contains a provision allowing the United States to request that the application for assistance and the contents of the request remain confidential. *See* Treaty Between the United States and Italy on Mutual Legal Assistance in Criminal Matters, Together with a Related Memorandum of Understanding, U.S.-Italy, art. 8(2), Nov. 9, 1982, 98th Cong., 2nd Sess. Treaty Doc. 98-25, [hereinafter Italian MLAT].

101. NADELMANN, *supra* note 10, at 332.

102. *Id.* at 333. Dual criminality refers to behavior that is criminal in both jurisdictions. *Id.* at 6-7.

103. As of September 28, 2009, these countries include: Anguilla, Antigua/Barbuda, Argentina, Australia, Austria, Bahamas, Barbados, Belize, Belguim, Brazil, British Virgin Islands, Canada, Cayman Islands, Columbia, Cyprus, Czech Republic, Dominica, Egypt, Estonia, European Union, Finland, France, Germany, Greece, Grenada, Hong Kong, Hungary, India, Ireland, Israel, Italy, Jamaica, Japan, South Korea, Latvia, Liechtenstein, Lithuania, Luxembourg, Mexico, Montserrat, Morocco, Netherlands, Panama, Philippines, Poland, Romania, Russian Federation, St. Kitts-Nevis, St. Lucia, St. Vincent/Grenadines, South Africa, Spain, Sweden, Switzerland, Thailand, Trinidad and Tobago, Turkey, Turks and Caicos Islands, United Kingdom, Uruguay, and Venezuela. U.S. DEP'T OF STATE, TRAVEL.STATE.GOV, BUREAU OF CONSULAR AFFAIRS, MUTUAL LEGAL ASSISTANCE (MLAT) AND OTHER AGREEMENTS, http://travel.state.gov/law/info/judicial/judicial_690.html.

104. The three earliest MLATs are the Swiss, Turkish and Netherlands treaties.

defend themselves, they are forced to rely upon inefficient market processes[105] while the government obtains evidence pursuant to the treaty. This creates a significant compulsion disparity in transnational criminal cases.

V.
COMPARING THE INSTITUTIONS

The four institutions that can play a role in protecting the norm of compulsion parity are the evidence-gathering market, the political process, the executive, and the courts. Each has its own merits and shortcomings. Only by comparing institutional capabilities is it possible to make an informed choice amongst them. Since the relevant decision-makers are the same, many of the factors considered are transferable to other criminal process questions. The Subparts below examine each institution's competence to safeguard parity either singly or in conjunction with another institution.

A. The Market for Foreign Evidence

Without MLATs, parties struggle to obtain foreign evidence because it is beyond the reach of domestic subpoenas. Law enforcement and defendants utilize either informal methods, such as cooperation and unilateral actions, or a formal diplomatic process called letters rogatory to obtain foreign evidence. Though far from perfect, these processes make up an informal community or market that represents a viable institutional choice for attaining the goal of equal access to evidence between prosecutors and defendants. What follows is an examination of this market. Comparative institutional analysis necessitates this exploration because one option for eliminating the compulsion disparity that currently exists between the prosecution and the defense is a return to the pre-MLAT world.

1. Informal Evidence Gathering

American law enforcement agents abroad often develop informal, cooperative relationships with their foreign counterparts. By working closely with their foreign equivalents, they can conduct investigations and obtain evidence while avoiding accusations that they are performing investigative operations normally reserved for employees of a sovereign. Cooperation often takes place below the radar of high level government officials so as not to be hindered by government policies.[106] High level officials pay attention only

105. *See infra* notes 108-142 and accompanying text.

106. This is a notion advanced by Robert Keohane and Joseph Nye Jr. called "transgovernmental relations." *See* Robert Keohane and Joseph Nye Jr., *Transgovernmental Relations and International Organizations*, WORLD POLITICS 27, 43 (1974) (referring to "sets of direct interactions among sub-units of different governments that are not controlled or closely guided

when the activities of agents or prosecutors "assume political significance, attract media attention or threaten to disrupt other dimensions of a state's foreign relations."[107]

Despite significant obstacles, cooperation and internationalization of policing has made great strides. American law enforcement agencies have increased their presence in foreign nations. For example, legal attachés operate as overseas agents of the FBI.[108] They handle all international matters that fall within the FBI's jurisdiction[109] and their presence facilitates informal cooperation. Legal attachés do not typically investigate criminal matters. Rather, they work as liaisons between American and foreign law enforcement agencies and prosecutors,[110] playing a crucial role in cutting through red tape and expediting requests to and from the United States for information and evidence.[111] Other law enforcement agencies such as the DEA[112] and the Secret Service also have an international presence that facilitates cooperation.[113] Additionally, the United States' office of Interpol assists with communications between the United States and foreign police agencies.[114]

Cooperative arrangements are not always possible, however, because they depend upon dual criminality[115] and similar law enforcement priorities. Absent informal cooperation, American law enforcement officials sometimes resort to three forms of unilateral action. First, law enforcement officials attempt to operate as private investigators rather than as representatives of a foreign sovereign.[116] This option is often problematic. Regardless of whether agents exercise their sovereign powers to arrest and the like, they are still employees of a foreign nation. Most nations do not take kindly to unilateral operations by foreign law enforcement and many have laws prohibiting such activity.[117] Also, local law enforcement agents may resent foreign agents operating on their turf.[118] They may report the activity to high level government officials, creating

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by the policies of the cabinets or chief executives of those governments") *cited in* NADELMANN, *supra* note 10, at 107-9.

107. NADELMANN, *supra* note 10, at 108.

108. *Id.* at 150.

109. *Id.* at 152.

110. *Id.* at 152-3.

111. *Id.* at 153.

112. *Id.* at 147-150.

113. *Id.* at 164-167.

114. *Id.* at 181.

115. For example, joint investigations of securities law violations are hampered by the fact that many of these violations simply are not criminal acts in other countries. *Id.* at 6-7.

116. *Id.* at 8.

117. For example, in many nations, laws forbid foreign agents from carrying firearms and even preclude them from conducting interviews and carrying out other investigative inquiries on their own. *Id.* at 190.

118. *See id.* at 108-9.

friction between the nations.[119] Second, unilateral action also takes the form of pressuring foreign nations to accommodate U.S. law enforcement needs.[120] Finally, in rare cases, unilateral actions involve bribery of foreign officials[121] and abductions.[122] As can be imagined, these unilateral measures lead to international friction.[123]

The same obstacles that hinder transnational criminal investigations can sometimes provide benefits to criminals. Successfully investigating and obtaining transnational evidence for prosecution is difficult. Transnational lawbreakers often take advantage of the lack of cooperation between nations and investigatory hindrances.[124] For example, offenders can hide the proceeds of their criminal activity in foreign bank accounts, safe in the knowledge that blocking statutes, designed specifically to limit the availability of financial documents and records, will hamper prosecutors' efforts to obtain important evidence.[125] The hurdles prosecutors face in obtaining foreign evidence often lead them to forgo prosecution.[126] For the transnational offender, "foreign territories and alien systems offer safe havens, lucrative smuggling opportunities, and legal shields and thickets to disguise their criminal

119. This occurred in a case in which the author was involved. Police officers from Washington State located and interviewed witnesses living in Canada without the prior permission or cooperation of local Canadian police. The local police learned of the unilateral police activity and reported it to high level government officials, resulting in friction between Canada and the United States.

120. NADELMANN, *supra* note 10, at 7. One form of pressure the United States was able to exert resulted from the growth of multinational corporations doing business in the United States. Foreign corporations operating in the United States were susceptible to court orders and subpoenas served upon their branches and personnel. *Id.* at 316. One well-known case, *United States. v. Bank of Nova Scotia*, 691 F.2d 1384 (11th Cir. 1982), arose from such a situation. *See infra* note 140. When fines are levied against domestic branches for failing to comply with subpoenas for records existing in the foreign branches of these corporations, foreign nations often respond to this unilateral financial pressure by agreeing to cooperate and providing the requested records. NADELMANN, *supra* note 10, at 358-9. Another form of unilateral action taken by the United States was the use of Ghidoni waivers. *See generally* Harvey M. Silets and Susan W. Brenner, *Compelled Consent: An Oxymoron with Sinister Consequences for Citizens Who Patronize Foreign Banking Institutions*, 20 CASE W. RES. J. INT'L L. 435 (1988).These waivers allow a court to order a grand jury target to sign a consent form waiving any bank secrecy privilege. *Id.* at 435-436.

121. NADELMANN, *supra* note 10, at 323.

122. *See, e.g.*, United States v. Verdugo-Urquidez, 494 U.S. 259 (1990).

123. For example, international tensions arose between the United States and the United Kingdom when prosecutors began serving subpoenas upon local branches of multinational corporations, commonly referred to as "Bank of Nova Scotia subpoenas" (referencing well-known cases involving such subpoenas). Civil fines are imposed for failures to comply. *See infra* note 140. To resolve the tension, the Justice Department ordered that all subpoenas to institutions in the United States for records located abroad be cleared through the Department. NADELMANN, *supra* note 10, at 359-360. This became known as "the Jensen memorandum" after Associate Attorney General D. Lowell Jensen. *Id.* at 360.

124. NADELMANN, *supra* note 10, at 324.

125. *Id.* at 314, 324.

126. *Id.* at 322-23.

enterprises."[127]

However, when criminal defendants require foreign evidence to defend themselves, they often face challenges more acute than those of law enforcement and prosecutors. Defendants cannot informally ally with law enforcement communities in other nations to aid in investigations. They cannot take advantage of the diplomatic pressures that governments exert to facilitate cooperation.[128] And, while they can obtain personal records and evidence such as their own financial documents or telephone records by requesting them directly from foreign institutions,[129] they cannot obtain other types of evidence through informal mechanisms except perhaps through bribery or other corrupt means.

Both the government and defendants can hire private investigators.[130] These investigators can operate abroad without raising sovereignty concerns. Law enforcement reliance on private investigators has decreased, though, as cooperation and harmonization among governments has increased.[131] However, defendants still rely upon them, as long as they have sufficient funds to hire them.

2. *Formal Evidence Gathering: Letters Rogatory*

The primary formal method available to prosecutors and defendants for obtaining foreign evidence in the absence of an MLAT is a process called letters rogatory.[132] The letters rogatory procedure requires the party seeking foreign evidence or other assistance to submit a formal request through diplomatic

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127. *Id.* at 6. The United State was concerned with the protection organized crime received from financial secrecy jurisdictions like Switzerland. *Id.* at 324. Despite serious efforts, law enforcement and prosecutors were unable to obtain financial evidence from these jurisdictions. *Id.*

128. *Id.* at 109.

129. For example, under the laws of the Cayman Islands, disclosure of bank records is generally prohibited unless the customer consents or the Cayman Grand Court orders disclosure. *See* Confidential Relationships (Preservation) Law (1995 Revision), available at <http://broadhurstbarristers.com/html/laws.html>.

130. NADELMANN, *supra* note 10, at 17, 99-100. One of the largest private detective agencies was the Pinkerton Detective Agency, whose principal client between 1890 and 1892 was the federal government. *Id.* at 49, 55-58. When the agency was investigated in 1892 for its role in suppressing the Homestead strike, Congress passed a law forbidding the use of private detectives to enforce federal law. *Id.* at 49, (citing HOMER CUMMINGS and CARL MCFARLAND, FEDERAL JUSTICE: CHAPTERS IN THE HISTORY OF JUSTICE AND THE FEDERAL EXECUTIVE 373 (Macmillan 1937)). This did not stop the federal government from hiring private detectives. Pinkerton agents were hired by the State Department to hunt down Robert LeRoy Parker and Henry Longbaugh, aka Butch Cassidy and the Sundance Kid, in the jungles of Bolivia. NADELMANN, *supra* note 10, at 60. Most historians agree that the agency was responsible for their deaths. *Id.* at 60 and note 141.

131. *Id.* at 22, 101-02.

132. 28 U.S.C. § 1781 (1970) (giving courts the discretionary authority to grant and receive judicial assistance to and from a foreign court through letters rogatory).

channels from a domestic court to a foreign court.[133] Letters rogatory are problematic for a number of reasons. First, formal judicial proceedings are a prerequisite to the use of letters rogatory.[134] Hence, the procedure provides little assistance to prosecutors seeking evidence prior to instituting proceedings. Second, the procedure creates no obligation among nations to provide the requested evidence.[135] If a country responds to a request, it is simply as a matter of comity.[136] Even if a response is forthcoming, it frequently takes years.[137] Third, the procedure can be used to request a foreign court to compel the

133. NADELMANN, *supra* note 10, at 318; Inter-American Convention on Letters Rogatory, 14 I.L.M. 339 (1975) (entered into force Aug. 27, 1988), at art. 5, *cited in* Abraham Abramovsky & Jonathan I. Edelstein, *Time for Final Action on 18 U.S.C. sec. 3292*, 21 MICH. J. INT'L L. 941, 947 (2000) (providing that letters rogatory must be certified by a diplomatic or consular agency); David Whedbee, *The Faint Shadow of the Sixth Amendment: Substantial Imbalance in Evidence-Gathering Capacity Abroad Under the U.S.-P.R.C. Mutual Legal Assistance Agreement in Criminal Matters*, 12 PAC. RIM L. & POL'Y J. 561, 570 (2003).

134. At least one court has allowed the issuance of a letter rogatory in support of grand jury proceedings. United States v. Reagan, 453 F.2d 165 (6th Cir. 1971). However, many common law countries will refuse to respond to a request made before formal charges have been filed. *See* ABBELL & RISTAU, *supra* note 9, §12-4-3, at 132 note 1. *See also* NADELMANN, *supra* note 10, at 322 (many countries reject letters rogatory requests coming from grand juries.)

135. *See* ABBELL & RISTAU, *supra* note 9, §12-3-3, at 87-88. Upon reviewing a request, the foreign court, at its discretion, may choose then to issue orders to the appropriate authority in its country asking it to produce the requested evidence. *Id.* at 88. *See also* Whedbee, *supra* note 135, at 570. Foreign courts are often reluctant to obtain evidence for criminal proceedings in another country and many lack officials specifically charged with responding to requests. NADELMANN, *supra* note 10, at 322.

136. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 101 cmt. e (1978). The meaning of the comity doctrine remains unclear. Joel R. Paul, *Comity in International Law*, 32 HARV. INT'L L.J. 1, 1, 3 (1991) (noting comity has been variously defined as "a rule of choice of law, courtesy, politeness, convenience or goodwill between sovereigns, a moral necessity, expediency, reciprocity or 'considerations of high international politics concerned with maintaining amicable and workable relationship between nations.'"). In *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895), the Supreme Court noted comity "in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other;" Instead, it is "the recognition which one nation allows within its territory to legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience."

137. *See* Cayman Islands, *supra* note 1, at 166 (testimony of Pisani) ("[E]ven with countries where we have the best of relations, it takes an average of 6 months now to have a return on a letters rogatory. That is far too long in the Twentieth Century to wait."). In a lecture given in 2000 in Japan, the Director of the OIA stated, "Too often, however, the letter process is not very successful, and the prosecutor or police officer who generates a letter rogatory may wait many frustrating months, or years, only to find that the requested evidence is not produced. We have many cases in which evidence sought by letters rogatory is supplied long after the trial for which it was requested has been completed." Harris Lecture, *supra* note 91. *See also* Abramovsky & Edelstein, *Time for Final Action on 18 U.S.C. § 3292*, 21 MICH. J. INT'L L. 941, 949 (citing H.R. Rep. No. 98-907, 2d Sess. (1984)), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3578; *Worldwide Review of Status of U.S. Extradition Treaties and Mutual Legal Assistance Treaties: Hearings Before the House Comm. On Foreign Affairs*, 100th Cong. 36-37 (1987) (discussing the use of letters rogatory and their limitations as compared to MLATs). If a defendant is in custody, the long wait for evidence that may never arrive pursuant to a letter rogatory may raise Sixth Amendment speedy trial concerns, especially in cases where the prosecution has an existing MLAT with the country from which the evidence is sought.

testimony of foreign witnesses, to obtain permission to interview witnesses, and to obtain documents.[138] However, evidence gathered may not be in a form admissible in American courts. Due to the inadequacies of the process, letters rogatory are often replaced by informal evidence gathering.[139] When countries fail to provide evidence under letters rogatory, the United States frequently resorts to unilateral actions both to obtain the evidence and to pressure the other nation into negotiating MLATs.[140]

Although informal law enforcement cooperation and the letters rogatory process are not ideal methods for obtaining evidence,[141] neither party is guaranteed access to foreign evidence. In other words, evidence gathering parity exists in the market. While this solution is by no means ideal, comparative institutional analysis teaches that no institutional choice is perfect. If the goal of achieving compulsion parity is important to the fair functioning of our criminal justice system, as this Article argues, difficult institutional choices and compromises must be made. A return to the pre-MLAT market represents a viable means of achieving compulsion parity, and must be considered alongside the political process, the executive, and the courts.

B. The Political Process

Another institution that can play a role in protecting the norm of compulsion parity is the political process, namely, the Senate. The Senate Foreign Relations Committee takes testimony from interested parties regarding treaties and issues reports to the full Senate with recommendations regarding ratification. The Senate can remedy compulsion disparity by declining to ratify

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138. NADELMANN, *supra* note 10, at 319.

139. *Id.* at 318. Some nations will respond to informal requests such as those made through Interpol to obtain evidence. Others require the more formal letters rogatory. *Id.* at 318-9. For example, in an effort to obtain financial records from banks in the Cayman Islands, a country with strong bank secrecy laws, prosecutors convinced the federal courts to issue letters rogatory to Cayman courts. However, the Cayman courts refused to respond with the requested evidence. Prosecutors then resorted to unilateral measures, serving subpoenas duces tecum to the Miami branch of the Canadian Bank of Nova Scotia seeking records maintained in the banks' Bahamian, Cayman Islands, and Antigua branches. *See* United States v. Bank of Nova Scotia, 691 F.2d 1384 (11th Cir. 1982) and *In re* Grand Jury Proceedings, United States v. Bank of Nova Scotia, 740 F.2d 817 (11th Cir. 1984). When the bank refused to comply on the basis that compliance would violate its country's bank secrecy laws, the federal court agreed to levy daily fines of $25,000 on the bank. This was the first time the courts became involved in the process of helping the government obtain foreign evidence by ordering sanctions. NADELMANN, *supra* note 10, at 358. Even with the existence of letters rogatory, the United States still resorted to unilateral actions such as bribing local officials. *Id.* at 357.

140. *Id.* "[T]he principle incentive for many foreign governments to negotiate MLATs with the United States was, and remains, the desire to curtail the resort by U.S. prosecutors, police agents, and courts to unilateral, extraterritorial means of collecting evidence from abroad." *Id.* at 315.

141. The informal and formal processes that exist suffer from uncertainty as a result of systemic obstacles such as foreign legal institutions, political tensions and the lack of compulsory mechanisms for ensuring the provision of foreign evidence. MLATs are negotiated to overcome these problems.

MLATs that create it.

The major advantage of the political process is its responsiveness to public will and its ability to gather facts through hearings.[142] The competence of the Senate to protect parity depends upon the opportunity and ability of various interests to effectively have their voices and views considered by Senators. Two forms of political malfunction, minoritarian bias and majoritarian bias, can distort the political process. Determining what form of bias is likely to exist is crucial because that bias will affect the competence of the Senate to protect the norm of compulsion parity. Below, the Senate's MLAT ratification history is examined, and the majoritarian bias which prevented parity interests from being seriously considered by Senators is exposed.

1. Ratification History

Prior to 1988, Senate ratification of MLATs occurred perfunctorily, with little fanfare or opposition.[143] However, that changed in 1988 when the executive presented the Senate Foreign Relations Committee with additional MLATs to consider and ratify.[144] For the first time, these MLATs contained provisions preventing defendants from utilizing the compulsory process provisions.[145] As a result, executive officials faced serious opposition to ratification. The opposition groups included the National Association of Criminal Defense Lawyers, the Criminal Justice Section of the American Bar Association,[146] the American Civil Liberties Union and private criminal defense

142. IMPERFECT ALTERNATIVES, *supra* note 13, at 68.

143. NADELMANN, *supra* note 10, at 379.

144. *Id.*; Bruce Zagaris and Jessica Resnick, *The Mexico-U.S. Mutual Legal Assistance in Criminal Matters Treaty: Another Step Toward the Harmonization of International Law Enforcement*, 14 ARIZ. J. INT'L & COMP. L. 1, 20 (1997). The Senate was considering the treaties with the Cayman Islands, Mexico, Canada, Belgium, Thailand and the Bahamas. Cayman Islands, *supra* note 1, at 5.

145. The MLATs with the Cayman Islands, Mexico, Canada, and Belgium provide they do "not give rise to a right on the part of a private party to obtain . . . any evidence." The Bahamian and Thailand treaties provide that the treaties are intended "solely" for mutual assistance between the government and law enforcement authorities of the contracting parties and are "not intended or designed to provide such assistance to private parties." *See* Treaty on Mutual Assistance in Criminal Matters, U.S.-Bahamas, art. 1(3), S. TREATY DOC. 100-17 (1987).

A few years later, in 1996, the executive faced similar opposition to the Austrian MLAT. In my discussions of the legislative history concerning the opposition to this language, no distinction is made between testimony offered during the hearings in 1988-89 and that in 1996. Although there also was opposition to several other provisions of the treaties, the focus is on the opposition to the treaties' language barring defense access to the compulsory process provisions. For an extended discussion of the complicated legislative history surrounding these treaties and the objections to other provisions of the treaty, see generally Zagaris and Resnick, *supra* note 146.

146. The American Bar Association testified in support of defense access and the Criminal Justice Section of the ABA issued a resolution, approved unanimously by the ABA's House of Delegates, that "every future MLAT should expressly permit criminal defendants to use the treaty to obtain evidence from the Requested country to use in their defense if they can make a showing of

lawyers (collectively, the "defense lobby").[147] The defense lobby argued the treaties should not be ratified because they created an unconstitutional compulsion disparity.[148] Executive officials dismissed this criticism[149] and their arguments were persuasive. The Committee vote was nearly unanimous in favor of recommending ratification of these MLATs.[150] Only one Senator, the late Jesse Helms, criticized MLATs, in part because of the inequity in evidence gathering capabilities they created.[151] He questioned why criminal defendants' only option for obtaining foreign evidence would be the inefficient and discretionary letters rogatory[152] process when "MLATs [were] the result of the United States deciding that the letters rogatory were not satisfactory for U.S. prosecutorial needs because they were too slow in obtaining information."[153]

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necessity to the trial court." ABA Criminal Justice Section Report No. 109 (1989) *cited in* Michael Abbell, *DOJ Renews Assault on Defendant's Right to Use Treaties to Obtain Evidence from Abroad*, THE CHAMPION, AUG. 21, 1997, at 20, 21.

147. Abbell, *supra* note 148, at 21. NADELMANN, *supra* note 10, at 380.

148. The primary opposition came from testimony by Michael Abbell, the first director of OIA who is now a defense lawyer. NADELMANN, *supra* note 10, at 380. He argued the exclusionary language violated fairness norms and the compulsory process clause of the Sixth Amendment. He pointed out that defendants would be forced to rely upon the inadequate letters rogatory process while the prosecution could take advantage of MLATs.

149. Justice Department officials were not happy with their former colleague's criticisms. *Id.* at 380-81.

150. The vote in the Senate Foreign Relations Committee was 17-2 in favor of the MLATs. NADELMANN, *supra* note 10, at 383. Senator Helms represented one of the nay votes. The treaties were not ratified by the full Senate until late 1989. *Id.* at 383. By that time, Senator Helms had successfully appended two reservations to the treaty, one of which stated that nothing in the MLAT would require or authorize "legislation or other action by the United States prohibited by the U.S. Constitution as interpreted by the United States." *Id.* at 381-83. Neither reservation directly addressed the compulsion disparity concern.

151. *See* Cayman Islands, *supra* note 1, at 6, 52-55. Helms raised concerns about the disparity. *Id.* at 175; Marian Nash, *Contemporary Practice of the United States Relating to International Law*, 91 AM.J. INT'L. L. 93, 100 (January, 1997) (setting forth the written questions submitted by Senator Helms to the Department of State in connection with hearings over the advice and consent of a number of MLATs in 1996). His written questions included the following:

> Defendants do not have access to information through MLAT procedures. This disparity between prosecution and defendant in access to MLAT procedures has led some to question the fairness and even the constitutionality of MLATs denying individual rights. At the core of the legal objections is the belief that it is improper in our adversarial system of justice to deny defendants compulsory process and other effective procedures from compelling evidence abroad if those procedures are available to the prosecution . . . . Are there any efforts to provide access to information under consideration in current negotiations?

152. Letters rogatory are a completely discretionary and diplomatic process for obtaining foreign evidence. *See supra* notes 134-143 and accompanying text for a description of the failings of the letters rogatory procedure.

153. *See* Cayman Islands, *supra* note 1, at 175. In relevant part, Senator Helms' question was as follows:

> I believe that the Justice Department says that individuals can use letters rogatory, . . . but the MLATs are the result of the United States deciding that the letters rogatory were not satisfactory for U.S. prosecutorial needs because they were too slow in

The Committee's report to the Senate recommending ratification did acknowledge that the "disparity between prosecution and defendant . . . has led some to question the fairness and event [*sic*] the constitutionality of MLATs denying individual rights."[154] However, the report concluded, "it is clear that MLATs are intended to aid law enforcement authorities only."[155] The Committee's decision to ratify the MLATs, despite its awareness of the compulsion disparity they created, is evidence of political malfunction in the form of majoritarian bias. A discussion of political malfunction and how it affected the Senate ratification process follows.

2. *Evidence of Majoritarian Bias*

Political malfunction can take the form of minoritarian or majoritarian bias, depending upon how the impacts of a policy are distributed amongst those affected.[156] Minoritarian bias occurs when a special interest minority group prevails on an issue that disproportionately harms the majority. The majority could change the policy by virtue of its numbers, but each individual member of the majority is only minimally affected, for example, the per capita impact of the policy is small. There is little incentive for individuals to expend time and energy to understand the issues or even to recognize the harm to their interests.[157] On the other hand, the per capita impact on individual members of the special interest minority group is large. Each member thus has the incentive to understand its interests, organize political activity and determine the most effective way to influence the political process in order to prevail.[158] Hence, minoritarian bias is most likely to occur when an interest group with small numbers and high per capita stakes is pitted against a majority with low per capita stakes.[159]

Majoritarian bias also results from a skewed distribution of impacts.[160] But this time, the majority understands its interests and votes to implement a policy that harms the minority group far more than any corresponding benefit to the majority. Although the minority group may understand the disproportionate harm to its interests, it simply cannot overcome the power of the majority to

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> obtaining information . . . . My question is, Why should American citizens accused of a crime by foreign governments be stuck with a process that the Justice Department itself has called "cumbersome and ineffective?"

154. Austria, *supra* note 87, at 10. In an earlier MLAT, the committee additionally stated that, "[N]othing in the treaty is intended to negate the authority of the Court to ask the prosecution to make requests for information under the treaty." Cayman Islands, *supra* note 1, at 5.

155. Austria, *supra* note 87, at 9, 10 ("MLATs were intended to be law enforcement tools, and were never intended to provide benefits to the defense bar.").

156. IMPERFECT ALTERNATIVES, *supra* note 13, at 68.

157. *Id.* at 68-69.

158. *Id.* at 68-72.

159. *Id.* at 71-72.

160. *A Job for Judges*, *supra* note 40, at 672.

outvote them.[161]

The Committee's overwhelming vote in support of ratification, despite awareness of the compulsion disparity, evidences the majoritarian bias that existed during the ratification process. Both the executive and defense lobbies were well-informed as to the issues surrounding MLATs[162] and the channels of political influence, and both had high per capita stakes. However, the executive lobby successfully influenced the Senate hearings because they could credibly threaten to harness the power of the voting majority. In such a situation, when a smaller group within the majority has high stakes in an issue and can impel other majority members to act, they are known as a catalytic subgroup.[163]

A catalytic subgroup operates much like a special interest minority but is distinguished by its ability to spur the majority into action.[164] In order to do this, the subgroup must accomplish three things. First, it must educate the majority to care enough about a policy to take steps to implement it. Second, since the policy will disproportionately impact a minority group, the subgroup must convince majority members that they will not be mistaken for or become a part of that minority. Third, the subgroup must attain these goals in a manner that is easy for the majority to understand and digest with minimal effort. Otherwise, because of the low per capita stakes of each majority group member, they will simply not expend energy to learn enough about a particular policy to care enough to vote.[165]

The subgroup can attain these goals through the use of simple symbols and safe targets. Stereotypes are examples of simple symbols. These symbols convey considerable information with minimal effort. They are familiar and traditional sources of differentiation which people are usually "exposed to at an early age."[166] As such, they are endowed with meaning that is immediately recognized, often creating a visceral, emotional response.[167] A swastika is a particularly cogent example of a simple symbol that can be used with ease to communicate a powerful message to a targeted constituency.

A safe target is a discrete and easily identifiable group, such as one defined by its race or ethnicity,[168] that will be disproportionately harmed by a policy.

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161. *Id.*

162. A technical analysis of the treaties is provided to the Senate by the treaty negotiators to address anticipated problems and questions. NADELMANN, *supra* note 10, at 354. The executive was criticized for failing to make the treaties and their accompanying technical analyses available to the public until the eve of the Senate hearings. Cayman Islands, *supra* note 1, at 205, 206 (1988) (statement of Bruce Zagaris).

163. IMPERFECT ALTERNATIVES, *supra* note 13, at 72.

164. *Id.* Unlike a special interest group, however, the subgroup has the incentive to inform and organize the lower per capita stake members of the majority. *Id.*

165. *See supra* notes 158-161 discussing minoritarian bias.

166. *A Job for Judges*, *supra* note 40, at 676.

167. *Id.* at 676-77.

168. *Id.* at 677.

The target is "safe" only if the majority feels secure that it will not become part of or be mistaken for that minority. The more familiar the classification or source of difference between the safe target and the members of the majority, the easier it is to activate the majority to vote.[169]

By coupling a simple symbol with a safe target, the catalytic subgroup can efficiently and effectively educate the majority about an issue. Use of these symbols and targets lowers the information costs of educating the low stakes majority and spurring them to action.[170] When a catalytic subgroup can utilize simple symbols in conjunction with a safe target, instances of severe majoritarian bias are most likely to exist.

Any advantage the political process has by virtue of its ability to respond to the public will and gather facts, becomes a liability in the face of majoritarian political malfunction. Catalytic subgroups can influence the political process merely by threatening to activate the majority and turn out the vote. By using simple symbols against a safe target, the subgroup can issue a subtle threat to legislators: side with us or we will activate the majority and vote you out of office. If credible, such threats are a powerful bargaining chip when negotiating with political actors,[171] and can influence policy-making. Thus, legislators' responsiveness to the public will may exacerbate majoritarian bias.

The executive lobby's use of simple symbols against a safe target can explain its success before the Senate. Criminal defendants are a safe target because they are a discrete, easily identifiable and marginalized group. During the Senate hearings, the executive lobby emphasized the message that support for MLATs meant politicians were being "tough on crime."[172] This theme was echoed numerous times in the testimony of executive branch officials.[173]

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169. *Id.* at 676.

170. *Id.*; IMPERFECT ALTERNATIVES, *supra* note 13, at 73.

171. *Id.* at 74, 83.

172. The testimony of Mary Mochary, Principle Deputy Legal Adviser with the Department of State provides a good example of the executive's use of simple symbols against safe targets:

> We have stressed that mutual legal assistance treaties can help countries fight back against the enemies within: Narcotraffickers who threaten the stability of well-meaning governments; terrorists who hold the rule of law in contempt; and white-collar criminals who enrich themselves by stealing from honest citizens. We have also emphasized that the treaties are important because many criminals operate on an international scale, orchestrating illegal activities in the United States from foreign countries . . . . Today's major criminal . . . whether he embezzles money or launders it, is far more likely than not to cross an international border or to leave traces of his criminal conduct in several countries. This kind of conduct is not limited to the drug trafficker or terrorist, even though they may be most proficient in these practices. This is the methodology of the major criminal who seeks to exploit to his advantage the barriers to cooperation that can be erected by international borders.
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> *See* Cayman Islands, *supra* note 1, at 58-59, 225-26.

173. Cayman Islands, *supra* note 1, at 87, 90, 92 (testimony of Mary Mochary) ("There is little doubt that The Bahamas will remain a significant transshipment point for narcotics for the foreseeable future. This fact only underscores the need for more efficient and effective cooperation

Politicians understand that being "tough on crime" decreases the potential for ouster.[174]

The defense lobby, on the other hand, was at a disadvantage. They could not credibly threaten activation of the majority. While they could bring politicians' attention to the risk of convicting the innocent in the absence of compulsion parity, legislators are aware that most citizens believe that those accused of crime have too many rights. In this context, constitutional protections for criminal defendants are viewed as "technicalities" that allow the factually guilty to go free.[175]

Majoritarian bias infected the political process. While it is impossible to assert that this bias was the singular causal factor resulting in the ratification of MLATs that disproportionately harm those accused of crime, it certainly was a significant contributing factor. Unearthing the majoritarian bias that permeated the Senate has implications for institutional choice. Majoritarian bias thrives in a majoritarian system, making it difficult for the political process to correct the policy results it produces as a consequence of the malfunction.[176] Whether the Senate is competent to protect compulsion parity depends upon the defense lobby's ability to counteract the powerful influence of the executive lobby's credible threat to activate the majority against Senators who do not vote to give

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in joint law enforcement endeavors;" "[T]he treaty with the Cayman Islands will facilitate U.S. efforts to obtain bank records and other evidence of money laundering and trafficking in illicit narcotics;" "[T]he treaty should help shore up U.S. efforts to stem the flow of illegal narcotics from Southeast Asia to the rest of the world."); *Id.* at 94 (statement of Mark M. Richard presenting the views of the Department of Justice) ("The negotiation and implementation of effective mutual legal assistance treaties and executive agreements is a very important aspect of our effort to investigate and prosecute serious crime. As this Committee knows all too well, we have in recent years seen the internationalization of serious crimes such as narcotics trafficking, money laundering, terrorism, and large scale fraud. As a result, it has become increasingly common that significant evidence in major criminal cases will be found abroad. Obtaining such evidence, particularly in a form that will be admissible in our courts, has not been an easy matter. The purpose of our MLATs is to provide a reliable and efficient means of obtaining this evidence."); *Id.* at 217 (letter to committee from J. Edward Fox, Assistant Secretary, Legislative Affairs) ("Secretary of State Shultz asked me to convey to you the importance which he attaches to Senate approval of all six treaties during the current session. The treaties are very important to U.S. law enforcement interests, especially in obtaining convictions against international narcotics traffickers, terrorists, and other international criminals").

174. *See, e.g.*, William J. Stuntz, The *Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 509 ("Voters demand harsh treatment of criminals; politicians respond with tougher sentences...and more criminal prohibitions. This dynamic has been particularly powerful the past two decades, as both major parties have participated in a kind of bidding war to see who can appropriate the label 'tough on crime.'").

175. *See, e.g.*, Charles J. Ogletree, Jr., *Comment:* Arizona v. Fulminante*: The Harm of Applying Harmless Error to Coerced Confessions,* 105 HARV. L. REV. 152, 170-171 (1991) (referencing the public's view that too many guilty defendants go free based upon "technicalities."); Guido Calabresi, *Law and Truth: Debate: Exclusionary Rules: The Exclusionary Rule*, 26 HARV. J.L. & PUB. POL'Y 111, 111 (2003) (conservatives view the fourth amendment's exclusionary rule as a "technicality" that frees guilty criminal defendants).

176. *A Job for Judges, supra* note 40, at 705.

advice and consent to MLATs. This may prove difficult when politicians believe that being "soft on crime" will hurt their chances of re-election.[177].

C. *The Executive*

The executive branch also plays a role in protecting compulsion parity because it is responsible for negotiating MLATs. This institution occupies a unique position in our adversarial criminal justice system. On the one hand, it must be concerned with effectively prosecuting the guilty. On the other, its agents, the prosecutors, must act as "ministers of justice"[178] to ensure that defendants receive a fair trial.[179] Bias can exist in this institution when the

177. Politicians are loath to be characterized as "soft on crime." *See, e.g.*, Jill Young Miller, *Hanging Tough; She's Survived Polio, Poverty and Two Bouts of Bone Cancer. Georgia Supreme Court Justice Carol Hunstein Is Used to Fighting. She Says She'll Never Be the Same after a Bruising Battle for Re-election*, The Atlanta Journal-Constitution, Dec. 17, 2006, at 1D; Jennifer Steinhauer, *Bulging, Troubled Prisons Push California Officials to Seek a New Approach*, N.Y. TIMES, Dec. 11, 2006, at A18. A change in attitude may occur if the defense lobby can demonstrate that a factually innocent person was wrongfully convicted as a result of the absence of compulsion parity. See generally JIM DWYER ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION & OTHER DISPATCHES FROM THE WRONGLY CONVICTED (1st ed. 2000) for a discussion of how wrongful convictions can affect legislative reform and public opinion.

178. MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (1995) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."); *See also* ABA STANDARDS FOR CRIMINAL JUSTICE, THE PROSECUTION FUNCTION, Standard 3-1.3, cmt. (3d ed. 1993) (the prosecutor must "strive not for 'courtroom victories'...but for results that best serve the overall interests of justice."); MODEL CODE OF PROF'L RESPONSIBILITY EC 7-13 (1981) (The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict."); Lisa Kurcias, *Prosecutor's Duty to Disclose Exculpatory Evidence*, 69 FORDHAM L. REV. 1205, 1209 (2000) ("The prosecutor has this duty to seek justice because she is a representative, not of a single individual, but of the government and society as a whole."); Richard Rosen, *Disciplinary Sanctions Against Prosecutors for* Brady *Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 695 (1987) ("The prosecutor's role as an advocate is tempered by an obligation of fairness, a duty to ensure that each trial results in an accurate determination of guilt and punishment."); Jennifer Blair, *The Regulation of Federal Prosecutorial Misconduct by State Bar Associations: 28 U.S.C. 530B and the Reality of Inaction*, 49 U.C.L.A. L. REV. 625, 629 (2001) ("federal prosecutors have shouldered the heightened obligation to always 'seek justice,' and not to merely be an advocate for a client.").

179. *See, e.g.*, Thompson v. Calderon, 120 F.3d 1045, 1058 (9th Cir. 1997) (The prosecutor, as the agent of the people and the State, has the unique duty to ensure fundamentally fair trials by seeking not only to convict, but also to vindicate the truth and to administer justice.). *See also* Moore v. Illinois, 408 U.S. 786, 809-810 (1972) (Marshall, J., concurring in part and dissenting in part) ("It is the State that tries a man, and it is the State that must insure that the trial is fair."). As stated by the Supreme Court over 70 years ago:

> The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a

appropriate balance between these conflicting roles is upset. The existence of bias affects the executive's competence to protect the norm of equal access to foreign evidence. Scrutinizing the role this institution played in negotiating MLATs uncovers the extent of any bias that existed. The two subparts below analyze the negotiation history of the first MLAT, and the executive's role in creating the current compulsion disparity.

1. Negotiating the Swiss MLAT

The evolution of MLATs is primarily a chronicle of the executive branch's efforts to facilitate foreign evidence-gathering and ensure its provision in a form admissible in American courts.[180] The United States negotiated its first MLAT with Switzerland.[181] Examination of the negotiation process reveals its delicate nature and the seemingly insurmountable hurdles executive officials overcame. While each MLAT negotiation involves different considerations dependent upon existing political relations with the country and the differing law enforcement priorities of each,[182] valuable lessons were learned during the Swiss negotiations that facilitated the negotiation of subsequent treaties.[183]

The Swiss MLAT was the first negotiated between a civil law and a common law country.[184] Officials from the State, Justice and Treasury Departments as well as the Securities and Exchange Commission were given negotiating responsibility.[185] The United States sought an MLAT with Switzerland primarily because it had the toughest bank secrecy laws.[186] These laws had stymied the efforts of prosecutors and law enforcement agencies to obtain information from Swiss financial institutions.[187] As a result, organized crime, including the Mafia, successfully hid assets in Switzerland.[188]

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wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States, 295 U.S. 78, 88 (1935). *See generally* Bruce Green, *Why Should Prosecutors Seek Justice*? 26 FORDHAM URB. L.J. 607, 634 (1999).

180. NADELMANN, *supra* note 10, at 327.

181. *Id.* at 323.

182. *Id.* at 345-375 (discussing the different incentives for negotiating treaties with other countries).

183. *Id.* at 345.

184. *Id.* at 326. Switzerland was already a signatory to a multilateral MLAT, the European Convention on Mutual Assistance in Criminal Matters, European Treaty Series No. 30, and several bi-lateral criminal assistance treaties with European countries. *See* Lionel Frei, *Overcoming Bank Secrecy: Assistance in Tax Matters in Switzerland on Behalf of Foreign Criminal Authorities*, 9 N.Y.L. SCH. J. INT'L & COMP. L. 107 (1988).

185. *Id.* at 324.

186. *Id.* at 324-25 (explaining other reasons for negotiating the treaty with Switzerland first.) *See also*, Lionel Frei, *Overcoming Bank Secrecy: Assistance in Tax Matters in Switzerland on Behalf of Foreign Criminal Authorities*, 9 N.Y.L. SCH. J. INT'L & COMP. L. 107, 112-22 (1988) (discussing how foreign nations can obtain information despite Swiss bank secrecy laws).

187. *Id.* at 324-25.

188. *Id.* at 324-26.

Negotiations were politically sensitive and took over nine years to complete.[189] The Swiss press periodically criticized the negotiations, fanning fears that treaty requests would be relatively one-sided, with most coming from the United States.[190] Additionally, Swiss business leaders feared potential investors would invest elsewhere if MLATs allowed the United States to pierce bank secrecy laws.[191] Eventually, the negotiators held meetings with Swiss business and banking leaders and obtained their support for the treaty.[192] The treaty was signed in 1973[193] and ratified by the U.S. Senate and the Swiss in 1976.[194]

The negotiation of the Swiss treaty illuminates the challenges and compromises involved in creating a mechanism for regularizing foreign evidence gathering. Even after the treaty was signed, the transition was rocky. For example, the United States angered the Swiss by continuing to utilize unilateral measures, such as court orders,[195] to compel Swiss banks located in the United States to provide evidence in violation of Swiss bank secrecy laws.[196] The countries negotiated and signed two Memorandums of Understanding to resolve the tensions,[197] and agreed every effort would be made to utilize the MLAT before resorting to unilateral measures. By the end of the 1980s, most of the kinks were resolved.[198]

The executive learned valuable lessons from the Swiss negotiations and from using the treaty which helped it to anticipate problems and avoid pitfalls in future negotiations.[199] First, the executive learned to negotiate treaties more

189. Treaty negotiations began in 1967 and ended when the treaty was ratified in 1976. NADELMANN, *supra* note 10, at 326, 334. For further discussion of the negotiating history of the U.S. and Swiss MLAT, *see* Lionel Frei and Stefan Treschel, *Origins and Applications of the United States-Switzerland Treaty on Mutual Assistance in Criminal Matters*, 31 HARV. INT'L L.J. 77 (1990).

190. NADELMANN, *supra* note 10, at 327

191. *Id.*

192. *Id.*

193. *Id.* at 333.

194. *See* Swiss MLAT, *supra* note 93.

195. For example, the United States resorted to unilateral measures during discovery in the largest tax evasion case in U.S. history. NADELMANN, *supra* note 10, at 338. Prosecutors obtained a subpoena duces tecum from a federal court which they served on the U.S. based subsidiary of a Swiss company. When the Swiss company failed to comply, the court issued a fine of $50,000 per day. *See In re* Grand Jury Subpoena Directed to Mark Rich & Co., A.G., 707 F.2d 663 (2d Cir.1983); *In re* Grand Jury Subpoena Duces Tecum, 731 F.2d 1032 (2d Cir. 1984); *In re* Marc Rich & Co., A.G., 736 F.2d 864 (2d Cir. 1984); 739 F.2d 834 (2d Cir. 1984). The case eventually settled.

196. NADELMANN, *supra* note 10, at 335.

197. *See id.* at 336-39.

198. *Id.* at 339. A similar agreement was included in the MLAT with the Cayman Islands. *Id.* at 361. The U.S. agreed not to serve subpoenas duces tecum on U.S. branches of foreign banks as a way of circumventing bank secrecy laws. *See* Art. 17 of Cayman MLAT, NADELMANN, *supra* note 10, at 361, 363-65.

199. NADELMANN, *supra* note 10, at 341, 343. In 1979, the State Department created the Office of Law Enforcement and Intelligence (LEI). *Id.* at 342. The LEI and OIA began negotiating MLATs

quickly, avoiding the laborious nine year process experienced with the Swiss.[200] Second, it learned that having at least one foreign representative with experience in criminal prosecutions could help streamline negotiations.[201] That person could explain the country's criminal processes and also build relationships with executive officials in order to facilitate requests later made under the treaty.[202] Third, the language of the treaties was simplified in order to broaden the types of evidence available, reduce the likelihood that courts from either country would impede legal assistance, and avoid future disagreements.[203]

2. *Creation of the Compulsion Disparity*

The Swiss treaty is silent regarding defense access to its compulsory process provisions.[204] There is no evidence defense access was discussed or even considered. This changed in future MLATs, the reason for which is unclear. Perhaps the experience of prosecutors litigating a major fraud case utilizing the Swiss MLAT accounts for the change. In January of 1980, Italian financier Michele Sindona was charged with 69 counts, including fraud and perjury, in connection with the collapse of the Franklin National Bank.[205] Prior to trial, Sindona requested evidence pursuant to the MLAT with the Swiss. This was the first time a defendant sought foreign evidence under the MLAT. The prosecution refused to utilize the treaty on Sindona's behalf. However, because the treaty was silent regarding a defendant's ability to use it to obtain evidence, the federal district court ordered the Department of Justice to request the evidence or the case would be dismissed with prejudice. [206]

Prior to the Sindona prosecution, the possibility that defendants could take advantage of MLATs may not have occurred to executive officials. Whether or not the Sindona prosecution had any bearing on the change, it is certainly interesting that after Sindona's trial in early 1980, every subsequent MLAT, save one, included language restricting its use to the government.[207] There is no

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together. *Id.* at 342. This partnership worked well, with the LEI bringing expertise in the politics of judicial assistance and treaty negotiations and the OIA bringing expertise in prosecuting crime and in making and responding to MLAT requests. *Id.*

200. *See id.* at 334, 343.

201. *Id.* at 343.

202. *Id.*

203. *Id.* at 346.

204. *See, e.g.*, 27 U.S.T. 2019, Articles 9, 10, 25.

205. United States v. Sindona, 636 F.2d 792 (2d Cir. 1980). For background on the prosecution of Michele "The Shark" Sindona, see James I.K. Knapp, *Mutual Legal Assistance Treaties as a Way to Pierce Bank Secrecy*, 20 CASE W. RES. J. INT'L L., 405, 415 (1988).

206. *See* ABBELL AND RISTAU, *supra* note 9, §12-4-8, at 174 n.7; Alan Ellis and Robert L. Pisani, *The United States Treaties on Mutual Assistance in Criminal Matters*, *in* INTERNATIONAL CRIMINAL LAW: PROCEDURAL AND ENFORCEMENT MECHANISMS 2d edition 403, 440 (M. Cherif Bassiouni ed., 1999).

207. The treaty with the Netherlands is the exception. *See* Treaty on Mutual Assistance in

need to speculate about the purpose for adding the restrictive language. A State Department official stated, "MLATs were intended to be law enforcement tools, and were never intended to provide benefits to the defense bar."[208] The executive gives numerous explanations for creating the disparity: it has the job of proving guilt beyond a reasonable doubt;[209] granting access to defendants would deter other nations from negotiating MLATs;[210] and defendants do not need compulsory process because they have greater access to foreign evidence.[211] The executive has even denied that MLATs create compulsory process.[212]

Criminal Matters, U.S.-Neth., June 12, 1981, T.I.A.S. No. 10,734. It does not contain the restrictive language although it was signed after the Sindona trial. The Italian MLAT provides that the treaty is intended "solely" for mutual assistance between the government or law enforcement authorities of the contracting parties. Treaty on Mutual Legal Assistance in Criminal Matters, Together with a Related Memorandum of Understanding, U.S.–Italy, art. 1, Nov. 9, 1982, S. Treaty Doc. 98-25. The Thailand and Bahamian treaties provide that they are not intended or designed to provide assistance to private parties. Treaty with Thailand on Mutual Assistance in Criminal Matters, U.S.-Thail., art. 1Mar. 19, 1986, S. Treaty Doc. No. 101-18; Treaty with The Bahamas on Mutual Assistance in Criminal Matters, U.S.–Bah., art. 1, Aug. 19, 1987, S. Treaty Doc. No. 100-17. The Canadian, Caymanian, and Mexican MLATs provide that they do "not give rise to a right on the part of a private party to obtain . . . any evidence." *See* Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Can., art. 2, Mar. 18, 1985, S. Treaty Doc. No. 100-14 [hereinafter Canadian MLAT]; Cayman Islands, *supra* note 1; Mutual Legal Assistance Cooperation Treaty, U.S.-Mex., Dec. 9, 1987, S. Treaty Doc. No. 100-13.

208. Austria, *supra* note 88 at 10 (testimony before the Senate Foreign Relations Committee during the ratification process). The State Department's website discussing MLATs provides that defendants must generally utilize the letters rogatory process. *See* www.travel.state.gov/law/info/judicial/judicial_690.html. *See also* Cayman Islands, *supra* note 1, at 176 (Testimony of White, former director of the Office of International Affairs, Criminal Division, Department of Justice.) ("It was the conception in the very beginning that these kinds of law enforcement tools would be limited to the parties, the governments, the law enforcement authorities of each.").

209. *See* Austria, *supra* note 87, at 10 (The government "has the job of assembling evidence to prove guilt beyond a reasonable doubt, so it must have the tools to do so. The defense does not have the same job, and therefore does not need the same tools.") This statement reflects a deep misunderstanding of the role of prosecutors in our adversarial system of criminal justice. This misunderstanding is not surprising. As advocates, prosecutors are not immune from the pressure and desire to win. In fact, the many prosecution offices foster a "win-loss scorekeeping mentality." For a comprehensive discussion of this mentality and culture, see Catherine Ferguson-Gilbert, *It is Not Whether You Win or Lose, It is How You Play the Game: Is the Win-Loss Score-Keeping Mentality Doing Justice for Prosecutors*, 38 CAL. W. L. REV. 283 (2001) and Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355 (discussing institutional pressures on prosecutors to win at all costs).

210. The government has never asserted that any treaty partner required the exclusion as a condition to signing the treaty. In fact, an executive official admits that "there was no discussion of how our treaty partners would react to receiving MLAT requests by or on behalf of criminal defendants" among the negotiators. Cayman Islands, *supra* note 1, at 274.

211. *See* Austria, *supra* note 87, at 10-11. ("[T]he defendant frequently has far greater access to evidence abroad than does the Government, since it is the defendant who chose to utilize foreign institutions in the first place.").

212. "[T]here is nothing that the defense is being denied" because none of the MLATs provide the government with transnational compulsory process. *See* Austria, *supra* note 87, at 10-11. This

The creation of a compulsion disparity demonstrates the existence of executive bias in favor of the executive's role as law enforcer rather than minister of justice. The reason the executive does not protect a defendant's right to compulsory process appears obvious. After all, allowing defendants access to the treaty to obtain evidence would make successful prosecution of transnational offenders more difficult. It is easy, then, to dismiss consideration of the executive as an institution that could protect parity.

Further analysis, however, renders this ready dismissal inappropriate. Executive officials did take pains to ensure that MLATs protected some defense interests. The treaties provide protections for the privilege against self-incrimination.[213] They also protect defendants' sixth amendment right to confrontation by providing that the defendant (or his counsel) be present in foreign judicial proceedings to take evidence.[214] Executive officials safeguarded these defense interests even in the face of questions from foreign governments about why these rights needed accommodation and amid complaints about the inconveniences these rights would cause in foreign judicial proceedings.[215] Certainly, protecting these interests does not make prosecution easier. Additionally, in at least one instance, the executive has requested defense

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statement contradicts testimony of other executive branch officials before the Senate. For example, a Deputy Assistant Attorney General stated that:

> [MLATs] provide, from our perspective, a much more effective means of obtaining evidence. . . . [An] MLAT obligates each country to provide evidence and other forms of assistance needed in criminal cases . . . .[I]n an MLAT, we have the opportunity to include procedures that will permit us to obtain evidence in a form that will be admissible in our courts....[O]ur MLATs are structured to streamline and make more effective the process of obtaining evidence

Id. at 2-3 (*citing Worldwide Review of Status of U.S. Extradition Treaties and Mutual Legal Assistance Treaties: Hearings Before the Senate Committee on Foreign Affairs Committee on Foreign Affairs*, 100th Cong., 1st Sess., at 36-37 (1987) (statement of Mark M. Richard, Deputy Assistant Attorney General, Criminal Division)) This same official testified in hearings that "[i]t has been increasingly common that significant evidence in major criminal cases will be found abroad. Obtaining such evidence, particularly in a form that will be admissible in our courts, has not been an easy matter. The purpose of our MLAT's is to provide a reliable and efficient means of obtaining this evidence." Cayman Islands, *supra* note 1, at 61 (statement of Mark M. Richard). The express provisions of MLATs create compulsory process for the government. For example, the U.S.-Mexico MLAT not only compels a witness to appear for a deposition, but also compels that the witness bring any requested documents:

> A person in the requested State whose testimony is requested shall be compelled by subpoena, if necessary, by the competent authority of the requested Party to appear and testify or produce documents, records, and objects in the requested State to the same extent as in criminal investigations or proceedings in that State.

Treaty on Cooperation Between the United States of America and the United Mexican States for Mutual Legal Assistance, U.S.-Mex., Art. 7, 27 I.L.M. 443, 449 (emphasis added). Similar language exists in other MLATs.

213. *See* 27 U.S.T. 2019, Article 13; NADELMANN, *supra* note 10, at 332.

214. *See* 27 U.S.T. 2019, Article 12; NADELMANN, *supra* note 10, at 332-33.

215. NADELMANN, *supra* note 10, at 355.

evidence under an MLAT despite the existence of the exclusionary language.[216]

The executive's protection of these interests is significant for two reasons. First, it demonstrates the executive's willingness and ability to protect defendants' constitutional rights in certain circumstances. Second, it shows that foreign nations are amenable to persuasion from the executive to include provisions in MLATs that are alien to their legal systems and procedures. Thus, the executive institution cannot easily be dismissed as an option for achieving the goal of parity, for it is best situated to convince foreign nations of the importance of parity and, at times, it protects defense interests.

The executive's competence to protect parity norms depends upon whether, in most instances, the bias tips in favor of their role as ministers of justice or as advocates seeking to effectively prosecute transnational offenders. The question is whether the executive can be relied upon to strike the appropriate balance in every case. Experience in analogous contexts demonstrates the answer is likely no.[217] While the executive may decide to protect parity by utilizing an MLAT

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216. In *United States v. Des Marteau*, 162 F.R.D. 364 (M.D. Fla. 1995), once the court granted the defendant's motion to depose a foreign national located in Canada, the prosecution agreed to utilize the Canadian MLAT to facilitate it. *Id.* at 372 n.5 ("The United States, after communicating with its office of International Affairs, informed the Court it is appropriate to utilize the treaty (with Canada) in this manner.") The prosecutor utilized the Canadian MLAT despite language which provides that it "shall not give rise to a right on the part of a private party to obtain . . . any evidence . . . ." *See* Canadian MLAT, *supra* note 209, at art. 2.

217. For example, prosecutors could not be relied upon to disclose material exculpatory evidence to defendants of their own volition, *see, e.g.*, Brady v. Maryland, 373 U.S. 83 (1963), or to disclose witness perjury, *see, e.g.*, Mooney v. Holohan, 294 U.S. 103 (1972).

In the past, the executive has expressed the view that it might seek evidence on behalf of defendants if there was a court order. According to an executive official: "Nothing in the proposed treaties would preclude the Department of Justice from making MLAT requests on behalf of prosecutors who wish to pursue claims raised by the defense . . . .[I]t would not be accurate to describe this process as 'making a request on behalf of a criminal defendant." Cayman Islands, *supra* note 1, at 273 (emphasis in original). However, their position seems to be hardening. In its most recent statements on the issue, the Department of Justice has taken the position that it need not comply with a court order to request information on behalf of the defense using an existing MLAT. *See* 3 MICHAEL ABBELL & BRUNO A. RISTAU, INTERNATIONAL JUDICIAL ASSISTANCE, CRIMINAL, OBTAINING EVIDENCE, at 27 & n.12 (Supp. 1997) ("The Department of Justice, however, has continued to maintain that the restrictive language in the more recent mutual assistance treaties in criminal matters gives it veto power over whether the United States will make a court-ordered treaty request on behalf of a defendant."). In testimony before the Senate Foreign Relations Committee in 1992, the Deputy Legal Adviser for the Department of State, Mr. Alan Kreczko, testified that "the court . . . lack[s] the power or authority to compel the Government to make a request for the benefit of the defense over the objection of the prosecution." STAFF OF S. COMM. ON FOREIGN RELATIONS, 102ND CONG., CONSULAR CONVENTIONS, EXTRADITION TREATIES, AND TREATIES RELATING TO MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS 6, 40-41 (Comm. Print 19921992). If the prosecutor did not believe that the request was appropriate, and opposed the use of the MLAT for the request, Mr. Kreczko testified that it was unlikely that the Department of Justice would make the request. *Id.* In such cases, he stated, the Court would have to pursue the letters rogatory approach. *Id.* He also testified that if the prosecutor felt the request was inappropriate, it could be ignored. *See id.*

Empirical analysis is necessary to determine whether or not the prosecution is actually requesting evidence on behalf of defendants under the treaties. Arguably, the prosecution's role as a Minister of Justice would require them to seek material and relevant evidence on a defendant's behalf.

for the benefit of defendants, it is risky to rely upon the executive's good graces to do so.[218] Officials from the Department of Justice already express the view that even if a court orders them to request defense evidence under the treaty, they will refuse the order if they deem it to be inappropriate.[219] Before completely dismissing the executive, however, its competence to resolve the disparity in access to process must be compared to that of the political process and the courts. An examination of the competence of the courts to protect parity follows.

D. The Courts

Criminal process questions are likely to be resolved by the courts because in most instances, the questions arise in the context of a pending criminal adjudication. Whether the court should provide a right and what the strength of that right should be are questions of institutional choice. While this Article seeks to answer these questions in the context of the compulsion disparity created by MLATs, similar questions arise when seeking to resolve most criminal process questions.

The character of the right to compulsion parity defined by courts will reflect a choice amongst the relevant institutions.[220] The three Subparts below

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218. Relying upon the good graces of the executive to protect compulsion parity is risky because they are advocates, after all. In hotly contested cases, for example, it is more likely that the prosecution will determine that the defense request is without merit. Prosecutors, just like defense lawyers, are not immune from the pressures of trial and the desire to win that comes long with it. Prosecutors have been known to hide physical evidence and bury statements inconsistent with their theory of guilt. *See* Catherine Ferguson-Gilbert, *It is Not Whether You Win or Lose, It is How You Play the Game: Is the Win-Loss Score-Keeping Mentality Doing Justice for Prosecutors*, 38 CAL. W. L. REV. 283, 297-99 (2001). She describes a situation where the prosecution failed to disclose a statement from an eyewitness (the victim's brother) saying that the killers were white while the prosecution was prosecuting a black man for the crime. If some prosecutors will go this far in their zeal to win, there can be no question that some prosecutors will decide not to use the MLAT on behalf of a defendant in order to place themselves at an advantage during the trial. It is in hotly contested cases, when the defense's ability to rebut the prosecution's case with its own evidence could make the difference between conviction and acquittal, that the prosecution will most likely refuse to utilize the MLAT voluntarily on behalf of the defense.

219. While the government may decide to use the MLAT for the benefit of defendants, nothing currently compels them to do so. An official from the Department of Justice expressed a similar view:

> There may be cases in which a court determines that because of the exceptional circumstances of the case, the interests of justice require that it order the prosecutor to make an MLAT request. In such a circumstance, the government would evaluate such a prospective order, reserving its rights to oppose issuance or appeal issuance, and if it lost such an appeal, to weigh the consequences of non-compliance. These consequences could include dismissal of the case against the defendant, or suffering such sanctions as the court might see fit to impose, including a prohibition on the government's use of certain evidence in the case in question.
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> Cayman Islands, *supra* note 1, at 273.

220. *See supra* notes 23-41 and accompanying text.

respectively examine the considerations for deciding whether courts should define no rights, moderate rights or strong rights to compulsion parity in transnational criminal cases. The strength of the right reflects an institutional choice, and thus, a conception of the relative competence of the available decision-makers.[221]

1. No Rights to Compulsion Parity

The courts can determine that no Sixth Amendment right to compulsion parity exists in the transnational context. This judicial inaction would leave MLATs in place and represent a decision that the political process and the executive are the appropriate forums for change. Before the decision to provide no remedy or judicial review is made, the form and degree of bias in the political and executive institutions must be examined and compared.[222] Otherwise this judicial response can exacerbate existing biases or produce counter-intuitive results.

When considering the relative merits of the political process and the executive, there are two factors to weigh. The first is the majoritarian bias that permeates the political process.[223] The second is the executive bias in favor of its law enforcer role.[224] The court should produce no rights or remedies only if the executive or political institutions, even in the face of their existing biases, are comparably better suited than the courts to achieve the goal of equitable process.

A determination of no rights would seem to exacerbate, rather than alleviate existing biases in the executive and political institutions. It is easy, then, to assume that these institutions should not be relied upon to protect parity. But comparative institutional analysis rejects such a simplistic approach. The existence of a malfunction in other institutions does not, in and of itself, create a sufficient basis for the allocation of institutional responsibility to the courts. As explored in Subpart two, the courts may perform no better because of limited physical resources and personnel and lack of competence to decide the issue at hand.[225]

2. Moderate Rights to Compulsion Parity

Rather than declaring no rights to compulsion parity, courts could define moderate compulsory process rights for transnational defendants by creating a flexible doctrinal standard. This approach indicates a determination by the

221. LAW'S LIMITS, *supra* note 12, at 71.

222. *Id.*

223. *See supra* notes 158-178 and accompanying text.

224. *See supra* notes 216-223 and accompanying text.

225. IMPERFECT ALTERNATIVES, *supra* note 13, at 138-149.

courts that they are the institution best suited to protect the norm of parity in evidence-gathering. A moderate right requires courts to substitute their decision-making for that of other institutions.[226] Rather than leaving it to the executive to decide if it will respond to a defense request for evidence, or letting the Senate decide whether or not to ratify an MLAT, the court decides when and under what circumstances compulsion parity is warranted.

A standard requires courts to determine, on a case by case basis, whether a defendant's rights to compulsion parity are violated. This increases the strain on courts' limited physical and personnel resources. Therefore, before deciding to substitute their decisions for those of other institutions by defining a moderate right, courts must decide whether the balance of competence and scale favors that substitution.[227] Competence refers to the judges' ability to investigate, understand, and make substantive decisions.[228] It is determined, for the most part, by training and experience.[229] The strain on the court's limited resources is reduced when its competence in an issue is high.[230]

Federal judges have special competence in criminal procedure issues as a result of experience. The federal criminal docket constitutes a significant portion of the cases federal courts adjudicate each year. Judges frequently interpret the constitutional provisions governing a defendant's rights and a prosecutor's obligations in such cases. Despite the strain on the court's limited resources, balancing the issues in order to determine how to protect compulsion parity in transnational criminal cases is well within the competence of the courts.

However, transnational cases in general and MLATs in particular raise potential foreign policy issues, a traditional area of doubt about the courts' competence.[231] Conducting foreign affairs usually requires secrecy, flexibility and the ability to respond quickly to changed circumstances.[232] Courts do not have independent access to foreign intelligence and thus may not understand the far-reaching implications of their decisions. Judges must consider the possibility that their rulings on issues involving foreign affairs unwittingly expose sensitive information and reduce the executive's flexibility to respond.[233]

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226. *See id.* at 150.

227. *Id.* Scale refers to "the resources and budget available to the judiciary and the constraints on the expansion and size of the adjudicative process." *Id.* at 138.

228. *Id.* at 138-39.

229. *Id.*

230. *Id.* at 138-150.

231. Neil K. Komesar, *Taking Institutions Seriously: Introduction to a Strategy for Constitutional Analysis,* 51 U. CHI. L. REV. 366, 380-394 (1984) [hereinafter *Taking Institutions Seriously].* The executive has speculated that including a provision that allowed defense access to the treaty might prevent some nations from entering into MLATs. Austria, *supra* note 87, at 10.

232. Taking Institutions Seriously, *supra* note 233, at 381.

233. *Id.* at 382. The Supreme Court is reluctant to adjudicate issues that it views as implicating foreign policy or foreign relations. *See, e.g.,* United States v. Balsys, 524 U.S. 666, 697 (1998) ("Because foreign relations are specifically committed by the Constitution to the political branches, U.S. Const., art. II, § 2, cl. 2, we would not make a discretionary judgment premised on inducing

A flexible balancing approach may best serve the goal of achieving compulsion parity while reducing foreign policy concerns. How would such a standard work? In cases where defendants require foreign evidence, the court would first determine whether the requested evidence is relevant and material. This requirement of materiality is consistent with current doctrinal approaches in domestic criminal cases. If the requested evidence is material, the court could then order the prosecution to request the evidence under the existing MLAT or risk dismissal.[234]

This is a viable option. The treaties require that requests for evidence come from the government and not a private party. However, they are silent regarding the ability of the government to request evidence *on behalf of* a defendant. One executive official expressed the view that if a request was made by the government on behalf of a defendant, "the United States would expect the foreign government to treat the request like any other MLAT request made by the United States."[235] This flexible case by case approach requires courts to do more, but avoids invalidating MLATs, thereby avoiding serious foreign policy concerns.

3. *Strong Rights to Compulsion Parity*

An alternative approach for the courts is to find a strong Sixth Amendment right to compulsion parity in transnational criminal cases. The strongest Sixth Amendment right would require courts to substitute their decisions for political process and executive determinations. By creating a clear doctrinal rule that compulsion parity is a constitutional requirement in transnational cases and MLATs are unconstitutional because of the disparity they create, the courts reject Senate and executive determinations that the disparity is appropriate.

The advantage of a clear rule is that it requires minimal judicial activity. If MLATs are unconstitutional because of the disparity they create, the decision of how to remedy the disparity falls to other institutions. In the meantime, in the absence of MLATs, defendants and prosecutors would be forced to rely upon the evidence-gathering market to obtain foreign evidence. By finding a strong right to compulsory process, the courts choose the market as the institution to protect parity, at least until new MLATs are negotiated. Though the pre-MLAT

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them to adopt policies in relation to other nations without squarely confronting the propriety of grounding judicial action on such a premise").

234. There is precedent for this. In *United States v. Des Marteau*, 162 F.R.D. 364 (M.D. Fla. 1995), once the court granted the defendants motion to depose a foreign national located in Canada, the prosecution agreed to utilize the MLAT with Canada to facilitate it. *Id.* at 372 n.5 ("The United States, after communicating with its office of International Affairs, informed the Court it is appropriate to utilize the treaty [with Canada] in this manner.") Similarly, in *United States v. Sindona*, 636 F.2d 792 (2d Cir. 1980), the court required prosecutors to obtain defense evidence utilizing the existing MLAT. *See* 3 MICHAEL ABBELL & BRUNO A. RISTAU, INTERNATIONAL JUDICIAL ASSISTANCE - CRIMINAL 27 & n.12. (Supp. 1997).

235. Cayman Islands, *supra* note 1, at 274.

market was far from perfect, it represents a viable institutional choice for attaining equal access to foreign evidence between prosecutors and defendants.

Creation of a strong right might motivate the executive to protect parity explicitly in the treaties. Rather than relying upon the inefficient evidence-gathering market, the executive can decide to negotiate parity-protecting language into future treaties, as well as save existing treaties by negotiating memorandums of understanding that explicitly require prosecutors to request foreign evidence on behalf of defendants. The new treaties and the memorandums of understanding for existing MLATs could contain a materiality requirement in order to allay a foreign nation's concern that it will be inundated with frivolous or baseless requests for defense evidence.

Negotiation of memorandums of understanding can likely be done with minimal delay as a result of the special relationships developed between the nations during the process of negotiating MLATs.[236] Attorneys for the OIA already schedule annual or biannual meetings with foreign Central Authorities to discuss issues and problems.[237] If the executive decides to negotiate memorandums of understanding, the issue could simply be added to the agenda. If the nation is a signatory to the International Covenant on Civil and Political Rights[238] (often described as the International Bill of Rights), it will likely sign such a memorandum since the Covenant contains explicit protection of the right to compulsion parity.[239]

Similarly, a court-declared right provides the defense lobby with a

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236. "[T]he ratification of an MLAT reflects the fact that the two countries consider each other important and that their mutual legal assistance relationship is something that they are proud of" as a national asset. Harris Lecture, *supra* note 90. Harris also acknowledges that during the negotiation process, personal relationships and contacts were developed that facilitate cooperation. The Director of the OIA stated, "A related advantage [of MLATS] is that it is far easier to amend or revise a bilateral treaty than a comprehensive multilateral treaty. For instance, the U.S. is in the process now of negotiating revisions and amendments to some of our older MLATs, on such topics as video link or asset forfeiture and asset sharing. This enables states to add new ideas to the text of the bilateral MLAT with a minimum of delay, or respond quickly to changes in legislation. Obviously, it is not possible to revise multilateral crime conventions without a great deal of difficulty." *Id.*

237. Thomas Snow, *Symposium: Prosecuting White-Collar Crime: The Investigation and Prosecution of White Collar Crime: International Challenges and Legal Tools Available to Address Them*, 11 WM. & MARY BILL OF RTS. J. 209, n.68 (2002).

238. Art. 14(3)(e), *entered into force* March 23, 1976, 999 U.N.T.S. 171.

239. At least one treaty, the U.S.-Austria MLAT, specifically provides that the Austrian Central Authority will make requests from the U.S. on behalf of their defendants under the treaty. *See* Austria, *supra* note 87, at 14 (1996). In the technical analysis of this treaty, this provision was explained as follows: "The Austrian delegation indicated that under its legal system, courts are required to seek evidence to assist defense counsel as well as prosecutors. The Austrian Central Authority therefore will make such requests to the United States under the Treaty. The United States delegation stated that the United States Central Authority ordinarily does not make treaty requests on behalf of defense counsel. The negotiators agreed that the Treaty is not available for use by private counsel representing civil litigants as a means of evidence-gathering in criminal or civil matters. Private litigants in the United States may continue to obtain evidence from Austria by letters rogatory, an avenue of international assistance left undisturbed by the Treaty." *Id.*

powerful tool to counteract the majoritarian bias that previously existed in the political process. Senators need no longer fear being voted out of office when they refuse to ratify an MLAT which creates a compulsion disparity. The cover of a court ruling insulates them from threats of ouster.

Defining a strong right to compulsory process has many disadvantages, however. MLATs are important law enforcement tools in a world of transnational crime. Their creation entailed monumental efforts and hard-fought compromises to harmonize differing legal systems in order to combat the exponential rise in global crime.[240] Effective transnational prosecutions require mandatory mechanisms for obtaining evidence from foreign nations. The willingness of nations to work with the United States to create these mechanisms depends upon our willingness to enter into MLATs.[241] Declaring MLATs unconstitutional would return nations to square one, creating international friction and irritation.[242]

Even if nations feel inclined to renegotiate, their own domestic politics may make renegotiation difficult. The court's decision invalidating MLATs compromises the executive's authority and legitimacy to negotiate new treaties. How would the executive officials convince foreign nations that these renegotiated treaties would not be declared unconstitutional? Moreover, if new treaties cannot be negotiated, the United States may once again resort to the unilateral actions that so angered foreign nations in the past.[243] A strong right thus raises serious foreign policy concerns.

VI.
CONCLUSION

Comparative institutional analysis must inform any decision of how to obtain a desired goal or policy, because there is rarely one easily identified first and best institution. The framework teaches that the choice is amongst imperfect and flawed alternatives, each burdened with its own benefits and drawbacks. Explicit institutional comparison teases out existing institutional biases and helps to avoid unanticipated results or unintended consequences. Without comparative analysis, a role may be defined for the court that exacerbates an

240. *See supra* notes 182-208 and accompanying text.

241. "[W]e need to receive confirmation from the Senate that the Senate believes that the conclusion of MLAT's is in the best interest of the United States. We cannot sensibly continue in this direction if the Senate believes otherwise. We cannot reasonably expect foreign governments to adopt meaningful cooperative agreements with us if we are unable to ratify the MLAT's that we have urged them to conclude. Senate advice and consent to ratification of the six pending MLAT's also would show foreign governments that their efforts to cooperate with the United States in law enforcement matters have not been in vain." Cayman Islands, *supra* note 1, at 221 (testimony of Mary Mochary).

242. Of course, the executive could mitigate the foreign policy damage caused by this approach by allowing foreign nations to continue to request evidence from the United States.

243. *See supra* notes 118, 121-124 and accompanying text.

existing malfunction in another institution or produces a counter-intuitive result. No matter what the criminal process question is, explicit institutional consideration and comparison forces contemplation of nuanced questions and avoids simplistic answers and knee-jerk institutional choices.

Applying the comparative framework to the question of how to achieve compulsion equity in transnational criminal cases demonstrates its usefulness. At first blush, it may appear that a strong right to compulsion parity in transnational criminal cases would best protect the twin goals of accuracy and fairness in criminal adjudications. However, comparative institutional analysis reveals a potentially counter-intuitive negative result from this seemingly attractive option.

Strong compulsory process rights could undermine accuracy norms. Under a strong rights approach, if the executive is unable to renegotiate the existing MLATs to explicitly protect parity, the parties are left to rely upon the evidence-gathering market that existed prior to MLATs.[244] This market does not provide the parties with reliable access to material and relevant evidence from foreign nations. Surprisingly, a strong right makes prosecution of the guilty more difficult and increases the risk that a factually innocent person will be wrongfully convicted. Accordingly, a strong right is not the best option.

A moderate right to compulsion parity provides the best solution to remedying the compulsion disparity in transnational evidence-gathering. The potential problem with a moderate rights approach is uncertainty about whether a foreign nation will comply with a government request on behalf of defendants. However, nothing in the treaties' language prevents this type of request, and the U.S. government has expressed the view that foreign nations will honor it.[245] A moderate right would leave MLATs intact, thereby avoiding serious foreign policy concerns. Under this approach, the courts would determine, on a case by case basis, whether to order the prosecution to request defense evidence. Although a moderate right requires courts to use more resources in making case by case materiality determinations, these decisions are already made by courts in most criminal cases. The increased burden upon the courts will thus be negligible. With MLATs in place, both parties will be able to present foreign evidence to the trier of fact. Comparative institutional analysis demonstrates that a moderate right provides the best safeguard for protecting the innocent and convicting the guilty in transnational criminal cases.

244. *See supra* notes 243-250 and accompanying text.

245. *See supra* note 241.

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The Judge Who Knew Too Much: Issue Conflicts in International Adjudication

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I.
INTRODUCTION

Professor Thomas M. Franck once asked whether "any man, or any group of men, [can] administer justice impartially in an ideologically and culturally divided world."[1] His question may have been rhetorical, but it highlights the intractability of the problem of impartiality in international adjudication. Cases and commentary have elucidated various features of this problem, but one aspect of adjudicator impartiality, issue conflicts,[2] warrants greater discussion. Essentially, an issue conflict refers to actual bias, or an appearance of bias, arising from an adjudicator's relationship with the subject matter of, as opposed to the parties to, the dispute. It seems both intuitive and indispensable that an international adjudicator "should come to the case with an open mind, ready to be convinced by the arguments of the parties, and should not already have formed and expressed a view on the questions arising in the case."[3] In practice, however, determining when an adjudicator should be disqualified from adjudicating an international dispute because of "a prior commitment to one of the contending

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1. Thomas M. Franck, *Some Psychological Factors in International Third-Party Decision-Making*, 19 STAN. L. REV. 1217, 1217 (1967).

2. The label "issue conflict" in this Article focuses on adjudicators. A distinct problem that has also been described as an issue or positional conflict occurs when an attorney advocates contradictory outcomes of an issue for different clients in different disputes. For a discussion of that type of issue conflict, see, for example, John S. Dzienkowski, *Positional Conflicts of Interest*, 71 TEX. L. REV. 457 (1993).

3. NAGENDRA SINGH, THE ROLE AND RECORD OF THE INTERNATIONAL COURT OF JUSTICE 190 (1989).

views of the grievances . . . in the case"[4] has proved difficult.

Addressing issue conflicts is valuable because of the prevalence of repeat players—whether states, private entities, or adjudicators—in international adjudication. More than ever, parties in international disputes are considering third-party adjudication as a means of settlement.[5] Not only are multinational companies increasingly involved in several arbitrations, but it is now common that sovereign states, their agencies, and entities find themselves entangled in multiple international proceedings: public disputes related to their foreign policies, private disputes arising out of their commercial contracts, and "mixed" disputes brought under their investment treaties. Similarly, some adjudicators, skilled in public and private international law, frequently serve on international courts and tribunals. In public disputes, the political stakes convince most states to select the leading experts as permanent and *ad hoc* adjudicators. Likewise, although private arbitration is touted for the freedom to select arbitrators familiar with both the applicable law and the relevant industry, parties repeatedly appoint the same arbitrators because of their preference for well-known or charismatic individuals who can sway other members of the tribunal. In all of these disputes, institutions favor established professionals whose decisions are more likely to be accepted. However, the consequence of parties' increased use of international adjudication under the auspices of a small number of expert adjudicators is an increase in the frequency with which issue conflicts arise.

The regulation of issue conflicts has often focused only on actual bias. An adjudicator's publicly declared opinion that prejudges the merits of a disputed issue is clear evidence of partiality, often resulting in voluntary recusal or withdrawal, whereas her general experience is not.[6] This stance seems reasonable: on the one hand, experience in international public or private law is a threshold qualification for international adjudicators (whether they are selected by an international institution or the parties), but on the other hand, the fundamental unfairness is obvious when a party is faced with an adjudicator who has closed her mind on important issues in dispute.

Yet, absent voluntary recusal, actual bias provides little guidance for an adjudicator's activities that lie between these two extremes. An adjudicator's past or current professional, academic, or even personal experiences may raise legitimate doubts about her ability to decide impartially controverted facts and contested legal propositions or justly apply the law to the particular dispute. Past and present academic articles, expert testimony, internal memoranda, interviews, diplomatic experiences, or advocacy on an issue related to the dispute may create a conflict of interest. Such activities may not evidence actual bias, but they

4. Edward Gordon et al., *The Independence and Impartiality of International Judges*, 83 AM. SOC'Y. INT'L L. PROC. 508, 509 (1989).

5. Thomas Buergenthal, *The Proliferation of Disputes, Dispute Settlement Procedures and Respect for the Rule of Law*, 22(4) ARB. INT'L 495, 495-99 (2006).

6. *See infra* Part II.

can raise concerns about the propriety of the adjudicator's resolution of the international dispute.

Thus, just as the regulation of conflicts arising from national[7] and party[8] interests has expanded from an inquiry into actual bias to consider the appearance of bias,[9] regulation of the appearance of bias arising from issue conflicts is becoming increasingly considered in international adjudication. The appearance of bias has recently led to the disqualification of international adjudicators. Indeed, the resulting appearance of bias has led to calls for a prohibition against individuals simultaneously representing a party and serving as an adjudicator in different arbitrations under investment treaties.[10] The guiding principle seems to be that "the appearance of fairness is as important as fairness itself,"[11] because the appearance of fairness promotes and sustains public confidence in the legitimacy of international adjudication.[12] Legitimizing international adjudicators increases trust in the rule of law, persuading governments and private disputants to rely upon international courts and tribunals.[13] Moreover, such confidence allows international adjudicators to ensure individual rights and encourage economic and political stability—the purposes that international law is designed to protect.[14]

Academic commentary has recognized the problem of issue conflicts in international adjudication[15] but has not provided an in-depth treatment of its con-

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7. The regulation of national interests has moved beyond the actual bias of demonstrated jingoism to consider the appearance of bias where an adjudicator seems to favor—or disfavor—states with similar wealth levels, political systems, cultures, or languages. *See* ICJ Statute, *infra* note 24, arts. 2-3, 31; ITLOS Statute, *infra* note 23, arts. 2-3, 17, 36; ICTY Statute, *infra* note 50, art. 12. *See also* Omar E. Garcia-Bolivar, *Comparing Arbitrator Standards of Conduct in International Commercial Trade Investment Disputes*, 60 DISP. RESOL. J, Nov. 2005–Jan. 2006, at 76 (2006). Available empirical data supports some of these "appearance of bias" concerns. *See* Eric A. Posner & Miguel F. P. de Figueiredo, *Is the International Court of Justice Biased?*, 34 J. LEGAL STUD. 599, 624 (2004) (concluding that ICJ "Judges vote for their home states about 90 percent of the time").

8. The impartiality concerns arising from party interests have extended past evidenced amity to consider an adjudicator's financial, professional, and personal interests in the outcome of the dispute, including indirect interests of a close friend or family member or an interest in a party's or counsel's affiliate. For an illustrative list of potential party interests, see International Bar Association Guidelines on Conflicts of Interest in International Arbitration (2004), *available at* http://www.ibanet.org/images/downloads/guidelines%20text.pdf [hereinafter IBA Guidelines].

9. In the seminal American case on arbitrator impartiality, the Supreme Court held that an arbitrator must not only "be unbiased but also must avoid even the appearance of bias." Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145, 150 (1968).

10. *See infra* Part V.D.

11. Leslie W. Abramson, *Appearance of Impropriety: Deciding When a Judge's Impartiality "Might Reasonably be Questioned"*, 14 GEO. J. LEGAL ETHICS 55, 66 (2000).

12. THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 7, 25-26 (1995).

13. Shimon Shetreet, *Standards of Conduct of International Judges: Outside Activities*, 2 LAW & PRAC. INT'L CTS. & TRIBUNALS 127, 161 (2003).

14. Theodor Meron, *Judicial Independence and Impartiality in International Criminal Tribunals*, 99 AM. J. INT'L L. 359, 359 (2005).

15. Issue conflicts are not unique to international adjudication, but their occurrence is more

tours or its proper resolution. In a panel discussion over 20 years ago, Professor Edward Gordon acknowledged the problem of an adjudicator's prior advocacy or viewpoint but contended that such concerns presented little systemic risk to the fifteen-member International Court of Justice.[16] More recently, Judge Theodor Meron noted that "[a]t some point in their judicial career, [judges] will be called upon to rule on issues they [have] considered as practicing lawyers or civil servants, or written about as academics" and broadly remarked that such an appearance of bias should be reviewed under an objective standard.[17] Similarly, Judith Levine reviewed examples of issue conflicts in international investment and commercial arbitration and concluded that "some clarification would . . . be welcome."[18] With less discussion, others have also noted the problem of issue conflicts.[19] Indeed, although noting the importance of appearances, the recently enunciated Burgh House Principles on the Independence of the International Judiciary provide little guidance, stating only that international adjudicators "shall not serve in a case with the subject matter of which they have had any other form of association that may affect or reasonably appear to affect their independence or impartiality."[20]

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likely in international adjudication than in domestic adjudication because of the absence of career judges, the use of *ad hoc* adjudicators, and requirements for specialized expertise. For brief remarks of the problem in the United States, see Abramson, *supra* note 11, at 76-79 (recommending more effective regulation of "judge's remarks about the parties or a litigation issue" in the United States); Tobin A. Sparling, *Keeping Up Appearances: the Constitutionality of the Model Code of Judicial Conduct's Prohibition of Extrajudicial Speech Creating the Appearance of Bias,* 19 GEO. J. LEGAL ETHICS 441, 484 (2006) (reviewing the due process and First Amendment influences on regulating judges' extrajudicial speech in the United States). For a discussion of the appearance of bias and issue conflicts in England in the wake of *R. v. Bow Street Stipendiary Magistrate and Others ex parte Pinochet Ugarte* (No.2) [1999] 2 WLR 272, see Kate Malleson, *Judicial Bias and Disqualification after* Pinochet (No.2), 63 MOD. L. REV. 119, 127 (2000) (observing that the "expression of strong views about something connected to the case" has been a successful basis for appeal).

16. *See* Gordon, *supra* note 4, at 509-10.

17. *See* Meron, *supra* note 14, at 365-67.

18. Judith Levine, *Dealing with Arbitrator "Issue Conflicts" in International Arbitration*, 61 DISP. RESOL. J, Feb.-Apr. 2006 60, 65 (2006).

19. *See, e.g.,* Ruth Mackensie & Phillipe Sands, *International Courts and Tribunals and the Independence of the International Judge*, 44 HARV. INT'L L.J. 271, 280-81 (2003) (noting the impartiality problem arising out of "prior involvement . . . with an issue" in international public adjudication but merely indicating that "[i]n some cases the need for recusal will be clear, but in others it will be less so"); CRAIG, PARK & PAULSON, INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION 231 (2000) (indicating that disqualification may be appropriate for an international commercial arbitrator "who had publicly taken extreme and detailed views on political or economic issues central to the arbitration" but that "[t]he expression of academic views . . . does not necessarily preclude him from deciding a case in a completely impartial manner"). *See also* ALAN REDFERN ET AL., LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 238-39 (4th ed. 2004) (indicating that impartiality includes "actual or apparent bias of an arbitrator—either in favour of one of the parties or in relation to the issues in dispute"); Luke Eric Peterson, *Analysis: Arbitrator Challenges Raising Tough Questions as to Who Resolves BIT Cases*, INVEST-SD: INVESTMENT L. & POL'Y WEEKLY NEWS BULL., Jan. 17, 2007, *available at* http://www.iisd.org/pdf/2007/itn_jan17_ 2007.pdf (noting that there are no clear guidelines for issue conflicts).

20. The Burgh House Principles on the Independence of the International Judiciary, 9.2

Accordingly, this Article analyzes issue conflicts in international adjudication, focusing on the application of current and potential impartiality standards.[21] Part II summarizes how issue conflicts have been addressed in the major international adjudicatory bodies and systems of international adjudication. Part III asserts that the fundamental variables of issue conflicts are proximity, depth and timing. Part IV discusses structural features of international courts and tribunals that have confused, or may confuse, the analysis of issue conflicts in international adjudication. Part V assesses potential obstacles to, and avenues for, the establishment of impartiality standards that effectively regulate issue conflicts in the main international courts and tribunals. This Article concludes that both actual bias and the appearance of bias created by issue conflicts can and should be regulated to enhance the legitimacy and efficacy of international adjudication.

II.
IMPARTIALITY STANDARDS AND ISSUE CONFLICTS IN INTERNATIONAL ADJUDICATION

Allegations of issue conflicts have arisen in disputes before most of the major international adjudicatory bodies and systems of international adjudication.[22] The grounds cited for these issue conflicts are analytically similar, but the content and application of standards of impartiality have varied. This section delineates the applicable standards of impartiality in the most prominent international dispute resolution systems and reviews how these systems have handled issue conflicts.

A variety of sources provide standards of impartiality for international adjudicators. First, the agreement that created the adjudicatory forum, founded in treaty or contract, usually addresses impartiality. Second, institutional norms, established in guidelines or rules of conduct, may also include standards. Third, sometimes rules and practice of domestic law and courts, by persuasive reasoning or judicial intervention, provide direction. These standards address imparti-

(2005), *available at* http:// www.ucl.ac.uk/laws/cict/docs/burgh_final_21204.pdf. The principles were designed primarily for international judges but "should also be applied as appropriate to judges *ad hoc*, judges *ad litem*, . . . part-time judges, to international arbitral proceedings and to other exercises of international judicial power." *Id.* at recitals.

21. This Article focuses on the existence and application of impartiality standards because without standards the effective regulation of issue conflicts cannot occur. Nevertheless, disclosure, another aspect of regulating impartiality, is also important. A party cannot challenge an adjudicator for actual bias or an appearance of bias absent access to information from which an issue conflict arises. Thus, disclosure standards entail determining what information the adjudicator must disclose, the effects of failure to disclose, and what information parties are required individually to investigate or else be deemed to have waived any objection. Disclosure for issue conflicts is worthy of discussion beyond the limits of this Article.

22. For an overview description of the different international courts and tribunals, see MANUAL ON INTERNATIONAL COURTS AND TRIBUNALS (Phillippe Sands et al. eds. 1999).

ality generally, disqualification or removal, and, occasionally, outside activities.

A. The International Court of Justice

The International Court of Justice ("ICJ" or "World Court") has entertained allegations of issue conflicts in cases before it, but its impartiality standards do not explicitly address them.[23] Nevertheless, issue conflicts are partially regulated: ICJ standards tend to prevent actual bias, the appearance of bias from extrajudicial activities, and the appearance of bias that may result from an adjudicator's prior experience as an advocate before the ICJ.

1. The ICJ's Impartiality Standards

Adjudicator impartiality at the World Court is governed primarily by Article 17(2) of the Statute of the International Court of Justice ("ICJ Statute").[24] This article prohibits the participation of a Court member in "any case in which he has previously taken part as agent, counsel, or advocate for one of the parties, or as a member of a national or international court, or of a commission of enquiry, or in any other capacity." Although actual bias in a publicly expressed opinion regarding the preferred outcome of a specific case might be construed as advocacy for one of the parties, Article 17(2) does not address the appearance of bias. As detailed below, the ICJ "does not go so far as to disqualify a judge who has publicly taken a position on an issue that comes up in the case."[25]

Three other provisions of the ICJ Statute provide impartiality standards. Article 2 requires "independent judges." Article 24 permits a judge to recuse herself and also allows the President of the Court to remove a judge from a case if "some special reason" exists. However, the ICJ Statue does not define "independent judges" or "some special reason" and neither article has been invoked to disqualify a judge at the ICJ. Although there are many instances of voluntary recusal by members of the Court,[26] there is no "known instance of an issue of this kind being initiated by the President and being settled formally by the Court itself."[27] The occurrence of issue conflicts is limited by Article 16(1) of the ICJ

23. I note that although the relatively new International Tribunal for the Law of the Sea has not been confronted with issue conflicts in any of its cases, it is reasonable to infer that ITLOS would look to the ICJ cases in reviewing issue conflicts, given the textual similarities between their impartiality standards. *See* United Nations Convention on the Law of the Sea, Annex VI, arts. 7-8, Dec. 10, 1982, 1833 U.N.T.S. 397; ITLOS Rules of the Tribunal, U.N. Doc. ITLOS/8 (Apr. 7, 2005) *available at* http://www.itlos.org.

24. Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993, *available at* http://www.icj-cij.org/icjwww/ibasicdocuments.htm [hereinafter ICJ Statute].

25. Gordon, *supra* note 4, at 510.

26. For a list of voluntary recusals and situations where Court members did not recuse themselves, see SHABTAI ROSENNE & YAËL RONEN, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT 1920-2005 1062-65 (4th ed. 2006).

27. *Id.* at 1062.

Statute, which prohibits a member of the Court from exercising "any political or administrative function" and from engaging "in any other occupation of a professional nature." Issue conflicts are accordingly limited to an adjudicator's activities prior to election to the Court, her academic publications, and other public statements.

Although the ICJ Rules of the Court do not provide additional standards beyond requiring members of the Court to declare that they will serve "impartially,"[28] one of the ICJ's Practice Directions[29] reduces the risk of both actual bias and the appearance of bias. Practice Direction VII discourages individuals from serving as an *ad hoc* judge in one case and as an "agent, counsel, or advocate" in another within three years. Thus, for three years, these Directions partially ameliorate the problem of issue conflicts by avoiding the possibility of an *ad hoc* judge's decision on an issue being affected by her advocating a particular position on a similar issue in another dispute before the Court.[30]

2. ICJ Practice and Issue Conflicts

The ICJ's jurisprudence has dismissed, without thorough analysis, the problem of appearance of bias presented by issue conflicts by developing three rules. First, the ICJ has held that Article 17(2) does not exclude judges whose prior diplomatic activities as government representatives may provide an appearance of bias in the form of an issue conflict.[31] Historically, the Court's Orders have not contained reasons for dismissing these lack-of-impartiality claims.[32] However, in the 1971 Advisory Opinion regarding the *Continued Presence of South Africa in Namibia*, the Court explained its Orders and indi-

28. ICJ Rules of Court, art. 4, (1978, amended 2005), *available at* http://www.icj-cij.org/icjwww/ibasicdocuments.htm.

29. ICJ Practice Directions, (2001, amended 2002), *available at* http://www.icj-cij.org/icjwww/ibasicdocuments.htm.

30. It appears that the primary purpose of this Direction and Direction VIII is to prevent counsel in an ongoing dispute from influencing the judges. *See* ICJ Press Communiqué 2002/12 (April 4, 2002). Although the influence may only be slight, counsel that can "attend meetings and deliberations with the rest of the bench and deal with judges on an equal footing" will naturally have an advantage in the dispute she advocates, if only personal. *See* Pieter H. F. Bekker, *Letter to the Co-Editors in Chief*, 90 AM. J. INT'L LAW 645, 645-46 (1996). Moreover, these Directions do not allow the situation where counsel who also serves as an *ad hoc* judge could obtain an unfair advantage in litigation strategy "given that legal and factual . . . issues that are relevant to one pending case, including the one in which the judge *ad hoc* appears as counsel, may be referred to in another [case]." *Id.* Presumably, the length of the time period is to ensure a change in the composition of the Court because one-third of the Members are replaced every three years. *See* ICJ Statute, *supra* note 24, art. 13.

31. *See* South West Africa Cases (Eth. v. S. Afr.; Liber. v. S. Afr.), 1965 I.C.J. 3-4 (Order of Mar. 18), Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), notwithstanding Security Council Resolution 286 (1970), 1971 I.C.J. 2-10 (Orders 1-3 of Jan. 26), Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. 3 (Order of Jan. 30).

32. SINGH, *supra* note 3, at 191.

cated that in both that case and in the 1965 *South West Africa Cases* "the participation of [each] Member concerned in his former capacity as representative of his Government . . . did not attract the application of Article 17, paragraph 2, of the Statute of the Court."[33] The ICJ reiterated this rule in the Advisory Opinion about the *Construction of a Wall in the Occupied Palestinian Territory*. Israel claimed that Article 17(2) prohibited Judge Elaraby from sitting as a judge because "he [had] previously played an active, official and public role as an advocate for a cause that is in contention in this case."[34] Rejecting Israel's assertion, the ICJ's Order noted that Judge Elaraby's experience in the 1970s and 1980s as a legal adviser to the Egyptian Government, including his work at the Egyptian Ministry of Foreign Affairs and his involvement in both the Camp David Middle East Peace Conference of 1978 and the Israel-Egypt Peace Treaty in 1979,[35] "were performed in his capacity of a diplomatic representative of his country . . . many years before the question of the construction of the wall in the occupied Palestinian territory, now submitted for advisory opinion, arose." The Court concluded that Judge Elaraby could not be considered as having "previously taken part" in the case.[36]

Second, the ICJ has concluded that a judge's prior activities as a representative at the United Nations also do not violate Article 17(2). In the 1971 Advisory Opinion regarding the *Continued Presence of South Africa in Namibia*, the ICJ reasoned that a judge's activities "in United Nations organs of the Members concerned, prior to their election to the Court . . . do not furnish grounds for treating these objections differently from" objections to a judge's prior diplomacy on behalf of her country.[37] Furthermore, the ICJ noted that "participation of the Member concerned in the work of the United Nations" is permissible, and that account must also be taken in this respect of precedents established by the present Court and the Permanent Court wherein judges sat in certain cases even though they had taken part in the formulation of texts the Court was asked to interpret."[38] In its 2004 Order preceding the Advisory Opinion in the *Construction of a Wall in the Occupied Palestinian Territory*, the ICJ reinforced the holding

33. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), notwithstanding Security Council Resolution 286 (1970), Advisory Opinion, 1971 I.C.J. 16, 18 (June 21).

34. Construction of a Wall in the Occupied Palestinian Territory, *supra* note 31, at 4.

35. *Id.*

36. *Id.* at 5.

37. Continued Presence of South Africa in Namibia, Advisory Opinion, *supra* note 33. Judge Gros and Judge Fitzmaurice dissented on this point, considering "active participation on the part of a Member, before his election, in a question laid before the Court" a sufficient basis for disqualification under Article 17. Judge Morozov had participated in drafting a related Security Council resolution and had given "several speeches . . . on the substantive problem now decided by the Court." *Id.* at 316-17, 323-24 (Fitzmaurice, J. and Gros, J. dissenting).

38. In his dissenting opinion, Judge Gros contended that these precedents where "judges [had] contributed to the drafting of international treaties" were distinguishable because the disputes arose many years after their participation. *Id.* at 324 (Gros, J., dissenting).

of the 1971 Advisory Opinion, concluding that Judge Elaraby's involvement in the General Assembly "did not attract the application of Article 17, paragraph 2."[39] However, the Court obfuscated its interpretation somewhat by noting that, although Israel's construction of the wall had been discussed in the General Assembly, the question for the Court "was not an issue in the Tenth Emergency Special Session of the General Assembly until after Judge Elaraby had ceased to participate in that Session as representative of Egypt."[40] The implication is that Judge Elaraby may have been disqualified if he had participated in the General Assembly Session at the time the question was introduced. Given the ICJ's lenient view of representation, it nevertheless appears that any prior diplomatic activities at the United Nations by a judge are permissible under Article 17(2).

Finally, in considering a violation of Article 17(2), the ICJ has demanded a high degree of similarity between a disputed issue and any positions of a judge taken in her personal capacity. In the *Construction of a Wall in the Occupied Palestinian Territory*, Israel complained about Judge Elaraby's 2001 interview with an Egyptian newspaper "two months before his election to the Court, when he was no longer an official of his government and hence spoke in his personal capacity."[41] The newspaper quoted Mr. Elaraby's comments that "Israel is occupying Palestinian territory, and the occupation itself is against international law" and that Israel's territorial claims were fabricated to create "confusion and gain[] time."[42] The question before the ICJ was "[w]hat are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem . . . considering the rules and principles of international law . . . ?"[43] The majority of the Court stated that Judge Elaraby's comments "expressed no opinion on the question put in the present case."[44] Judge Buergenthal's lone dissent balked at this conclusion, asserting that although a "formalistic and narrow" construction of Article 17(2) had not been violated, legitimate concerns existed because "this question cannot be examined by the Court without taking account of the context of the Israeli/Palestinian conflict" and because the outcome would depend upon "the validity and credibility of [the parties'] arguments."[45] Against this backdrop, he reasoned that Judge Elaraby's remarks created an unacceptable "appearance of bias"[46] and that the Court had "implicit" power to ensure the "fair and impartial administration of justice."[47]

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39. Construction of a Wall in the Occupied Palestinian Territory, *supra* note 31, at 5.
40. *Id.*
41. *Id.* at 8 (Buergenthal, J., dissenting).
42. *Id.*
43. G.A. Res. A/RES/ES-10/14, U.N. Doc. A/ES-10/L.16 (Dec. 12, 2003).
44. Construction of a Wall in the Occupied Palestinian Territory, *supra* note 31, at 5.
45. *Id.* at 8-10 (Buergenthal, J., dissenting).
46. *Id.*
47. *Id.*

B. International Criminal Tribunals

An issue conflict allegation has arisen before the International Criminal Tribunal for the former Yugoslavia ("ICTY") and the Special Court for Sierra Leone subsequently invoked the ICTY's ensuing jurisprudence regarding the appearance of bias as persuasive.[48] Considering the similarity of impartiality provisions amongst the international criminal tribunals and courts, the International Criminal Tribunal for Rwanda and the International Criminal Court will also most likely follow the ICTY's jurisprudence concerning issue conflicts.[49]

1. The ICTY's Impartiality Standards

The basic impartiality standard for ICTY judges is found in Article 13(1) of the ICTY Statute, which requires judges to be "persons of high moral character, impartiality and integrity."[50] Another provision, Rule 15(A) of the Rules of Procedure and Evidence, requires a declaration to serve "impartially" and disqualifies a judge from sitting "on a trial or appeal in any case in which the Judge has or has had any association which might affect his or her impartiality."[51] The ICTY Appeals Chamber has interpreted these two standards as follows: first, a "judge is not impartial if it is shown that actual bias exists"; and second, "[t]here is an unacceptable appearance of bias if: i) a Judge is a party to the case, or has a financial or proprietary interest in the outcome of a case, or if the Judge's decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties . . . or ii) the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias."[52] The application of these standards to issue conflicts is discussed below but the occurrence of issue conflicts at the ICTY is limited by Article 13bis(3) of the ICTY Statute. This Article regulates a judge's extra-judicial activities by subjecting judges to the "terms and conditions of service . . . of the judges of the International Court of Justice,"[53] including Article 16(1) of the ICJ Statute.

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48. Prosecutor v. Issa Hassan Sesay, Case No. SCSL-2004-14-AR 15, Decision on Defence Motion Seeking the Disqualification of Justice Robertson from the Appeals Chamber (Mar. 13, 2004), *available at* http://www.sc-sl.org/ Documents/SCSL-04-15-PT-058.pdf.

49. *See* Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, annex, art. 12, Nov. 8, 1994, U.N. Doc. S/RES/944, (Nov. 8, 1994), *available at* http://69.94.11.53/ENGLISH/Resolutions/955e.htm; International Criminal Tribunal for Rwanda Rules of Procedure and Evidence, rule 15(A), (1995, amended 2006), *available at* http://69.94.11.53/ENGLISH/rules/101106/rop101106.pdf; *and* Rome Statute of the International Criminal Court, art. 40-41, July 17, 1988, arts. 40-41, 2187 U.N.T.S. 90.

50. Statute of the International Criminal Tribunal for the Former Yugoslavia, May, 25, 1993, U.N. Doc. S/RES/827, *available at* http://www.icls.de/dokumente/icty_statut.pdf [hereinafter ICTY Statute].

51. ICTY Rules of Procedure and Evidence, Sept. 22, 2006, U.N. Doc. IT/32/Rev.39, *available at* http://www.un.org/icty/legaldoc-e/index.htm.

52. Prosecutor v. Furundzija, Case No. IT-95-17/1-A, Judgment, ¶ 189 (July 21, 2000).

53. *See* ICTY Statute, *supra* note 50, art. 13 bis(3).

2. The ICTY's Determination on an Issue Conflict

The "reasonably apprehend bias" standard and the only detailed analysis of an issue conflict claim in ICTY jurisprudence is found in the *Furundzija* appeal.[54] The defendant was arrested on December 18, 1997,[55] and tried and convicted on December 10, 1998, of violating the laws of war for torture and rape in Yugoslavia.[56] Petitioning to vacate the judgment and sentence, the defendant contended that the prior involvement of Judge Florence Ndepele Mwachande Mumba[57] with the U.N. Commission on the Status of Women ("UNCSW") provided a basis for her disqualification because it created an impermissible appearance of bias. Among other things, the UNCSW addressed "the war in the former Yugoslavia and specifically the allegations of mass and systematic rape."[58] After noting that the Defendant did not allege that the judge was actually biased[59] and rejecting the contention that she had a party conflict of interest resulting from her relationship with the Prosecutor and with the three authors of an *amicus curiae* submission,[60] the ICTY turned to the issue conflict to determine whether a properly informed, reasonable observer would "reasonably apprehend bias," given the circumstances.[61]

The issue conflict allegation centered around whether Judge Mumba's participation in the adjudication created the appearance "that she had sat in judgment in a case that could advance and in fact did advance a legal and political agenda which she helped to create whilst a member of the UNCSW."[62] The defendant contended that although Judge Mumba's participation with the UNCSW had formally ended, she "continued to promote the goals and interests of the UNCSW."[63] The Prosecutor asserted that a Judge "should not be disqualified purely on the basis of their beliefs or legal expertise" and argued that prior involvement with a "United Nations body . . . cannot give rise to any reasonable apprehension that the Judge has an agenda."[64]

The Tribunal discussed a number of factors to test for the appearance of bias. First, the Tribunal mentioned timing. The Tribunal noted that Judge

54. Prosecutor v. Furundzija, *supra* note 52, ¶¶ 164-215.

55. *Id.* ¶ 2.

56. *Id.* ¶ 10.

57. Judge Mumba has served in a number of distinguished public roles in Zambia and at the United Nations. She has been a Member of the ICTY since November 17, 1997, and has served as a Judge of the Appeals Chamber since 2003. *See* U.N.org., Biographical Note on Judge Florence Ndepele Mwachande Mumba, http://www.un.org/icty/judges/mumba-e.htm (last visited Nov. 1, 2007).

58. Prosecutor v. Furundzija, *supra* note 52. ¶ 166.

59. *Id.* ¶ 192.

60. *Id.* ¶¶ 193-94.

61. *Id.* ¶ 189.

62. *Id.* ¶ 169.

63. *Id.* ¶ 170.

64. *Id.* ¶ 171.

Mumba had served as a Judge since 1997 and that her activities at the UNCSW occurred between 1992 and 1995. Thus, "[a]t no stage was she a member of the UNCSW whilst at the same time serving as a Judge with the International Tribunal."[65] Although not further discussed in detail, the implication is that concurrency would have been problematic.

Second, although less absolute than the ICJ, the Tribunal concluded that the existence of an issue conflict is less likely if the adjudicator was serving as a governmental representative. Despite the defendant's argument that Judge Mumba "acted in a personal capacity and was 'personally involved' in the cause of the UNCSW,"[66] the Tribunal reasoned that as a representative of a U.N. member state, "a member of the UNCSW is subject to the instructions and control of the government of his or her country" and therefore "he or she speaks on behalf of his or her country."[67] The Tribunal determined that although "[t]here may be circumstances which show that, in a given case, a representative personally identified with the views of his or her government," there was no evidence to suggest that Judge Mumba concurred with the views of the Zambian Government or the UNCSW.[68] Thus, the Tribunal required the defendant to provide sufficient evidence that Judge Mumba's personal views aligned with her representation.

Third, similar to the ICJ, the Tribunal looked for a substantial nexus between the viewpoint taken by the Judge and the disputed issue. The Tribunal stated that even if Judge Mumba's representation at the UNCSW did indicate her personal viewpoint, that viewpoint would not create an issue conflict because "promoting and protecting the human rights of women" was of a "general nature."[69] Thus, "[i]t follows that she could still sit on a case and impartially decide upon issues affecting women."[70]

The Tribunal struggled, however, to determine whether Judge Mumba's involvement with the UNCSW still created an appearance of bias: Did Judge Mumba apply her general viewpoint to the specifics of the *Furundzija* case? To deal with this concern, the Tribunal turned to two sources. First, the Tribunal argued that any viewpoint she may have had was encouraged by the United Nations.[71] Noting that the Security Council resolutions that led to the establishment of the Tribunal sought "to put an end to such crimes [as systematic rape and detention] and to . . . bring to justice the persons who are responsible for them," the Tribunal adopted the Prosecutor's view that "[c]oncern for the achievement of equality for women, which is one of the principles reflected in the United Na-

65. *Id.* ¶ 166.
66. *Id.* ¶ 198.
67. *Id.* ¶ 199.
68. *Id.*
69. *Id.* ¶ 200.
70. *Id.*
71. *Id.* ¶¶ 201-02.

tions Charter, cannot be taken to suggest any form of pre-judgment in any future trial for rape."[72] Thus, even if Judge Mumba had a personal position in relation to the applicable legal rule, a conflict did not exist because the viewpoint was supported by the UN and was therefore legally permissible. Not completely satisfied, the Tribunal further rationalized any appearance of bias by looking to the qualifications of Judges serving on the ICTY. Article 13(1) of the ICTY Statute states that "[i]n the overall composition of the [ICTY] due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law."[73] The Tribunal noted that Judge Mumba's experience with the UNCSW was likely one of the qualifications considered for her selection as a judge. Without further explanation, the Tribunal concluded that "[i]t would be an odd result if the operation of an eligibility requirement were to lead to an inference of bias."[74]

Finally, the Tribunal addressed the defendant's argument that Judge Mumba's past experience led her to classify rape as a war crime, a purportedly novel proposition. In addition to noting that the definition of rape was not contested at trial, the Tribunal referred to other cases and held that the classification of rape as a war crime was not new.[75] Consequently, the ICTY rejected the defendant's appeal.

3. The Special Court for Sierra Leone

The Special Court for Sierra Leone adopted the ICTY's "reasonably apprehend bias" standard to determine an issue conflict, but, in contrast to the ICTY, the Court actually disqualified the judge. With little elaboration, the Court recited Rules 15(A) and 15(B) of the Rules of Procedure and Evidence of the Special Court (provisions that were textually similar to the ICTY's impartiality standards), repeated the ICTY's interpretation of its impartiality standards and prohibited Justice Robertson from deciding *every* dispute involving a member of the Revolutionary United Front.[76] Justice Robertson had published opinions regarding this group's barbarism in a book, alleging its "pillage, rape and diamond-heisting" as well as its "more devilish tortures" of mutilation.[77] The Appeals Chamber concluded that "the reasonable man, reading those passages will have a legitimate reason to fear that Justice Robertson lacks impartiality."[78] Subsequently, the Special Court amended its Rules to more clearly cover issue conflicts. The Rules now disqualify a judge "in any case in which his impartial-

72. *Id.*
73. *See* ICTY Statute, *supra* note 50.
74. Prosecutor v. Furundzija, *supra* note 52, ¶ 205.
75. *Id.* ¶¶ 208-10.
76. Prosecutor v. Issa Hassan Sesay, *supra* note 48.
77. *Id.* ¶ 2.
78. *Id.* ¶ 15.

ity might reasonably be doubted on any substantial ground."[79]

C. The World Trade Organization Dispute Settlement Understanding

At least one panel adjudicator has been challenged for an issue conflict under the WTO Dispute Settlement Understanding ("DSU").[80] Although standards of impartiality exist, the resolution of impartiality complaints, including issue conflicts, is not transparent. There is, however, no reason why issue conflicts, including appearances, should not be regulated under the existing standards.

1. WTO Impartiality Standards

The DSU, the DSU Rules of Conduct,[81] and the Working Procedures for Appellate Review[82] address impartiality. Article 8.2 of the DSU governs all panel proceedings, including Article 21.5 compliance proceedings and Article 22.6 arbitrations, and states that "[p]anel members should be selected with a view to ensuring the independence of the members." Article 17.3 of the DSU addresses the members of the Appellate Body, declaring that they "shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest." The Rules of Conduct further require that all persons serving as a panelist, arbitrator or member of the Appellate Body[83] "shall be independent and impartial [and] shall avoid direct or indirect conflicts of interest."[84] The Rules indicate that such interests are those that are "likely to affect, or give rise to justifiable doubts as to, that person's independence or impartiality."[85] The Working Procedures of Appellate Review lists both "active interests," which includes organizations with "a declared agenda," and "statements of personal opinion on issues relevant to the dispute in question" among the information that a member of the Appellate Body "may" have to disclose to satisfy the Rules of Conduct.[86]

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79. Rules of Procedure and Evidence of the Special Court, Rules 15(A)-(B), Nov. 24, 2006, http://www.sc-sl.org/rulesofprocedureandevidence.pdf.

80. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement, Establishing the Word Trade Organization, Annex 2, Legal Instruments – Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter DSU].

81. Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes, WT/DSB/RC/1 (Dec. 11 1996), *available at* http://www.wto.org/english/tratop_e/dispu_e/rc_e.htm [hereinafter Rules of Conduct].

82. Working Procedures for Appellate Review, WT/AB/WP/5 (Jan. 4, 2005), *available at* http://www.wto.org/english /tratop_e/dispu_e/ab_e.htm [hereinafter Working Procedures for Appellate Review].

83. *Id.* (stating that the Appellate Body adopts the applicable Rules of Conduct on a provisional basis).

84. Rules of Conduct, *supra* note 81, at Rule II.

85. *Id.* at Rule III.

86. Working Procedures for Appellate Review, *supra* note 82, at Annex 2.

2. An Issue Conflict at the WTO

The only WTO adjudication addressing an issue conflict concluded that, absent agreement by the state parties, the Rules of Conduct provide the only avenue for redress for complaints against panelists. Since these Rules indicate that the Chair of the Dispute Settlement Body ("DSB") shall resolve such impartiality allegations,[87] the Panel in *Guatemala–Cement II*[88] stated that it could not adjudicate the issue conflict because "[n]either Article 8 nor any other provision of the DSU prescribes any role for the panel in the panel composition process."[89] This absence of involvement by the panelists is strange, especially considering the notion that a court or tribunal must have some power to ensure "the fair and impartial administration of justice."[90]

Nevertheless, the panel report in *Guatemala–Cement II* provides details of Guatemala's issue conflict allegation.[91] Without questioning the panelist's integrity or qualifications, Guatemala objected to the inclusion[92] in the panel of an adjudicator who had served on the *Guatemala–Cement I* panel.[93] Guatemala contended that since the second dispute would turn on the same issues examined in the first dispute, specifically "claims relating to the violation of Article 5.3 and 5.5" of the Anti-Dumping Agreement,[94] "it would be virtually impossible for [the panelist] . . . not to take account of the opinions of those who served with him and of the discussions held and the decisions taken in the previous dispute . . . ."[95] Relying on Article 8.2 of the DSU and the Rules of Conduct, Guatemala urged the Panel to declare itself without competence to adjudicate the

87. *See* Rules of Conduct, *supra* note 81, at Rule VIII (indicating that the Chair of the DSB should resolve problems via consultation with the adjudicator, except for complaints against Appellate Body members, which will be resolved by the Appellate Body).

88. Panel Report, Guatemala–Definitive Anti-Dumping Measures on grey portland Cement from Mexico, WT/DS156/R (Oct. 24, 2000) [hereinafter Guatemala–Cement II].

89. *See id.* ¶ 8.11.

90. *See supra* Part.II.A.2.

91. Guatemala–Cement II, *supra* note 88.

92. *Id.* The context of Guatemala's contention that the panelist "would have preconceived positions" was atypical. *Id.* ¶ 4.3. The Appellate Body had vacated the *Guatemala–Cement I* panel report on the ground that it had decided issues that were outside the terms of reference. *See* DSU, *supra* note 80, articles 6.2, 7.1, *and* David A. Yocis, Note, *Hardened Positions: Guatemala Cement and WTO Review of National Antidumping Determinations*, 76 N.Y.U. L. REV. 1259, 1286-89 (2001) (explaining that Mexico "had challenged Guatemala's conduct of the antidumping investigation, rather than the antidumping duties themselves"). As a result, Mexico had been required to pursue another dispute settlement complaint.

93. *See* Panel Report, *Guatemala – Anti-Dumping Investigation regarding portland Cement from Mexico*, WT/DS60/R (Nov. 25, 1998) [hereinafter *Guatemala–Cement I*].

94. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments–Results of the Uruguay Round, 33 I.L.M 1133 (1994).

95. Guatemala–Cement II, *supra* note 88, ¶ 4.3. As a third party, Honduras supported this argument. *See id.* ¶¶ 5.60, 5.70.

dispute.[96]

Mexico's response to Guatemala's allegation included three arguments. First, it demanded evidence of actual bias, namely "specific facts" rather than "appearances,"[97] and implied that panelists should be deemed impartial "irrespective of any past experience."[98] Second, Mexico contended that the DSU jurisprudence should permit this panelist to participate because panelists may serve as a DSU adjudicator more than once and occasionally adjudicate multiple disputes simultaneously.[99] Mexico suggested that the preference of Article 21.5 of the DSU for original panelists to adjudicate disputes regarding compliance measures indicates, by analogy, that it is acceptable for panelists to consider more than once issues arising out of the same circumstances.[100] Third, Mexico argued that the panel did not have the competency to declare itself incompetent, because the Rules of Conduct provided that a complaint of impartiality should be submitted to the Chair of the DSB rather than to the panel.[101]

Ultimately, the panel yielded to this third argument, a decision that allowed it to avoid discussing the issue conflict itself. The panel further indicated that it was unaware whether Guatemala had raised its complaint before the Chair of the DSB.[102] This is not surprising given the confidential nature of the Chair's proceedings under the Rules of Conduct.[103]

D. International Arbitration

As with permanent tribunals, international arbitrations have experienced allegations of issue conflicts against the arbitrators. Although domestic arbitration law and association guidelines may influence the assessment of an arbitrator's impartiality, the primary standards derive from the contract or treaty that subjects the dispute to arbitration. Such treaty and contract provisions often reference established international arbitration rules such as the 1976 Arbitration Rules of the United Nations Commission on International Trade Law ("UNCITRAL"),[104] the 1998 Arbitration Rules of the International Chamber of

96. *Id.* ¶¶ 4.7-4.8, 4.12-4.13. *See also* DSU, *supra* note 80, arts. 8, 11; Rules of Conduct, *supra* note 81, Rule III.2.

97. Guatemala–Cement II, *supra* note 88, ¶ 4.18.

98. *Id.* ¶ 4.41.

99. *Id.* ¶ 4.26.

100. *Id.* ¶¶ 4.25, 4.31. *See also* DSU, *supra* note 80, art. 21.5.

101. Guatemala–Cement II, *supra* note 88, ¶¶ 4.19, 4.28-4.29, 4.40. This position was also argued by third parties Ecuador and the European Communities. *See id.* ¶¶ 5.6, 5.26.

102. *Id.* ¶ 8.12.

103. *See* Rules of Conduct, *supra* note 81, Rule VIII (stating that information related to impartiality complaints "shall be kept confidential").

104. UNCITRAL Arbitration Rules, Apr. 28, 1976, 15 I.L.M. 701, *available at* http://www.uncitral.org/pdf/english/ texts/arbitration/arb-rules/arb-rules.pdf [hereinafter UNCITRAL Arbitration Rules].

Commerce ("ICC Arbitration"),[105] or the Rules of Procedure for Arbitration Proceedings of the International Centre for the Settlement of Investment Disputes ("ICSID").[106] These impartiality standards are readily available but decisions interpreting them are not, even though the impartiality of arbitrators is frequently challenged. Reasons behind this include voluntary withdrawal by the arbitrator without a formal appraisal of the alleged conflict, confidentiality obligations mandated by these rules, and a prevalent practice of not publishing decisions on arbitrator challenges.[107] Nevertheless, recent available decisions indicate that these impartiality standards can address both the appearance and presence of bias presented by issue conflicts.

1. Impartiality Standards in International Arbitration

The impartiality provisions in frequently-used international arbitration rules are broad enough to include issue conflicts. The UNCITRAL Arbitration Rules state that an arbitrator "may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence."[108] The ICC Arbitration Rules have evolved from an understanding that parties "may not choose anyone of whom an unbiased decision cannot be expected,"[109] to requiring independence of party-nominated arbitrators,[110] to the current standard that "[e]very arbitrator must be and remain independent of the parties involved in the arbitration."[111] The ICSID Arbitration Rules permit disqualification of an arbitrator if any fact indicates "a manifest lack of the [required] qualities,"[112] including more specifically "recognized competence in the fields of law, commerce, industry or finance" but also the capacity "to exercise independent judgment."[113]

Except for ICSID arbitrations,[114] international arbitrations are typically subject to the domestic arbitration law at the *situs* of the arbitration, including its

105. ICC Arbitration Rules 1998, http://www.iccwbo.org/court/english/arbitration/rules.asp [hereinafter ICC Arbitration Rules 1998].

106. ICSID Arbitration Rules (as amended Apr. 10, 2006), http://www.worldbank.org/icsid/basicdoc/partF.htm [hereinafter ICSID Arbitration Rules].

107. *See infra* notes 124, 155, 163.

108. *See* UNCITRAL Arbitration Rules, *supra* note 104, art. 10(1).

109. E. J. Cohn, *The Rules of Arbitration of the International Chamber of Commerce*, 14 INT'L & COMP. L. Q. 132, 144 (1965) (explaining the nomination and appointment of arbitrators under the 1955 ICC Arbitration Rules).

110. ICC Arbitration Rules, 1975 Revision, art. 2(4), 15 I.L.M. 395, at 399.

111. ICC Arbitration Rules 1998, *supra* note 105, art. 7(1).

112. *See* ICSID Arbitration Rules, *supra* note 106, rule 9. *See also* Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, art. 57, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention].

113. ICSID Convention, *supra* note 112, art. 14(1).

114. *Id.*, art. 53(1) (stating that "the award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention").

arbitrator impartiality standards. The domestic arbitration law of many states entails a standard similar to that found in the UNCITRAL Arbitration Rules because many states have adopted a version of Article 12 of the UNCITRAL Model Law on International Commercial Arbitration, which requires the existence of "circumstances . . . [that] give rise to justifiable doubts as to [the arbitrator's] impartiality or independence."[115] Thus, this standard is also broad enough to regulate issue conflicts.

An indirect source of standards is found in association guidelines. The most influential of these is the 2004 International Bar Association ("IBA") Guidelines on Conflicts of Interest in International Arbitration ("IBA Guidelines").[116] Two provisions of the IBA Guidelines touch upon issue conflicts. First, an arbitrator is required to disclose whether she has "publicly advocated a specific position regarding the case that is being arbitrated" which, depending upon the circumstances, may result in her replacement.[117] Second, the fact that an arbitrator "has previously published a general opinion (such as a law review article or public lecture) concerning an issue which also arises in the arbitration" does not require disclosure so long as "this opinion is not focused on the case that is being arbitrated."[118] Consequently, where the basis for an issue conflict allegation is an academic article or lecture, challenges are unlikely to be raised, and even less likely to succeed. Although the IBA Guidelines are frequently invoked, they have been criticized as providing "scant guidance" for issue conflicts.[119]

2. Issue Conflicts Under the Major International Arbitration Rules

i. UNCITRAL Arbitration Rules

Although not evidenced in the practice of the Iran-US Claims Tribunal, which applies the UNCITRAL Arbitration rules,[120] issue conflicts have been

115. UNCITRAL Model Law on International Commercial Arbitration, June 21, 1985, 24 I.L.M. 1302, *available at* http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/06-54671_Ebook.pdf.

116. *See* IBA Guidelines, *supra* note 8. For another set of guidelines, see the 2004 AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes, Comment to Cannon I, http://www.abanet.org/dispute/commercial_disputes.pdf (focusing on actual bias and stating that "arbitrators do not contravene this Canon if, by virtue of such experience or expertise, they have views on certain issues likely to arise in the arbitration, but an arbitrator may not have prejudged any of the specific factual or legal determinations to be addressed during the arbitration").

117. IBA Guidelines, *supra* note 8, at 3.5.2.

118. *Id.* at 4.1.1.

119. *See* Levine, *supra* note 18, at 62.

120. The United States and Iran agreed that the Tribunal would conduct its business under the UNCITRAL arbitration rules as "modified by the Parties or by the Tribunal." *See* The Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, art. 3(2), Jan. 19, 1981, 20 I.L.M. 230, 231. However, Article 10, the provision re-

raised under the UNCITRAL Arbitration Rules in at least three disputes.[121] First, in a sales contract dispute between Country X and Company Q, the appointing authority (designated by the Permanent Court of Arbitration[122]) determined that there is no indication of "potential bias" absent "a direct nexus" between the arbitrator's prior opinions and an issue within the dispute.[123] Country X, the claimant, challenged the arbitrator nominated by Company Q, a company in Country A, on the basis of both an issue conflict and a national conflict. The dispute arose out of events that took place during a period of "consistent hostility" between countries A and X,[124] during which the challenged arbitrator was "a high official of the government of Country A" and had "had some recent connection with a matter relevant to the underpinnings of the dispute in his capacity as one of the attorneys for a former government official."[125] In relation to the issue conflict, aside from noting that the arbitrator's prior legal opinions as an attorney did not necessarily reveal his "personal views," the appointing authority decided that those prior opinions were "on a peripheral but not directly related issue" about constitutional and domestic governmental law.[126] Because there was "no direct relationship to the disputed factual issues in this [present] case," the opinion did not provide an appearance of bias.[127] Moreover, the appointing authority rejected claimant's argument of an appearance of bias arising from "the totality of the circumstances."[128] The authority refused to assume that the legal opinions meant that the arbitrator, while working for Country A, was involved with issues concerning Country X.

Second, the Canfor dispute[129] relied upon the IBA Guidelines' indication that an arbitrator may be disqualified for "publicly advocat[ing] a specific posi-

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garding impartiality, was not changed. *See* Iran-United States Claims Tribunal Final Rules of Procedure, May 3, 1983, *reprinted in* 2 Iran-U.S.C.T.R. 405, 415 (1984).

121. It should be noted that only two challenges to arbitrators under the UNCITRAL Arbitration Rules have ever been reported in all of the volumes of Yearbook Commercial Arbitration. For commentary on the challenges before the Iran-US Claims Tribunal, see DAVID D. CARON ET AL., THE UNCITRAL ARBITRATION RULES, A COMMENTARY 187-193 (2006). *See also* STEWART ET AL., THE UNCITRAL ARBITRATION RULES IN PRACTICE: THE EXPERIENCE OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL 37-49 (1992).

122. *See* UNCITRAL Arbitration Rules, *supra* note 104, arts. 6-7, 12 (indicating that challenges to arbitrators shall be determined by an appointing authority and that if the appointing authority is not determined by the parties' arbitration agreement, it will be selected by the Secretary-General of the Permanent Court of Arbitration at The Hague).

123. Challenge Decision of 11 January 1995, *reprinted in* Yearbook Commercial Arbitration XXII, 227, at 240 (1997).

124. *Id.* at 237.

125. *Id.* at 229.

126. *Id.* at 240.

127. *Id.*

128. *Id.*

129. Canfor Corp. v. U.S.A. (consolidated with Tembec, Inc. v. U.S. and Terminal Forest Prods. v. U.S. by Order dated Sept. 7, 2005), *details available at* http://www.naftaclaims.com/disputes_us_ canfor.htm.

tion regarding the case that is being arbitrated."[130] In a NAFTA arbitration under the UNCITRAL Arbitration rules, the Canadian Canfor Corporation sought damages from the U.S. for measures which imposed anti-dumping and countervailing duties on softwood lumber imported from Canada. A year and a half earlier, Canfor's nominated arbitrator stated, in a public speech to a Canadian government council, that "[w]e have won every single challenge on softwood lumber, and yet [the U.S.] continue[s] to challenge us with respect to those issues, because they know the harassment is just as bad as the process."[131] Although no official decision was published, the appointing authority agreed with the United States that the arbitrator's speech dealt with the specific matter in dispute and advised the arbitrator that if he did not resign, a decision upholding the challenge would be issued.[132] The arbitrator subsequently withdrew.[133]

Third, the dispute between Telekom Malaysia Berhad and the Republic of Ghana suggests that it is impermissible for an adjudicator of an international investment arbitration to advocate simultaneously in another such dispute.[134] Ghana, the respondent, challenged the arbitrator nominated by the investor-claimant, Telekom Malaysia Berhad,[135] in an arbitration instigated under the UNCITRAL Arbitration Rules, pursuant to the Ghana-Malaysia Bilateral Investment Treaty ("BIT").[136] The basis of the challenge against the arbitrator, Professor Emmanuel Gaillard,[137] was his ongoing representation of a consortium of Italian investors who sought to annul an adverse ICSID arbitration award[138] rendered pursuant to the Italy-Morocco BIT.[139] The topical nexus between the two arbitrations that provided the basis for the issue conflict was the

130. *Id.* Barton Legum, *Investor-State Arbitrator Disqualified for Pre-Appointment Statements on Challenged Measures*, 21 ARB. INT'L 241, 245 (2005). Barton Legum served as counsel for the United States when this challenge was asserted.

131. *Id.* at 243.

132. *Id.* at 245.

133. *Id.*

134. The Republic of Ghana/Telekom Malaysia Berhad, Arrondissementsrechtbank [Rb.], District Court, The Hague, Challenge No. 13/2004, Petition No. HA/RK 2004.667 (Neth.) ¶ 1 (Oct. 18, 2004) [hereinafter Ghana/TMB 1], *available in English in* 20 MEALEY'S INT'L ARB. REP. No. 1, at 7; Document No. #05-050128-010Z.

135. *Id.*

136. Agreement Between the Republic of Ghana and the Government of Malaysia for the Promotion and Protection of Investments, http://www.unctad.org/sections/dite/iia/docs/bits/ghana_malaysia.pdf.

137. Emmanuel Gaillard is a renowned academic and practitioner of international arbitration.

138. *See* Consortium R.F.C.C. v. Kingdom of Morocco, ICSID Case No. ARB/00/06, *available in French at* http://www.worldbank.org/icsid/cases/rfcc-award.htm. An ICSID Committee refused to annul the award but its reasons were not published. *See* Damon Vis-Dunbar, *ICSID Committee Rejects Request for Annulment in R.F.C.C. v. Morocco*, INVEST-SD: INVESTMENT L. & POL'Y WEEKLY NEWS BULL., Mar. 29, 2006, *available at* http://www.iisd.org/pdf/2006/itn_ mar29_2006.pdf.

139. Agreement Between the Government of Italy and the Government of Morocco for the Promotion and Protection of Investments, art. 5(2), *available in Italian at* http://www.unctad.org/sections/dite/iia/docs/bits/italy_morocco_it.pdf.

ICSID award's interpretation of the expropriation provision in the Italy-Morocco BIT. Under a similar, though not identical, expropriation provision in the Ghana-Malaysia BIT, Ghana intended to rely on the conclusion from the ICSID award that a state's action must be taken pursuant to the *puissance publique*, or public power, for a claim of indirect expropriation to succeed.[140] Ghana argued that Professor Gaillard's commitment to annul this ICSID award provided a conflict that would undermine his ability to impartially assess and adjudicate its argument.

In contrast to the determinations of the arbitral tribunal and the appointing authority that there was no issue of partiality,[141] the District Court of The Hague, Netherlands, held that Professor Gaillard had an issue conflict. Since the parties chose The Hague as the *situs* of the arbitration,[142] Dutch courts had jurisdiction to determine the impartiality of the arbitrator pursuant to The Netherlands Arbitration Act, which includes a standard similar to the UNCITRAL Model Law.[143] Rejecting Telekom Malaysia Berhad's claim of irrelevance based on the fact that the two disputes were factually different, the District Court concluded that "there will be justified doubts about his impartiality, if Prof. Gaillard does not resign as attorney in the RFCC/Moroccan case."[144] The District Court reasoned that Professor Gaillard had the "duty to put forward all possibly conceivable objections against the [ICSID] award" and that "[t]his attitude is incompatible with the attitude Prof. Gaillard has to adopt as an arbitrator in the present case, for example, to be unbiased and open to all the merits of the RFCC/Moroccan award and to be unbiased when examining these in the present case."[145] Notably, the Court rejected Telekom Malaysia Berhad's assertion that Professor Gaillard's experience with the issue of expropriation is permitted under the IBA Guidelines approval of a "general opinion . . . concerning an issue which also arises in the arbitration."[146]

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140. *See* Ghana/TMB 1, *supra* note 134, ¶ 3. *See also* Luke Eric Peterson, *Dutch Court Finds Arbitrator in Conflict Due to Role of Counsel to Another Investor*, INVEST-SD: INVESTMENT L. & POL'Y WEEKLY NEWS BULL., Dec. 17, 2004, *available at* http://www.iisd.org/pdf/2004/investment_investsd_dec17_2004.pdf.

141. *See* Peterson, *Dutch Court Finds Arbitrator in Conflict Due to Role of Counsel to Another Investor*, *supra* note 140. It appears that the Permanent Court of Arbitration designated an appointing authority that reviewed this challenge.

142. *See* Ghana/TMB 1, *supra* note 134, ¶ 1.

143. *See* The Netherlands Arbitration Act 1986, arts. 1033 ("An arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to his impartiality or independence"); 1035(2) ("If the challenged arbitrator does not withdraw within two weeks . . . the President of the District Court shall, at the request of either party, decide on the merits of the challenge"); 1073 (indicating that arts. 1020-73 apply "if the place of arbitration is situated within the Netherlands"), *available in English in* P. SANDERS & A.J. VAN DEN BERG, THE NETHERLANDS ARBITRATION ACT 1986 (Stichting Nederlands Arbitrage Institut 1987).

144. *See* Ghana/TMB 1, *supra* note 134, ¶ 4.

145. *Id.*

146. *Id.* ¶ 3.

The Dutch Court also held that unless these roles of advocate and arbitrator are performed concurrently, an appearance of bias does not exist. Under the Court's first order, Professor Gaillard resigned as counsel in the ICSID case to continue serving as an arbitrator in the dispute between Telekom Malaysia Berhad and Ghana.[147] Ghana again challenged Professor Gaillard and, although the Court acknowledged the principle that "in international arbitrations, avoiding such appearances is an important prerequisite for the confidence in, and thereby the authority and effectiveness of, such arbitral jurisdiction,"[148] it rejected Ghana's challenge, declaring that Professor Gaillard's recent involvement in the disputed issue did not warrant his removal.[149] Explaining its rationale for temporally limiting the scope of issue conflicts, the Court stated that, "[a]fter all, it is generally known that in (international) arbitrations, lawyers frequently act as arbitrators. Therefore, it could easily happen . . . that an arbitrator has to decide on a question pertaining to which he has previously, in another case, defended a point of view."[150] The judge opined that, "[s]ave in exceptional circumstances, there is no reason to assume . . . that such an arbitrator would decide such a question less open-minded than if he had not defended such a point of view before" and therefore there is "no automatic appearance of partiality vis-à-vis the party that argues the opposite in the arbitration."[151]

ii. ICC Arbitration Rules

The ICC "independence" standard has also been interpreted to include issue conflicts but data is limited because challenges to arbitrators are not published.[152] This standard has included at least three principles in relation to issue

147. *Id.* ¶ 5.

148. The Republic of Ghana/Telekom Malaysia Berhad, Arrondissementsrechtbank [Rb.], District Court, The Hague, Challenge No. 17/2004, Petition No. HA/RK 2004.778 (Neth.) ¶ 7 (Nov. 5, 2004) [hereinafter Ghana/TMB 2], *available in English in* 20 MEALEY'S INT'L ARB. REP. No. 1, 7; Document No. #05-050128-010Z.

149. The nature of Professor Gaillard's involvement in the *Consortium R.F.C.C. v. Kingdom of Morocco* dispute prior to his resignation is unclear. Ghana objected to his continuance as an arbitrator on the basis that there was an issue conflict at an earlier date in the dispute, when the Tribunal issued various orders. *Id.* ¶ 2. A discussion regarding the amount of time that Professor Gaillard had devoted to and his responsibility for attacking the ICSID award's analysis of indirect expropriation would have been more helpful. *See infra* Part III.A.2.

150. *See* Ghana/TMB 2, *supra* note 148, ¶ 2.

151. *Id.*

152. The ICC does not publish reasons for disqualifying arbitrators. *See* ICC Arbitration Rules 1998, *supra* note 105, art. 11 (indicating that the ICC Court determines the admissibility and merits of challenges to arbitrators); Appendix, art. 6 (stating that "[t]he work of the Court is of a confidential nature"). Thus, there are no discussions of challenges to arbitrators in the following published collections of ICC awards: SIGVARD JARVIN & YVES DERAINS, COLLECTION OF ICC ARBITRAL AWARDS 1974-1985 (1990); SIGVARD JARVIN, YVES DERAINS, JEAN-JACQUES ARNALDEZ, COLLECTION OF ICC ARBITRAL AWARDS 1896-1990 (1994); JEAN-JACQUES ARNALDEZ, YVES DERAINS, DOMINIQUE HASCHER, COLLECTION OF ICC ARBITRAL AWARDS 1991-1995 (1997); JEAN-JACQUES ARNALDEZ, YVES DERAINS, DOMINIQUE HASCHER, COLLECTION OF ICC ARBITRAL

conflicts. First, a claim of issue conflict must explain why there is a conflict. For example, a party unhappy with the decision on costs in an adverse arbitral award cannot simply contend that the arbitrator appears to be biased on the basis that the arbitrator delivered a public presentation regarding arbitration costs during the time that the issue was contested before the arbitral tribunal. The ICC is likely to reject such a challenge because the party has failed to explain whether the arbitrator formed any particular view that may have influenced the issue of costs in the arbitration. The ICC Court rejected the challenge because the party failed to explain whether the arbitrator had formed any particular view that may have influenced the issue of costs in the arbitration.

Second, an arbitrator may be precluded from reviewing identical issues of fact and law that arise from similar treaty or contract provisions. Parties have successfully challenged party-appointed arbitrators who have rendered adverse rulings in earlier arbitrations involving a contract with identical terms. Similarly, arbitrators have been disqualified from adjudicating multiple disputes arising out of the same contract if the composition of the arbitral tribunal is not identical. The rationale is that "the knowledge gained by the person in question from the other arbitration may make it difficult to consider, with complete impartiality, the issues in the parallel or subsequent arbitration."[153]

Finally, an arbitrator may be disqualified on the basis of her prior involvement in the legal affairs from which the claim arises. In contrast to challenges to Members of the ICJ, arbitrators have been disqualified under the ICC Arbitration Rules because of personal experiences in drafting legal texts at issue or negotiating issues that are relevant to the dispute. For example, an arbitrator could be successfully challenged at the ICC because of her prior work as a legal advisor in a government ministry on a contract if the dispute relates to that contract. Indeed, the rationale for disqualification in such a situation need not be the arbitrator's personal affinity for the government because her involvement and familiarity with the issues underlying the dispute alone could create an unacceptable appearance of bias. The rationale was not that the arbitrator had a personal affinity for the government ministry, but that his involvement and familiarity with the issues underlying the disputed contract created an unacceptable appearance of bias.

iii. ICSID Arbitration Rules

Focusing on the ICSID requirement that arbitrators "exercise independent judgment," an issue conflicts was the ground for one recent challenge.[154] In a

AWARDS 1996-2000 (2003); *and* DOMINIQUE HASCHER, COLLECTION OF PROCEDURAL DECISIONS IN ICC ARBITRATION 1993-1996 (1997).

153. YVES DERAINS & ERIC A. SCHWARTZ, A GUIDE TO THE ICC RULES OF ARBITRATION 129 (2d ed. 2005).

154. The author characterizes Argentina's challenges to Dr. Andres Rigo Sureda as attenuated party conflicts, and not issue conflicts. *Cf.* Levine, *supra* note 18, at 63-64.

dispute about electricity distribution,[155] Argentina[156] challenged the arbitrator Mr. Fernando de Trazegnies Granda on the basis of an expert opinion that he provided to the U.S. investor, Duke Energy, in an ongoing ICSID arbitration against Peru.[157] The expert opinion was confidential, but it apparently concerned jurisdiction.[158] Before a final decision, the arbitrator withdrew from the tribunal.[159] It is unclear how many other times an issue conflict has officially arisen in ICSID arbitrations,[160] but the concern prompted a recent amendment to Rule 6,[161] requiring greater disclosure for adjudicators[162] in order to "address[] perceptions of issue conflicts among arbitrators."[163]

III.
A RUBRIC FOR ANALYZING ISSUE CONFLICTS IN INTERNATIONAL ADJUDICATION

The foregoing review of issue conflict allegations before international courts and tribunals describes issue conflicts in international adjudication. In addition to actual bias, some cases examine the appearance of bias but available analyses provide inadequate guidance for determining when an adjudicator's experience with and opinions about an issue constitute a conflict that justifies her disqualification. Taken together, the cases reviewed in Part II suggest that the impact of an adjudicator's opinion depends on three factors: the proximity, depth, and timing of the adjudicator's commitment to one potential outcome of

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155. *See* EDF International S.A., SAUR International S.A and Léon Participaciones Argentinas S.A. v. Argentina Republic, ICSID Case No. ARB/03/23, *available at* http://www.worldbank.org/icsid/cases/pending.htm.

156. Argentina has raised a number of challenges to arbitrators in proceedings organized pursuant to the ICSID Arbitration Rules. In general, Argentina's Attorney-General has objected to arbitrators simultaneously serving as advocates in other investment treaty disputes. *See* Luke Eric Peterson, *ICSID Tribunals Diverge over Independence of Arbitrator to Hear Argentine Claims*, INVEST-SD: INV. L. & POL'Y WEEKLY NEWS BULL., Mar. 24, 2005, *available at* http://www.iisd.org/pdf/2005/investment_investsd_mar24_ 2005.pdf.

157. *See* Duke Energy International Peru Investments No. 1 Ltd v. Republic of Peru, ICSIDICSID Case No. ARB/03/28, *available at* http://www.worldbank.org/icsid/cases/pending.htm.

158. *See* Luke Eric Peterson, *Argentina Persists with Challenges to Arbitration in BIT Cases*, INVEST-SD: INVESTMENT L. & POL'Y WEEKLY NEWS BULL., Jul. 19, 2006, *available at* http://www.iisd.org/pdf/2006/itn_july19 _2006.pdf.

159. *Id.*

160. As under the ICC and UNCITRAL Arbitration Rules, disqualification proceedings under the ICSID Arbitration Rules are not published "without the consent of the parties." *See* ICSID Arbitration Rules, *supra* note 106, rule 48(4); ICSID Convention, *supra* note 112, art. 48(5).

161. ICSID, Suggested Changes to the ICSID Rules and Regulations, Working Paper of the ICSID Secretariat May 12, 2005, http://www.worldbank.org/icsid/sug-changes.htm.

162. As amended and effective on April 10, 2006, Rule 6 now requires arbitrators to disclose "any other circumstance that might cause my reliability for independent judgment to be questioned by a party," a requirement comparable to Article 9 of the UNCITRAL Arbitration Rules. *See* UNCITRAL Arbitration Rules, *supra* note 104.

163. ICSID, Possible Improvements of the Framework for ICSID Arbitration, ICSID Secretariat Discussion Paper, Oct. 22, 2004, http://www.worldbank.org/icsid/improve-arb.pdf.

an issue. These factors suggest a number of propositions for properly analyzing whether an adjudicator should be disqualified for appearance of bias. These three factors also reveal that the analysis of an issue conflict should be independent of other aspects of adjudicator impartiality.

A. Proximity, Depth, and Timing

1. Proximity of the Opinion

International adjudicators frequently express their views on legal and factual issues in a variety of settings. As illustrated in Part II, an international adjudicator may have been "counsel before the same tribunal, or . . . an advisor to one of the parties before the tribunal; she may have served as a diplomat dealing with issues which subsequently come before the court; or she may have expressed views in academic writings on issues directly relevant to the case."[164] In some cases, such as the Canfor Dispute,[165] the impartiality problem is simple: an adjudicator's expressed preference for a particular resolution of the disputed issue readily permits disqualification for actual bias. In other cases, however, decision makers must determine whether the proximity of an expressed opinion to a disputed issue creates the appearance of bias.

i. Aspects of Proximity

Two aspects should be considered in determining whether a prior or concurrent opinion is proximate to a disputed issue. First, the more closely related the legal or factual opinion is to the issue at hand, the higher the risk is that the adjudicator will not neutrally review it and therefore the greater the appearance of bias. Second, the proximity of the opinion to accepted legal precepts or established factual circumstances mitigates the appearance of bias presented by a prior or concurrent opinion. At one end of the spectrum, an adjudicator's expressed views are sufficiently close to an established legal principle or historical data that they cannot provide a basis for questioning the adjudicator's impartiality. However, a stance on a particular issue may raise legitimate concerns when the view has not yet been adopted or, worse, when it has been generally rejected. The issue must be reasonably disputed before it can be relied upon to disqualify an adjudicator.

ii. Types of Viewpoints and Proximity

The types of opinions that form the basis of an issue conflict can be classi-

164. Mackensie & Sands, *supra* note 19, at 280.

165. *See supra* Part II.D.2.a.

fied as legal preferences, factual views, or combinations of the two.[166] While an adjudicator with a national or party interest in the outcome of a dispute is likely to exercise the adjudicatory functions of law declaration, fact identification, and law application in a manner favorable to the party that she prefers to vindicate, issue conflicts only give the appearance of bias in regard to one of these three functions.

International adjudicators often express their preferences about the content of a legal rule. An adjudicator may have advocated a legal proposition in general terms that affects a class of cases, including the dispute that she is to adjudicate. The possibility of such opinions affecting international disputes is real,[167] and is greater than in the domestic context. This is so because international law as defined in Article 38 of the ICJ Statute includes "the teachings of the most highly qualified publicists of the various nations"[168] and because international disputes that rely upon domestic laws often permit the choice of various "rules" of law[169] or the application of "general principles of law" or *lex mercatoria*.[170]

Preferences regarding the nature of a legal rule may provide the appearance of bias. An opinion regarding the proper interpretation of a disputed treaty or contract provision is directly proximate. The Dutch Court astutely realized that Professor Gaillard's ICSID representation would create a conflict, or at least appear to create a conflict, in the dispute between Telekom Malaysia Berhad and Ghana: both disputes focused on the same legal issue, the elements of indirect expropriation.[171] Likewise, opinions about the meaning of treaty provisions or other analogous legal principles may be sufficiently related to preclude the adjudicator's involvement with the case. In contrast, tangential opinions, such as the arbitrator's memoranda about constitutional and governmental law in the sales contract dispute between Country X and Company Q, would not be.[172]

Only legal opinions that are both proximate to a disputed issue and distant from established law provide sufficient appearance of bias to justify the dis-

166. *Cf.* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 350-52 (Foundation Press Inc. 1994) (discussing the adjudicator's roles of law declaration, historical fact identification, and law application).

167. This is particularly true if the proposition that "[j]udges have traditionally relied mainly on their own experience and common sense in shaping the propositions of law which they announce" is accurate. *See id.* at 361.

168. ICJ Statute, *supra* note 24, art. 38.

169. This most commonly occurs in international arbitration. *See, e.g.*, ICC Arbitration Rules 1998, *supra* note 105, art. 17.1 (stating that "[t]he parties shall be free to agree upon the rules of law to be applied . . . to the merits of the dispute," in the absence of which, "the Arbitral Tribunal shall apply the rules of law which it determines to be appropriate"). *See also* ICSID Arbitration Rules, *supra* note 106, Art. 42 (stating that, absent agreement, "the Tribunal shall apply the law of the Contracting State Party to the dispute . . . and such rules of international law as may be applicable").

170. For a famous discussion of *lex mercatoria*, see Lord Justice Michael Mustill, *The New Lex Mercatoria: the First Twenty-Five Years*, 4(2) ARB. INT'L. 87 (1988).

171. *See supra* Part II.D.2.a.

172. *Id.*

qualification of an adjudicator. Thus, although proximate to a disputed issue, the extent that Judge Mumba's past opinions influenced her decision to classify rape as a war crime was irrelevant, because the classification had already been established by the ICTY, and hence she followed the established law.[173] However, considering the generality and correspondingly distant proximity of the United Nations Charter principles, the ICTY's reliance on these principles to justify Judge Mumba's prior experiences and their impact on the dispute rendered the decision dubious.[174]

International adjudicators may have expressed opinions about the factual circumstances from which the dispute arises and these views may lead to an issue conflict. Absent a national or party interest, the likely scenario is where an adjudicator was involved in obtaining the relevant facts, for example, an international adjudicator may have been a journalist or a member of a peace-keeping mission. The appearance of bias may exist even where the adjudicator's factual viewpoint is not specifically at issue in the dispute, but merely reasonably related to the dispute and not yet generally accepted. This occurred when the Special Court of Sierra Leone disqualified Justice Robertson from adjudicating disputes involving members of the Revolutionary United Front.[175] His documentation of the Revolutionary United Front's atrocities, though not referring individually to any of the defendants, provided an appearance of bias.

Finally, international adjudicators may have expressed legal and factual opinions about circumstances closely related to the disputed issue. In this situation, the adjudicator has offered an opinion about how the law applies to the facts. In addition to opinions that exactly identify a legal issue in the context of the unique facts of the dispute, disqualification may be appropriate to avoid the appearance of bias stemming from an opinion about closely related circumstances. Judge Elaraby's comments concerning the legality of Israel's occupation of Palestinian territory is such an example.[176] The ICJ's 13-1 vote properly noted that Judge Elaraby's comment "expressed no opinion"[177] on the specific question of the legal consequences of Israel's construction of the wall and that therefore Article 17(2) did not apply. That conclusion, however, does not address Judge Buergenthal's point that the comment nevertheless created an appearance of bias.[178]

2. Depth of the Commitment

An adjudicator's level of commitment to an opinion that she presented in

173. *See supra* Part II.B.2.

174. *Id.*

175. Prosecutor v. Issa Hassan Sesay, *supra* note 48.

176. *See supra* Part II.A.2.

177. Construction of a Wall in the Occupied Palestinian Territory, *supra* note 31, at 5.

178. *See supra* Part II.A.2.

her former activities can be difficult to determine. To date, evaluations of issue conflicts have predominantly focused on whether or not the adjudicator "really" shares the view she presented. The aforementioned ICJ cases rejected all allegations of issue conflicts arising out of an adjudicator's prior diplomacy on behalf or her country.[179] With greater detail, the ICTY demanded evidence that Judge Mumba "personally identified with the views" of her government.[180] Similarly, the appointing authority in the dispute between Country X and Company Q noted that there was "no evidence whatsoever of the arbitrator's personal views on the matter."[181]

Such formalistic inquiries are deficient because they focus on evidence of actual bias rather than the appearance of bias. Actual bias is difficult to establish because "to attribute to lawyers and diplomats views pronounced by them in their representative capacity is to misconstrue the nature of representation, which often entails the espousal of views one does not necessarily share."[182] Moreover, absent independent evidence, there does not appear to be any "formula . . . for distinguishing personal from representative advocacy."[183]

However, just as it is assumed that representation does not accurately indicate an adjudicator's views, it is perhaps too quickly assumed that statements in an academic article definitively reveal her position. In fact, the adjudicator may not have thoroughly analyzed or sufficiently articulated such an opinion. When cross-examined about potentially contradictory views expressed in a law review article, one expert witness exclaimed, "I always think my best when I am paid!"[184]

Whether the opinions are found in journals or prior advocacy, focusing on the appearance of bias reduces the importance of inquiries into the adjudicator's role at the time. The broader inquiry is whether the adjudicator is likely to be substantially influenced by the view she presented such that she will not be open to all of the possible outcomes of the disputed issue. Although an adjudicator's individual commitment to her prior opinion is important, her personal involvement with the issue in terms of duration and responsibility also indicates the degree to which she may be influenced.

Involvement with a particular issue over an extended period of time and substantial responsibility for the formulation of policy are important because they may render an adjudicator unable to assess the issue neutrally. Even if an adjudicator's involvement with an issue does not result in prejudgment, the appearance of bias increases with duration and responsibility. Considerations of

179. *Id.*

180. Prosecutor v. Furundzija, *supra* note 52, ¶ 166.

181. Challenge Decision of 11 January 1995, *supra* note 123, at 240.

182. Gordon, *supra* note 4, at 510.

183. *Id.*

184. Discussion regarding expert witnesses at Columbia Law School, in New York, N.Y. (Fall 2005).

duration and responsibility appear to explain the ICC's removal of an arbitrator who had previously worked as a legal advisor for his government and was familiar with certain issues underlying the disputed contract.[185] These considerations also partially justify the District Court of The Hague's decision to sustain the challenge to Professor Gaillard.[186] Although Professor Gaillard may have personally disagreed with the arguments he would have advanced as an investor's advocate, his preoccupation with the deficiencies of the ICSID award led to the reasonable inference that he would be unduly influenced, and therefore unable to objectively evaluate such issues as an adjudicator.

If the adjudicator's involvement with an opinion was substantial in terms of time and responsibility, whether the adjudicator's work was representational in nature is less relevant. The inadequacy of focusing solely on whether an adjudicator's personal views comport with her advocacy may explain the ICTY's extended discussion of Judge Mumba's alleged issue conflict. Although the Appeals Chamber concluded that there was no evidence that Judge Mumba personally identified with the views of the Zambian Government or the UNCSW, it continued to defend its rejection of the appearance of bias on the basis of the Tribunal's purpose to prosecute crime and the qualifications of ICTY judges.[187] This additional analysis was warranted (although it is unpersuasive as discussed in Part IV.A), considering the fact that Judge Mumba had spent three years working with issues related to the dispute.[188]

3. Timing of the Issue Conflict

The passage of time seems to restore an adjudicator's ability to declare law, determine facts, and resolve a dispute and therefore mitigates the appearance of bias arising from an issue conflict. One reason for this is that an adjudicator may change her opinion or even forget the particulars of her position on the issue. Thus, over time, the *depth* of the adjudicator's commitment is expected to wane, and consequently, it is reasonable to conclude that the appearance of bias is reduced.

It is also possible that the nature of the applicable legal rules and factual conditions may have changed to make the adjudicator's previous opinion less relevant. Usually, the changed circumstances will indicate that the adjudicator's prior commitment does not directly address the disputed issue. Occasionally, the circumstances may change such that the adjudicator's opinion becomes the generally accepted view; that is, the feared prejudgment is rendered irrelevant because the preferred outcome is independently required. In either of these two situations, it is the *proximity* of the adjudicator's opinion about the disputed is-

185. *See supra* Part II.D.2.b.

186. *See supra* Part II.D.2.a.

187. *See supra* Part II.B.2.

188. Prosecutor v. Furundzija, *supra* note 52, ¶ 166.

sue that has been altered by time.

As a result, it is not surprising that the passage of time is invariably mentioned when an issue conflict is asserted. What is astonishing, however, is the District Court of The Hague's determination that an adjudicator's involvement with an issue is not problematic unless it is simultaneous.[189] It is unrealistic to assume, as the District Court apparently did in rejecting a challenge to the ability of Professor Gaillard to neutrally arbitrate the dispute between Telekom Malaysia Berhad and the Republic of Ghana,[190] that the appearance of bias associated with an adjudicator disappears immediately upon the cessation of her involvement with the issue.

B. Proximity, Depth, and Timing and the Appearance of Bias

It must be determined at what point an opinion becomes an issue conflict. Assessments of alleged bias too often focus on the extremes, which are the rare obvious cases. The test for the appearance of bias, however, is at heart one of probability: at some point the possibility that the adjudicator's prior opinion will affect her ability to adjudicate warrants her disqualification.[191] Absent proof of actual bias, at some point the appearance of bias is deemed unacceptable because of the likelihood of partiality. Thus, where the adjudicator's commitment is closely related to the issue in the current dispute, has demonstrated depth, and was formed in recent years, there is an appearance of bias sufficient for disqualification. Three propositions flow from this analysis of the appearance of bias from an issue conflict.

1. Proximity Analysis is Necessary

First, the most important factor in the analysis of an issue conflict is proximity. Regardless of the timing or the depth of the commitment, it is clear that unless the adjudicator's previously-expressed opinion is at least moderately proximate to an issue in dispute, neither actual bias nor the appearance of bias from an issue conflict exists. In contrast, only in obvious cases will the passage of time or the lack of depth independently render an opinion harmless without an assessment of proximity. Therefore, a proximity analysis is *always* warranted and should be the first step. Even if it is only a brief statement that the opinion is both legally and factually irrelevant, and even if reasonable minds differ regarding the nearness of an opinion to a disputed issue, analyses will provide future guidance.

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189. *See supra* Part II.D.2.a.

190. The nature of Professor Gaillard's involvement in the *Consortium R.F.C.C. v. Kingdom of Morocco* dispute prior to his resignation is unclear. I presume that Professor Gaillard had already engaged in analyzing the issue of indirect expropriation.

191. *Cf.* Abramson, *supra* note 11, at 65 (stating that American law "has always endeavored to prevent even the probability of unfairness").

2. Representation can Provide an Appearance of Bias

Second, a proper inquiry into the depth of an adjudicator's prior commitment to an issue should focus on the duration and the responsibility of the adjudicator's involvement with the issue. In addition to determining whether an adjudicator's prior involvement within the field of law relating to the disputed issue will *necessarily* impact her adjudication, such an inquiry will focus on whether that involvement will *likely* and *impermissibly* influence her adjudication. Accordingly, it is insufficient to rely solely on the lack of evidence that an adjudicator personally identified with an opinion that she previously advocated.

3. Timing and a "Concurrency Rule"

Third, as a practical matter, there may be cases where no amount of time will change the adjudicator's opinion or render that opinion irrelevant. However, on average, the seriousness of the appearance of bias, resulting from either the proximity or the depth of the adjudicator's commitment, is inversely proportional to the amount of time that has elapsed since the circumstances creating the issue conflict occurred.

The disputes described in Part II indicate the possible emergence of what I refer to as a "concurrency rule." The ICJ's Order regarding Judge Elaraby in the *Construction of a Wall in the Occupied Palestinian Territory*, the ICTY's decision in the *Furundzija* appeal, and the Dutch Court's decisions in the dispute between Telekom Malaysia Berhad and Ghana all suggest that adjudicators should be prohibited from serving simultaneously as advocates. Indeed, the ICJ Practice Directions now prohibit *ad hoc* judges from serving as advocates within the same three-year period[192] and, as will be discussed in Part V, a similar rule has been suggested for international treaty arbitration. Measured against the elements of proximity, depth, and timing, such a rule could be both over- and under-inclusive. The concurrency rule is unnecessarily over-inclusive to the degree that it precludes an adjudicator from participating in disputes regarding distant or unrelated issues. Such a rule is under-inclusive in that it inadequately accounts for the passage of time: it is irrational to assume that an issue conflict ceases the moment that an adjudicator's involvement with a prior issue ends. The concurrency rule is also under-inclusive because it fails to address current commitments to issues outside of advocacy, such as opinions expressed in articles or lectures.

C. Issue Conflicts and Other Aspects of Impartiality

Issue conflicts are often presented together with other impartiality objections to a potential adjudicator. Focusing on other bases for challenging a given adjudicator should not blind a tribunal to the three factors of proximity, depth,

192. *See supra* Part II.A.1.

and timing when analyzing an issue conflict allegation. For example, a party may allege that in addition to the adjudicator's commitment to a preferred outcome of an issue, she may have an unrelated party or national interest that will affect her ability to impartially adjudicate the dispute. In such circumstances, the dismissal of weak claims of actual bias, or the appearance of bias, resulting from national allegiance or party interests may, but should not, detract from issue conflict allegations.

Of greater interest, however, are situations where the circumstances that give rise to an issue conflict allegation simultaneously give rise to a national or party conflict. For example, in the aforementioned ICTY dispute, before challenging Judge Mumba on the basis of an issue conflict, the appellant unsuccessfully challenged her relationship with the Prosecutor and three authors of one of the *amicus curiae* briefs, noting that all of them had participated together in a meeting in furtherance of the work of the UNCSW.[193] In this scenario, the allegation should be reviewed under each head independently. Considering the unique factors relevant to the analysis of issue conflicts, the likelihood of an adjudicator being unduly influenced by a single past opinion or experience is not increased by the fact that it can be framed under an additional rubric: a weak claim of a party affiliation or national loyalty combined with a weak assertion of an issue conflict does not unite to provide an appearance of bias. This analysis was applied by the sales dispute between Country X and Company Q under the UNCITRAL Arbitration Rules.[194] Since neither the arbitrator's legal opinion nor his relationship with County A provided an adequate basis for challenging his appointment, the "totality of the circumstances"[195] could not provide a basis for his disqualification.

IV.
THE IMPACT OF CHARACTERISTICS OF INTERNATIONAL COURTS AND TRIBUNALS ON ISSUE CONFLICTS

As discussed in Part III, issue conflicts are of few dimensions; the appropriate inquiry should be limited to the variables of proximity, depth, and timing. However, certain characteristics of international courts and tribunals have also been referred to in issue conflict analyses. These characteristics include qualification requirements and the preference for *ad hoc* adjudicators and could include provisions governing an international adjudicator's outside activities. These characteristics are not relevant to assessing the existence of, and should not be employed to justify a permissive attitude toward, issue conflicts.

193. Prosecutor v. Furundzija, *supra* note 52, ¶ 167. *See supra* Part II.B.2.

194. *See supra* Part II.D.2.a.

195. Challenge Decision of 11 January 1995, *supra* note 123, at 240-41.

A. Issue Conflicts and Qualification Requirements

Issue conflicts, though inherent in adjudication, are made more likely by the political demand for international adjudicators who have specialized expertise. The extent and nature of the demand for expert adjudicators is highlighted by the qualification requirements stated in the rules of international public tribunals, be they "recognized competence in international law,"[196] experience in "international humanitarian law and human rights law,"[197] or demonstrated "expertise in law, international trade and the subject matter of the covered agreements generally."[198] Such qualification requirements restrict the size of the pool of potential adjudicators, increasing the likelihood that any given adjudicator will have an impermissible issue conflict in a particular dispute.

Qualification requirements provide an attractive excuse for ignoring issue conflicts. Rather than assess the impact of an issue conflict, it is easier to disregard an appearance of bias. Moreover, such an approach protects all adjudicators, which is an alluring outcome since the permissibility of an issue conflict is often determined by fellow adjudicators. Finally, some fear that the quality of international law would suffer if the pool of adjudicators were enlarged. In this regard, Professor Edward Gordon declared that strict policing of issue conflicts could disqualify:

> "Diplomats, legislators, and . . . law professors, even ones as distinguished as the late Philip Jessup, Hardy Dillard, and Richard Baxter, all of whom served with distinction as members of the World Court after having led active careers in which they frequently discussed and wrote about issues and legal doctrines of abiding importance."[199]

However, qualification requirements, which are general in nature, do not logically justify the appearance of bias presented by pre-conceived views of a disputed issue in an individual case. As Professor Randall Peerenboom remarked, "[w]hile dedication to human rights advocacy may qualify someone to be a judge, and may not be adequate grounds for removal, having staked out a position on a particular issue crucial to the disposition of the case in question is another matter."[200] Thus, contrary to the ICTY's conclusion,[201] there is nothing intrinsically "odd" about the possibility that a prior opinion or experience that satisfies "an eligibility requirement [may] lead to an inference of bias."[202] Ignoring the appearance of bias in issue conflicts in the name of a qualification requirement harms the high quality of judgments that qualification requirements

196. *See* ICJ Statute, *supra note* 24, art. 2.

197. *See* ICTY Statute, *supra* note 50, art. 13.

198. *See* DSU, *supra* note 80, art. 17.3.

199. *See* Gordon, *supra* note 4, at 510.

200. Randall Peerenboom, *Human Rights and the Rule of Law: What's the Relationship?*, 36 GEO. J. INT'L L. 809, 893 n. 278 (2005).

201. *See supra* Part II.B.

202. Prosecutor v. Furundzija, *supra* note 52, ¶ 205.

seek to ensure. Although adjudicators familiar with a particular area of international law can render a decision more speedily than those with a more general international or domestic legal training, qualification requirements also seek to ensure a high level of reasoning. Typically, an adjudicator trained in an area of law will better understand the nature of the dispute and the established legal contours. However, from an objective point of view, to ensure quality, an otherwise competent adjudicator, who is less familiar with the specific field of law, is preferable to an adjudicator who appears biased.

B. Issue Conflicts and Ad Hoc Adjudicators

Issue conflicts are also multiplied by the political demand for non-permanent adjudicators in certain international dispute systems. At one extreme, members of the ICJ may serve for nine years with one renewal.[203] At the other extreme, *ad hoc* adjudicators in international arbitration and non-appellate trade disputes are appointed only to an individual dispute. Although *ad hoc* adjudicators may not have the same formal qualification requirements, adjudicators in the most demand "speak multiple languages," "boast rich and multi-national educations from the world's most prestigious universities," "have vast experiences working in the highest echelons of diverse legal systems," engage in "rich scholarly research," and have "technical or industry specific expertise."[204] Naturally, such adjudicators are likely to have expressed opinions that may provide a basis for an issue conflict.

The use of *ad hoc* adjudicators does not, in and of itself, justify the rejection of challenges to adjudicators for issue conflicts. There is no reason to assume that parties, by agreeing to submit a dispute to an *ad hoc* adjudicator, waive the right to challenge that adjudicator for having an appearance of bias. In this regard, the District Court of The Hague's assertion that "it is generally known that . . . lawyers frequently act as arbitrators" does little to ameliorate the concern over issue conflicts.[205] This rationale suggests that the parties to international arbitration implicitly agree to permit the appearance of bias resulting from issue conflicts, which inappropriately circumvents the "justifiable doubts" standard in the UNCITRAL Arbitration Rules and the Netherlands Arbitration Act.[206] Likewise, Mexico's suggestion that DSU panelists be deemed impartial "irrespective of any past experience"[207] is ill-founded: no provision of the DSU indicates that the Member States agreed to waive this basis of impartiality.

Additionally, a more lenient standard for the appearance of bias should not

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203. *See* ICJ Statute, *supra note* 24, art. 13.

204. Catherine A. Rogers, *The Vocation of the International Arbitrator*, 20 AM. U. INT'L L. REV. 957, 958-59 (2005).

205. *See* Ghana/TMB 2, *supra* note 148, ¶ 11.

206. UNCITRAL Arbitration Rules, *supra* note 104, art. 9; Netherlands Arbitration Act, *supra* note 143, art. 1033.

207. *See* Guatemala–Cement II, *supra* note 88, ¶ 4.41.

be permitted for those *ad hoc* adjudicators selected by one of the parties. It is common in the practice of the ICJ and in international arbitration to permit parties to select one of the adjudicators. In regard to international commercial arbitration it has been suggested that such a distinction may be acceptable.[208] However, the modern trend has been to subject all the arbitrators to the same standard of impartiality. As Professor Andreas Lowenfeld explains, "[w]hile he or she is expected to be receptive to the position of the party that appointed him or her, an arbitrator is not supposed to approach a controversy with mind made up."[209] Indeed, it does not appear that the District Court of The Hague's conclusion considered the possibility that, since Professor Gaillard was nominated by the investor, he may have had a pro-investor attitude generally or an attitude specifically favorable to the party that appointed him. Similarly, there is no reason to differentiate between judges *ad hoc* and members of the ICJ. As Sir E. Lauterpacht noted in *Application of Genocide Convention*, "the fact that [a judge *ad hoc*] is appointed by a party to the case in no way reduces the operative force" of his duty to "exercise his powers impartially and conscientiously," and therefore a judge *ad hoc* cannot be "precommitted to the position that [the state that appointed him] may adopt."[210] The same principle should apply to the issues within the dispute.

C. Issue Conflicts and Restrictions on Outside Activities

Finally, limitations on outside activities should not be construed as sufficient to reduce the regulation of issue conflicts. As discussed in Part II, the occurrence of issue conflicts may be reduced by provisions regulating the outside activities of adjudicators.[211] However, outside activities permitted under these provisions, such as academic publications, may provide a basis for an issue conflict. In such circumstances, the limited reach of the regulation of outside activities should not be relied upon to justify the appearance of bias in an issue conflict. Although avoiding conflicts of interest is one of the purposes of regulating outside conduct, "this task is often illusive"[212] due to the difficulty of succinctly categorizing inappropriate activities. Moreover, case-by-case determination of a conflict of interest is preferable to broadly insulating international adjudicators

208. *See* CRAIG, PARK & PAULSON, *supra* note 19, at 231 (suggesting that the ICC International Court of Arbitration might be less likely to sustain an issue conflict challenge against a party-appointed arbitrator than a presiding arbitrator).

209. Andreas F. Lowenfeld, *The Party-Appointed Arbitrator in International Controversies: Some Reflections*, 30 TEX. INT'L. L. J. 59, 60 (1995).

210. Application of Genocide Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo. (Serb. & Mont.)), 1993 I.C.J. 407, 408-09 (Order of 13 Sept.) (separate opinion of Judge Lauterpacht).

211. *See, e.g.*, Article 16(1) of the ICJ Statute, *supra* note 24; art.7(1) of the ITLOS Statute, *supra* note 23; Art. 13 bis(3) of the ICTY Statute, *supra* note 50.

212. *See* Shetreet, *supra* note 13, at 161.

from the outside world, which can result in "judicial shortsightedness."[213]

V.
HOW FUTURE REGULATION OF ISSUE CONFLICTS COULD BE EFFECTED

Properly identified issue conflicts need to be regulated to increase the legitimacy of international courts and tribunals and also to provide guidance for both concerned parties and international adjudicators. Accordingly, this section reviews potential avenues and obstacles to ensuring that standards of impartiality exist and that they effectively regulate issue conflicts. None of the obstacles are insurmountable and none provide a legitimate basis for discounting issue conflicts.

A. The International Court of Justice and its Statute, Rules, and Practice Directions

At present, the regulation of issue conflicts at the ICJ is incomplete and therefore an analysis focusing on the proximity, depth, and timing of an issue conflict allegation is not possible.[214] Article 17(2) of the ICJ Statute focuses on the adjudicator's involvement with "any case," which results in the exclusion of issue conflicts absent actual bias. Indeed, in his dissent in the *Construction of a Wall in the Occupied Palestinian Territory*, Judge Buergenthal noted the limitations of Article 17(2), invoking instead a power "implicit in the very concept of a court of law" to evaluate "whether one of its judges has expressed views or taken positions that create the impression that he will not be able to consider the issues . . . in a fair and impartial manner."[215]

Moreover, it is unlikely that Article 17(2) will ever be modified or interpreted to address the appearance of bias presented by issue conflicts. The opinions of both the majority and Judge Buergenthal in the *Construction of a Wall in the Occupied Palestinian Territory* confirm that Article 17(2) is irrelevant to the appearance of bias from issue conflicts; the World Court has refused to adopt a broad interpretation of the language "advocate for one of the parties" or "in any other capacity" that could cover appearances of bias presented by the opinions of those not affiliated with a party to the dispute.[216] A majority of the Court also chose not to invoke the implicit power argument preferred by Judge Buergenthal.[217] Finally, revising Article 17(2) is unlikely because amendments to the

213. *Id.*

214. If the International Tribunal for the Law of the Sea follows ICJ jurisprudence, its impartiality standards will be similarly inadequate. *See supra* note 23.

215. Construction of a Wall in the Occupied Palestinian Territory, *supra* note 31, at 9-10 (Buergenthal, J., dissenting).

216. *See* ICJ Statute, *supra* note 24, art. 17.

217. *See* Construction of a Wall in the Occupied Palestinian Territory, *supra* note 31.

ICJ Statute require "two-thirds of the Members of the United Nations, including all of the permanent members of the Security Council."[218]

The Practice Directions partially regulate the possibility of issue conflicts for judges *ad hoc*. However, for the reasons discussed in Part III.B.3, and as the Advisory Opinion for the *Construction of a Wall in the Occupied Palestinian Territory* demonstrates, these provisions are under-inclusive: they only regulate issue conflicts arising from advocacy, permitting issue conflicts arising from an adjudicator's other activities and from her advocacy prior to the three-year period.

Nevertheless, both the Rules of Court and the Practice Directions could provide a solution.[219] Article 30 of the ICJ Statute authorizes the Court to "frame rules for carrying out its functions."[220] Accordingly, the Court could draft a broader standard of impartiality that could be incorporated into the ICJ Rules or the Practice Directions. This standard could then be interpreted to analyze issue conflicts by focusing on the proximity, depth, and timing of the challenged judge's opinion. Accordingly, such a standard should not follow ICJ precedents refusing to regulate proximate activities performed in a representative capacity, unless the participation was minimal or the passage of time renders the adjudicator's involvement irrelevant.[221]

B. International Criminal Tribunals and the ICTY's Jurisprudence

In contrast to the ICJ, the ICTY's interpretation of its impartiality provision to include issue conflicts is laudable. Other international criminal courts and tribunals, like the Special Court for Sierra Leone, should follow the ICTY's lead in interpreting or amending their own impartiality standards to regulate issue conflicts.

Similarly, the ICTY jurisprudence, though imperfect, has provided some guidance for the proper regulation of issue conflicts in international criminal disputes. In applying its impartiality provision, the ICTY's reliance upon the qualification requirements for adjudicators and the general principles of the U.N. Charter was unsatisfactory, but its discussion of the proximity of an opinion to established law and its implicit acceptance that opinions expressed in a represen-

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218. *See* ICJ Statute, *supra* note 24, art. 69 ("Amendments to the Present Statute shall be effected by the same procedure as is provided by the Charter of the United Nations for amendments to that Charter"); Charter of the United Nations, art. 108.

219. It has been suggested that Article 24 could provide a solution. *See* THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY, 349 (Andreas Zimmerman et al. eds., 2006). The author of this article, however, believes that this would be inadequate because the President of the Court has never invoked "some special reason" to disqualify adjudicators, as indicated *supra* Part II.A.1, and particularly because it was not used in *Construction of a Wall in the Occupied Palestinian Territory, supra* note 31.

220. *See* ICJ Statute, *supra* note 24, art. 30.

221. *Cf.* Continued Presence of South Africa in Namibia, Advisory Opinion, *supra* note 33, at 324 (Gros, J., dissenting).

tative capacity may not remove the appearance of bias are instructive.[222] Because the ICTY did not adequately address the proximity, depth, or timing of the issue conflict, it is difficult to readily conclude that it arrived at the correct result.[223] Future cases should address these factors more clearly.

C. The World Trade Organization and the Rules of Conduct

In theory, the DSU Rules of Conduct could provide adequate impartiality standards for the regulation of issue conflicts in WTO disputes. The impartiality requirement in the Rules of Conduct that all persons serving as panelists, arbitrators or members of the Appellate Body "shall be independent and impartial [and] shall avoid direct or indirect conflicts of interest"[224] has been explicitly construed for the Appellate Body to include conflicts arising out of both "active interests," which includes organizations with "a declared agenda," and "statements of personal opinion on issues relevant to the dispute in question."[225] This broader definition is commendable and should be applied to panelists; there is no reason why actual bias or the appearance of bias arising from an issue conflict should not be included in those interests that are "likely to affect, or give rise to justifiable doubts as to, that person's independence or impartiality."[226]

One potential weakness of the Rules of Conduct, however, is that disqualification depends upon the finding of a "material violation."[227] This term could be construed to limit disqualification only to issue conflicts that evidence actual bias.[228] Given the DSU's questionable enforcement of impartiality in regard to national and party conflicts of interest, this appears to be a real possibility.[229] A better interpretation of the "material violation" standard would be to disregard those issue conflicts that indicate that the adjudicator's opinion is not of sufficient proximity, depth, and timing to provide for an impermissible appearance of bias.

In regard to panelists, another possible problem for regulating issue con-

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222. *See supra* Part II.B.2, III.A, IV.A.

223. *Cf.* Mackensie & Sands, *supra* note 19, at 281.

224. *See* Rules of Conduct, *supra* note 81, Rule II.

225. Working Procedures for Appellate Review, *supra* note 82, at Annex 2.

226. *See* Rules of Conduct, *supra* note 81, Rule III.

227. *Id.*, Rule VIII.

228. Lawrence D. Roberts, *Beyond Notions of Diplomacy and Legalism: Building a Just Mechanism for WTO Dispute Resolution*, 40 AM. BUS. L.J. 511, 546 (2003) (asserting that minor improprieties or "acts that present the appearance of impropriety" are not material violations of the Rules of Conduct).

229. *See* John O. McGinnis & Mark L. Movsesian, *The World Trade Constitution*, 114 HARV. L. REV. 511, 535 (2000) (summarizing cases that indicate that that the WTO does not take its impartiality requirements seriously). *See also* John A. Ragosta, *Unmasking the WTO – Access to the DSB System: Can the WTO DSB Live Up to the Moniker "World Trade Court"?*, 31 LAW & POL'Y INT'L BUS. 739, 740-41, 743-46 (2000); Lori Wallach, *Transparency in WTO Dispute Resolution*, 31 LAW & POL'Y INT'L BUS. 773, 774 (2000).

flicts is the relationship between the Rules of Conduct and Article 8 of the DSU. Article 8.6 suggests that the parties not oppose nominations "except for compelling reasons." Accordingly, it is possible that this (as well as the political ramifications of explicitly rejecting a panelist nominated by another state) may compel State parties to accept, or waive objection to, issue conflicts. While voluntary waiver is not problematic, this same rationale may inappropriately permit the WTO Director-General "in consultation with the Chairman of the [Dispute Settlement Body] and the Chairman of the relevant Council or Committee" to ignore issue conflicts since Article 8.7 authorizes them to determine the composition of panels. Therefore, Articles 8.6 and 8.7 should be interpreted to discourage parties from asserting frivolous allegations but should not be allowed to limit the regulation of issue conflicts.

The DSU authorizes the repeat use of panelists in certain circumstances, but this should not be construed to permit issue conflicts. As Mexico pointed out in *Guatemala–Cement II*,[230] panelists may serve as a DSU adjudicator more than once and occasionally adjudicate multiple disputes simultaneously.[231] Indeed, Article 21.5 of the DSU prefers original panelists to adjudicate disputes regarding compliance measures.[232] However, none of these reasons, nor the fact that the *Guatemala–Cement II* panel included a panelist from *Guatemala–Cement I*, provides a legitimate reason for not regulating issue conflicts in WTO panels. First, as discussed in Part IV.B, the fact that adjudicators may serve more than once does not rationalize ignoring issue conflicts. Second, although panelists may adjudicate multiple WTO disputes, their participation should be conditioned upon the absence of an issue conflict. As has been noticed in international arbitration, the impartiality of an adjudicator assigned to multiple disputes may be affected, or may appear to be affected, if issues in those disputes are similar.[233] Finally, although Article 21.5 of the DSU permits the continued use of the panel adjudicators that originally decided the dispute for the sake of efficiency, Mexico's reliance on this provision was misplaced. Article 21.5 only authorizes an adjudicator who has legitimately analyzed legal and factual issues in a particular dispute to continue to resolve that dispute.

A final concern relates to adjudicator qualification requirements. Issue conflicts in international trade disputes are made more likely because the DSU requires "well-qualified" individuals[234] and permits only "persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally" to serve on the Appellate Body.[235] As discussed in Part IV.A, this is not necessarily problematic. However, one re-

230. *See supra* Part II.C.2.

231. Guatemala–Cement II, *supra* note 88, ¶ 4.26.

232. *Id.* ¶¶ 4.25, 4.31. *See also* DSU, *supra* note 80, art. 21.5.

233. *See* DERAINS & SCHWARTZ, *supra* note 153.

234. *See* DSU, *supra* note 80, art. 8.1.

235. *Id.* art. 17.3.

form proposal for panelists would exacerbate the situation. The United States and Chile have proposed that Article 8.2 also require that panelists have "expertise to examine the matter at issue in the dispute."[236] Such a requirement could actually encourage the use of adjudicators who have already prejudged legal or factual issues in a dispute.

D. International Arbitration and Courts, Institutions and Associations

Currently, impartiality standards in international arbitration are sufficiently general to provide for the regulation of issue conflicts. One shortcoming, however, is the possible interpretation of the IBA Guidelines. Cases of actual bias will be addressed by the standard requiring disclosure of a public opinion advocating "a specific position regarding the case that is being arbitrated,"[237] but it is uncertain whether this would apply to legal preferences, factual opinions, and the prejudgment of factually and legally similar disputes. Indeed, such an application is unlikely given the presumption that "a general opinion . . . concerning an issue which also arises in the arbitration" is acceptable if "not focused on the case that is being arbitrated."[238] Although these provisions focus on disclosure, not disqualification, to the degree that they influence the evaluation of issue conflict allegations, amending the IBA Guidelines is advisable.

The involvement of domestic courts in international arbitration will likely assist in the regulation of issue conflicts. Arbitral tribunals naturally provide a difficult forum for assessing issue conflicts because such regulation often requires the party alleging the conflict to persuade the third, neutral member of the tribunal. Similarly, arbitral institutions, reluctant to offend the world's leading arbitrators, have a reduced incentive to extend the application of impartiality standards. However, as was demonstrated by the District Court of The Hague, domestic courts can ensure impartiality.[239] Both the arbitral tribunal and the appointing authority selected by the Permanent Court of Arbitration rejected Ghana's challenge to Professor Gaillard's presence on the tribunal before it was accepted by the Dutch court.[240] The potential for as many as three *fora* to examine a challenge to an arbitrator on the basis of an issue conflict will encourage the regulation of issue conflicts.[241]

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236. NEGOTIATIONS ON IMPROVEMENTS AND CLARIFICATIONS OF THE DISPUTE SETTLEMENT UNDERSTANDING ON IMPROVING FLEXIBILITY AND MEMBER CONTROL IN WTO DISPUTE SETTLEMENT, 3, TN/DS/W/52 (14 MARCH 2003). *See also* NEGOTIATIONS ON IMPROVEMENTS AND CLARIFICATIONS OF THE DISPUTE SETTLEMENT UNDERSTANDING, 5, TN/DS/W/82 (24 OCTOBER 2005).

237. IBA Guidelines, *supra* note 8, at 3.5.2.

238. *Id.* at 4.1.1.

239. *See supra* Part II.D.2.a.

240. *Id.*

241. Of course, the potential for three *fora* to challenge arbitrators is an arguably inefficient system for ensuring impartiality.

Investment treaty arbitrations pose unique concerns. Such arbitrations "often involve the interpretation of BITs containing similar, if not identical, provisions and therefore similar legal issues" and "the application of an evolving body of international law."[242] As a result, some recent commentators have advocated the concurrency rule for such arbitrations.[243] For example, ICJ Judge Buergenthal commented that lawyers should not simultaneously serve as arbitrators and counsel "in order to ensure that an arbitrator will not be tempted, consciously or unconsciously, to seek to obtain a result in an arbitral decision that might advance the interests of a client in a case he or she is handling as counsel."[244]

Although a concurrency rule for investment treaty arbitrations would be under-inclusive,[245] given the small scope of disputed legal issues, it appears that it may not be too over-inclusive. The proximity of the similar legal issues, the depth of commitment required for advocacy, and the simultaneity of the timing, all suggest that the appearance of bias is inescapable. Employing a concurrency rule for investment arbitrations would be a considerable change for international arbitration. Because a would-be arbitrator cannot guarantee her appointment to a dispute, even some individuals that are frequently selected as arbitrators continue private practice. Under a concurrency rule, practitioners seeking to arbitrate investment treaty disputes would be forced to retire from advocacy or practice outside of their expertise.

In conjunction with a concurrency rule, the increased regulation of issue conflicts may result in international investment tribunals comprised of arbitrators who lack current specialized expertise in international investment law. Not only would practitioners have difficulty being appointed, but academics specializing in international investment law would also be subjected to closer scrutiny.

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242. *See* Levine, *supra* note 18, at 62.

243. *See, e.g.*, Howard Mann et al., *Comments on ICSID Discussion Paper, "Possible Improvements of the Framework for ICSID Arbitration,"* § 4.6, (Dec. 2004), *available at* http://www.iisd.org/pdf/2004/investment_icsid _response.pdf (advocating a concurrency rule and a roster of arbitrators, similar to the roster used for WTO panelists); Fiona Marshall & Howard Mann, *Revision of the UNCITRAL Arbitration Rules, Good Governance and the Rule of Law, Express Rules for Investor-State Arbitrations Required* (Sept. 2006), *available at* http://www.iisd.org/pdf/2006/investment_uncitral_rules_rrevision.pdf.

244. Buergenthal, *supra* note 5, at 498. Before his appointment to the ICJ, Judge Buergenthal served as an arbitrator under the ICSID Arbitration Rules. *See also* Peterson, *ICSID Tribunals Diverge over Independence of Arbitrator to Hear Argentine Claims*, *supra* note 156; Peterson, *Challenge to Arbitrator Schwebel rejected by Belgian Court, Poland seeks appeal*, INVEST-SD: INV. L. & POL'Y WEEKLY NEWS BULL., Jan. 17, 2007, *available at* http://www.iisd.org/pdf/2007/itn_jan17_2007.pdf (noting that Poland objected to Judge Stephen M. Schwebel's continuing role as arbitrator in the Eureko arbitration because he subsequently relied on the arbitration's partial award as an advocate in a different ongoing investment treaty arbitration).

245. *See supra* Part III.B.2.

VI.
CONCLUSION

Sometimes a judge "knows" too much: her opinion, regardless of its intellectual value, warrants her disqualification. Accordingly, this Article has assessed impartiality standards of the main international courts and tribunals and discussed the appropriate and inappropriate factors for considering issue conflicts arising from adjudicator's prior activities or expressed opinions. International courts and tribunals seem to prefer simple, bright-line rules, such as the concurrency rule or a rule exonerating prior advocacy and diplomacy, but these cannot ensure impartiality. Moreover, features that shape international courts and tribunals, such as qualification requirements, *ad hoc* adjudicators, and provisions regulating outside activities, should not be used to excuse an adjudicator's apparent partiality. Instead, the analysis of issue conflicts, both for bias and the appearance of bias, should focus on three factors: the proximity of the commitment, the depth of the involvement, and the timing of the opinion. In addition to improved standards, analyses of issue conflicts that consider these factors will be more persuasive, provide guidance to parties and adjudicators, and enhance impartiality in international adjudication. The hortatory language that it is an "elementary requirement" that international adjudicators "should come to the case with an open mind" will be enforced.[246]

246. SINGH, *supra* note 3, at 191.

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Dignitarian Posthumous Personality Rights - An Analysis of U.S. and German Constitutional and Tort Law

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Dignitarian Posthumous Personality Rights—An Analysis of U.S. and German Constitutional and Tort Law

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I. INTRODUCTION

Should reputational protections exist for the dead in general and in artistic works in particular? Take the case of a Hollywood movie depicting the U.S.-American lawyer Thomas E. Dewey (1902–1971), best known to the American public as a 1948 presidential candidate and special prosecutor in 1930s New York. At the end of the Prohibition, Dewey pursued infamous mobster Dutch Schultz on charges of tax evasion. Schultz planned to assassinate Dewey, but was murdered in 1935 by Lucky Luciano's crime syndicate before he could realize his plan. It is therefore astonishing to see Dewey's portrayal in *Hoodlum*:[1] the 1997 film depicts Schultz's struggle for control of the numbers racket in 1930s Harlem and explicitly claims that Dewey was bribed by Mafia boss Luciano to help defeat Bumpy Johnson, who was a rival of Schultz.[2] The family of the late Dewey objected to this portrayal, but the studio argued that it had not violated any legally cognizable rights. The film was a work of fiction, and the movie magnate presented it to the public as such.[3]

This legal approach stands in contrast to German law. In its landmark ruling *Mephisto*, the German Federal Constitutional Court (*Bundesverfassungsgericht* [BVerfG]) established a right to posthumous personality protections.[4]

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1. HOODLUM (MGM Distribution Company 1997).

2. However, in the biography, MARTIN GOSCH & RICHARD HAMMER, THE LAST TESTAMENT OF LUCKY LUCIANO (1975), Dewey had already been portrayed as corrupt. Luciano claimed to have paid for Dewey's presidential campaign in return for his release from prison. But the allegations have little credibility; as Gosch and Hammer state in their introduction, Luciano was "angry, scurrilous, even defamatory."

3. PAUL C. WEILER, ENTERTAINMENT, MEDIA, AND THE LAW: TEXT, CASES, PROBLEMS 195 (3d ed. 2006).

4. ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVerfGE] 30, 173; *see* BASIL S. MARKESINIS & HANNES UNBERATH, THE GERMAN LAW OF TORTS—A COMPARATIVE TREATISE 397-402 (4th ed. 2002) (the case is trans. by J. A. Weir) (partially translating the judgment); DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 427-430 (2d ed. 1997); *see* DAVID P. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 192-197 (1994).

The case concerned the Nazi era novel *Mephisto*, written by Klaus Mann (1906–1949), son of Thomas Mann (1875–1955), winner of the 1929 Nobel Prize for Literature.[5] Klaus Mann left Germany in 1933 and was one of the first writers stripped of his citizenship by the Nazis.[6] In exile in Amsterdam, he wrote a satire entitled *Mephisto—Novel of a Career*"[7] which was published there in October 1936.[8] Though Klaus Mann prefaced his book with the disclaimer "All characters in this work are types, not portraits," the novel's protagonist, Hendrik Höfgen, is an obvious portrayal—in physical appearance, manners, course of life, roles played, and appointment as General Director of the State Theatre of Prussia—of the well-known but controversial German actor and theatre director Gustaf Gründgens (1899–1963). A civil court first allowed the publication of the book in West Germany arguing it would be clearly fiction. Gründgens had just died and the claim had been filed by his heir. But on final constitutional appeal the BVerfG held that the human dignity of the deceased was of overriding constitutional value and superseded the publisher's right to freedom of speech and society's right to receive a creative work.

Thomas Dewey enjoyed no such protection in the United States, and his portrayal in *Hoodlum* illustrates the entertainment industry's approach to historical fiction. There currently seems to be a trend to "spice up" depictions of actual incidents by adding imaginary elements, or to intersperse historical facts and figures to render a fully made-up story more credible.[9] Such works become an ambiguous patchwork of fictional, biographical, and historical accounts. This approach has the potential to shift or skew the image of actual historical figures, events, and eras in the minds of viewers, listen-

5. Thomas Mann did not underestimate the "temptation" of Fascism. *See* THOMAS MANN, MARIO UND DER ZAUBERER [Mario and the Magician] (1930) (openly criticizing Italian facism). But, like his children, Mann resisted and chose to live in exile as early as 1933, later speaking publicly against the Nazi regime in nearly 60 BBC broadcasts to the "Deutsche Hörer!"; *see* Reinhard Zimmermann, *Was Heimat hieß, nun heißt es Hölle'—The emigration of lawyers from Hitler's Germany: political background, legal framework, and cultural context*, *in* JURISTS UPROOTED: GERMAN-SPEAKING ÉMIGRÉ LAWYERS IN TWENTIETH-CENTURY BRITAIN 44, 70-71 (Jack Beatson & Reinhard Zimmermann eds., 2004).

6. Germany denationalized Klaus Mann in 1934. He acquired Czech nationality in 1937, began his military service in the U.S. Army in January 1943, and became a U.S. citizen a few months later. In 1944/45 Mann, based in Casablanca and Italy, wrote handbills and texts for radiobroadcast and loudspeakers in an effort to persuade the opposing soldiers to defect. In May/June 1945 he returned to Germany as a correspondent of the Army newspaper, STARS AND STRIPES.

7. The available English version bears no subtitle. KLAUS MANN, MEPHISTO (trans. Robin Smyth, Penguin 1995).

8. KLAUS MANN, MEPHISTO – ROMAN EINER KARRIERE (Querido-Press 1936).

9. Other examples include THE PERFECT STORM (Warner Bros. Pictures 2000), involved in a case which will be dealt with in Part IV E, as well as THE LAST SAMURAI (Warner Bros. 2003), where Tom Cruise—in a set of partially true incidents—plays a U.S. military adviser who drills local troops in hastily modernizing 1870s Japan, though no such visit occurred. *See* MARK RAVINA, THE LAST SAMURAI: SAIGÔ TAKAMORI AND THE DEMISE OF THE SAMURAI CLASS (2003). Other examples are Oliver Stone's JFK (Warner Bros. 1991) and FORREST GUMP (Paramount Pictures 1994), where Tom Hanks was digitally added to historic scenes; for example, when his character "meets" John F. Kennedy.

ers, or readers. And what would happen if such a fusion of fiction and fact took place on a large scale, changing even the perception of history?[10]

Nonetheless, this Article does not intend to evaluate the socio-psychological implications of fusing fact and fiction nor decide whether the aforementioned statements in *Hoodlum* are really accurate.[11] Rather, it seeks to examine whether, along the lines of the cases mentioned above, family heirs have legally cognizable rights against inaccurate portrayals of their deceased relatives. Toward this end, the Article compares U.S. law to the quite different German approach in the *Mephisto* decision. It challenges the assumption of Anglo-American law that the deceased or their surviving relatives generally possess no interest worthy of protection, as in "the dead don't hear." Regarding the relevant instance of violation of the personality rights, the current case falls into the category of false assertions of facts by half-fictionalization in form of a portrayal of real persons, either in disguised form or as themselves, in a work of fiction.[12] Conversely, the relevant cases do not belong to the category of defamatory expression of opinions (as opposed to facts), or unauthorized publication of "private" matters.[13]

Now is a key time to start revamping assessments of posthumous rights. The digital revolution has contributed to a convergence of media and entertain-

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10. Just think of Iran's Holocaust denial. A distant totalitarian scenario, the "Ministry of Truth" in the novel 1984 by George Orwell (1903–1950), comes to mind, where newspapers and books are falsified to bring them in line with the Big Brother regime. Orwell's vision was too limited, however, in assuming that democracy, the rule of law, and a life of dignity could be threatened only by an almighty state. Today, private entities with economic or social strength pose just as grave a threat, boldly invading the private sphere of individuals. Orwell envisioned telescreens with video cameras transmitting the activities of those within range to the Thought Police. But he could hardly have imagined current methods of processing personal information through data surveillance, for example, spyware on computers, other means of collecting information of Internet behavior, and linking data from different sources (cyberspace and real world) to create new information about creditworthiness or direct marketing consumer profiles. *See* Jerry Kang, *Information Privacy in Cyberspace Transactions*, 50 STAN. L. REV. 1193 (1998). In the case of celebrities, there is also the paparazzi problem. *See* JEFFREY ROSEN, THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA (2000).

11. The case of HOODLUM was simplified here. For the purpose of the present comparative analysis, it will be assumed that the bribery accusation is historically inaccurate—as the heirs claim.

12. This is, along with embellishment (false material added to a news feature story or, for example, to an unauthorized biography), and distortion (for example, a photo-montage), one of the general categories where recent false light claims have arisen in the U.S. Desmond Browne, et al., *Privacy Rights, in* THE LAW OF PRIVACY AND THE MEDIA—MAIN VOLUME AND FIRST CUMULATIVE UPDATING SUPPLEMENT 3.50-3.51 (Michael Tugendhat & Iain Christie eds., 2004 & Supp. I 2004).

13. *See* GEORGIOS GOUNALAKIS, PRIVACY AND THE MEDIA: A COMPARATIVE PERSPECTIVE 94-5 (2000) (supplying a comparative chart under similar headings); *see* Georgios Gounalakis, *Medienpersönlichkeitsrechte in rechtsvergleichender Sicht*, Archiv für Presserecht [AfP] 2001, 271; MAX-PLANCK-INSTITUT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT, DER ZIVILRECHTLICHE PERSÖNLICHKEITS- UND EHRENSCHUTZ IN FRANKREICH DER SCHWEIZ ENGLAND UND DEN VEREINIGTEN STAATEN VON AMERIKA 328 et seq. (HANS DÖLLE Coord., 1960); Eike v. Hippel, *Persönlichkeitsschutz und Pressefreiheit im amerikanischen und deutschen Recht*, 33 Rabels Zeitschrift für ausländisches und internationales Privatrecht [RabelsZ] 276 (1969).

ment presentations and in particular to the global marketing of entertainment, informational, and infotainment products. This intersection creates broadened risks of exploiting personality and of infringing upon reputation, privacy, and dignity.[14] In light of ongoing internationalization, which tends to limit the reach of nationally bound constitutional rights, the strict position of common law on post-mortem personality rights results in a partial failure to protect the right to a fair description of a person's life. This is surprising because common law, with its long-winded case-to-case method, generally stresses the weight of history and importance of inherited authority, so that reputation and esteem survive death.[15] Yet exactly this adherence to the old set of rules—like the maxim of "actio personalis moritur cum persona" (personal action dies with the person)—can result in the complete deprivation of achievements and dignity after death.

II.
METHODOLOGICAL RATIONALE AND SCOPE

This Article combines comparative theory and practice in constitutional law by examining the role of the state in "taking rights seriously"[16] through tort law. Certainly, a broad analysis incorporating common and civil law could everywhere be in a more developed status and of more general relevance.[17] However, the universal trend of "denationalization" of markets, politics, and legal systems forces a new comparative effort in law schools and courts.[18] By analyz-

14. *See* Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CALIF. L. REV. 691 (1986) (distinguishing between three concepts: reputation as property, as honor, and as dignity); *see generally* Robert N. Bellah, *The Meaning of Reputation in American Society*, 74 CALIF. L. REV. 743, 747 (1986) (observing that "a politics of personality is replacing a politics of reputation.").

15. *See* HERBERT SPENCER (1820–1903), ON SOCIAL EVOLUTION: SELECTED WRITINGS 221-22 (John D. Y. Peel ed., 1972). Spencer, a proponent of Social Darwinism, as early as 1876 put the words of Mephistopheles in Goethe's *Faust* ("Statutes and laws through all the ages, / Like a transmitted malady you trace; / In every generation still it rages, / And softly creeps from place to place") into sociological terms by stating that customs embody the rule of the dead over the living, like the laws into which they harden; *see also* EUGEN EHRLICH, GRUNDLEGUNG DER SOZIOLOGIE DES RECHTS 339 (Manfred Rehbinder ed., 4th ed. 1989).

16. To borrow from RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (8d ed. 1996).

17. Basil S. Markesinis, *Comparative Law—A Subject in Search of an Audience*, 53 MOD. L. REV. 1 (1990) (stating the unimportance of comparative law in courts, despite the integration of the United Kingdom in the European Union); Reinhard Zimmermann, *Civil Code and Civil Law—The "Europeanization" of Private Law within the European Community and the Re-Emergence of a European Legal Science*, 1 COLUM. J. EUR. L. 63 (1994/95); Jonathan E. Levitsky, *The Europeanization of British Legal Style*, 42 AM. J. COMP. L. 347 (1994); Lord Bingham, *"There is a world elsewhere": The Changing Perspectives of English Law*, 41 INT'L & COMP. L.Q. 513, 519 (1992). However, the smaller the legal system, the more willingness there is to look abroad. This is why comparative analysis in court decisions takes place more often in Austria and Switzerland than in Germany and France. *See* Axel Tschentscher, *Dialektische Rechtsvergleichung – Zur Methode der Komparistik im öffentlichen Recht*, Juristenzeitung [JZ] 2007, 807-08.

18. In *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, 40 IDAHO L. REV. 1, 8 (2003), Supreme Court Justice Ruth Bader Ginsburg

ing the complex relation of free speech and the protection of immaterial values of the person (such as reputation and the right to privacy), this Article will also demonstrate that the real or assumed boundaries between common and civil law are blurring, not unlike the distinction between the different branches of the law (private and constitutional).[19]

The basic objectives characterizing all legal systems devoted to the Enlightenment values of liberty, democracy, and equality are similar. First, the need to preserve an individual's reputation and privacy must be balanced with the right to freedom of expression and the social interest in receiving information and being entertained. A second objective is to find a common ground between the individual's interest in compensation for reputational injury and the need to shield the media from excessive defamation and privacy awards.[20] The right to personality and the freedom of expression both represent integral parts of free, democratic and autonomy-based societies.[21] On the one hand free speech is not just a right to self-definition in line with individual liberty interests and its conception as a negative right position. Rather, it is also of considerable value for maintaining a democratic discourse and society.[22] And on the other hand,

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pointed out that the Court is looking beyond America's borders for guidance in addressing human rights issues like same-sex relationships and the death penalty: "Our 'island' or 'lone ranger' mentality is beginning to change" and the Court is "becoming more open to comparative and international law perspectives." These remarks, first uttered in a speech before the American Constitution Society's first National Convention on Aug. 2, 2003, caused an outcry by conservatives, who saw it as a threat to national legal sovereignty. Evidence for change can be seen in the comparative references made in *Grutter v. Bollinger*, 539 U.S. 306 (2003) (2003) (race preference); *Lawrence v. Texas*, 539 U.S. 558 (2003) (gay rights in Texas); *see also Roper v. Simmons*, 543 U.S. 551 (2005) (capital punishment). For the use of the comparative method in U.S. Supreme Court decisions, *see* Sarah K. Harding, *Comparative Reasoning and Judicial Review*, 28 YALE J. INT'L L. 409 (2003); Janet Koven Levit, *Going Public with Transnational Law: the 2002–2003 Supreme Court Term*, 39 TUSLA L. REV. 155 (2003); Donald E. Childress III, *Using Comparative Constitutional Law to Resolve Domestic Federal Questions*, 53 DUKE L.J. 193 (2003); Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 STAN. L. REV. 131 (2006) (arguing with the Condorcet jury theorem).

19. Note that the distinction is more strictly followed in civil law than in Anglo-American law; *cf.* John W. F. Allison, *Cultural Divergence, the Separation of Powers and the Public/Private Divide*, 9 EUROPEAN REVIEW OF PUBLIC LAW 305 (1997); JOHN W. F. ALLISON, A CONTINENTAL DISTINCTION IN THE COMMON LAW: A HISTORICAL AND COMPARATIVE PERSPECTIVE ON ENGLISH PUBLIC LAW (2d ed. 2000) (criticizing convergence theory); Duncan Kennedy, *The Status and Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982); Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423 (1982); *see* HANNES RÖSLER, EUROPÄISCHES KONSUMENTENVERTRAGSRECHT – GRUNDKONZEPTION, PRINZIPIEN UND FORTENTWICKLUNG 63 et seq., 69 (2004) (providing evidence that the distinction is also blurring on the Continent due to the influence of European Community private law).

20. *See* WEILER, *supra* note 3, at 139 (raising this question in connection with the analysis of *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 34849 (1974) and the fact that actual malice is not needed for private figures in order to gain compensation for defamatory statements); *see also* Joel D. Eaton, *The American Law of Defamation Through* Gertz v. Robert Welch, Inc. *and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349 (1975).

21. For this approach by German judges, see Ulrich Amelung, *Damage Awards for Infringement of Privacy—the German Approach*, 14 TUL. EUR. & CIV. L.F. 15, 16, 37-42 (1999).

22. *See* KOMMERS, *supra* note 4, at 695 ("In Germany, however, speech is juridically valued for its capacity to create community. The German view holds that free speech requires persons par-

reputation is not merely an individual asset, so that the right to personality and the freedom of expression complement rather than restrict one another.

But first and foremost we must inquire whether the fact that Germany has a civil law system, while the U.S. belongs to the common law world undermines a comparative reflection. As far as personality rights are concerned, there are large differences even within common law. The U.S. and English positions diverge considerably, notwithstanding their historical connections in substantive and methodological regard to the old common law of libel and slander.[23] This is evident especially where English law does not follow the U.S. rationale, put forth by Louis D. Brandeis (1856–1941) and Samuel D. Warren (1852–1910), in their 1890 article.[24]

Lord Hoffmann in *Wainwright v. Home Office* stated that deconstructing the concept of invasion of privacy, as U.S. law does, into four separate rights to sue (based on Prosser's analysis)[25]—intrusion, appropriation of a person's name or likeness, publicity, and—recognized under either common law or statute in about thirty States[26]—false light[27] which "must cast doubt upon the value of any high-level generalisation which can perform a useful function in enabling one to deduce the rule to be applied in a concrete case."[28] (Nonetheless, English law recently recognized a tort of misuse of private information by modifying the tort of breach of confidence to accommodate the prerequisites of the European Human Rights Convention.[29]) German general personality law, in comparison, en-

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ticipating in the forum of public discussion to speak the truth and to do so with respect for other persons' personal honor and dignity.").

23. For this distinction between a written and an oral form of defamation, see RESTATEMENT (SECOND) OF TORTS § 568 (1977), where broadcasting "by means of radio or television" is also regarded as libel. *Id.* § 568A. The outdated division causes problems in Internet law. *See* Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855 (2000); Lori A. Wood, *Cyber-Defamation and the Single Publication Rule*, 81 B.U.L. REV. 895 (2001).

24. Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890); *see also* WEILER, *supra* note 3, at 156-177; RICHARD C. TURKINGTON & ANITA L. ALLEN, PRIVACY LAW (2d 2002) (discussing the legacy of the germinal Warren and Brandeis article and the historical development of a right to privacy).

25. William L. Prosser (1898–1972), *Privacy*, 48 CALIF. L. REV. 383 (1960).

26. Including California, but not, for example, Massachusetts (Elm Med. Lab., Inc. v. RKO Gen., Inc., 532 N.E.2d 675, 681 (Mass. 1989)); New York, Howell v. N.Y. Post Co., 612 N.E.2d 699, 704 (N.Y. 1993); *cf.* Browne, et al., *supra* note 12, at 3.46; Nat Stern, *Creating a New Tort for Wrongful Misrepresentation of Character*, 53 U. KAN. L. REV. 81, 90 (2004).

27. Defined in RESTATEMENT (SECOND) OF TORTS § 652E at 394 (1977). In Time Inc. v. Hill, 385 U.S. 374 (1967), the Supreme Court held that the First Amendment limitations in defamation actions also apply to false light claims.

28. 3 W.L.R. 1137, 1142 [2003]; *cf.* Peter Birks, *Harassment and Hubris, the Right to an Equality of Respect* (1997) 32 IRISH JURIST 1, 2-3 (arguing that Prosser's classification would lead to a "balkanisation" of the tort of privacy and that tort law should include "protection of human dignity and autonomy, of which the right to privacy was just one manifestation.").

29. McKennitt v. Ash, [2007] 3 W.L.R. 194 (CA); *see also* Angus McLean & Claire Mackey, *Is there a Law of Privacy in the United Kingdom? A Consideration of Recent Legal Developments*, 29 EUR. INTELL. PROP. REV. 389 (2007); Geoffrey Gomery, *Whose Autonomy Matters? Reconciling the Competing Claims of Privacy and Freedom of Expression*, 27 LEGAL STUD. 404 (2007).

compasses a multitude of aspects such as honor, reputation and private life.[30] Due to the influence of written constitutions and the dynamic role of constitutional courts' interpretations, U.S. and German law highly qualify for a comparison though they belong to different legal families.[31]

Other reasons for comparing the U.S. and German approaches to balancing free speech and protection against false portrayals lie in the importance of both legal systems: The U.S. Constitution, the oldest democratic one in the world, and the German Basic Law for the Federal Republic of Germany (Grundgesetz [GG])[32] have been used as models for new democracies (e.g. in Central and Eastern Europe as well as the South African Constitution of 1996).[33] From a structural perspective, the German Federal Constitutional Court is perhaps "one of the few courts in the world that rivals the U.S. Supreme Court in political significance."[34] Beyond originating from the shared cultural and ethical heritage of Western civilization,[35] both constitutional democracies show striking similarities

30. *See* Hannes Rösler, *Harmonizing the German Civil Code of the Nineteenth Century with a Modern Constitution—The Lüth Revolution 50 Years Ago in Comparative Perspective*, forthcoming (setting forth the development of the German general personality law (*allgemeines Persönlichkeitsrecht*)); Ulrich Karpen, Nils Mölle & Simon Schwarz, *Freedom of Expression and the Administration of Justice in Germany*, 9 EUR. J. L. REFORM 63 (2007). A recommendable overview about German law is provided in INTRODUCTION TO GERMAN LAW (Joachim Zekoll & Mathias Reimann eds., 2d ed. 2005). For more on German legal thought, see William Ewald, *Comparative Jurisprudence (I): What Was It Like to Try a Rat?*, 143 U. PA. L. REV. 1889, 2045 et seq. (1995).

31. *See* GEORGIOS GOUNALAKIS & HANNES RÖSLER, EHRE, MEINUNG UND CHANCENGLEICHHEIT IM KOMMUNIKATIONSPROZEß – EINE VERGLEICHENDE UNTERSUCHUNG ZUM ENGLISCHEN UND DEUTSCHEN RECHT DER EHRE, 12, 103-106 (1998) (analyzing the influence of constitutional law in connection with a comparison of the English and German tort of defamation); *see id.* at 98 (dealing with the right of privacy). It still remains unclear how far the Human Rights Act of 1998 will function as a constitutional substitute. *See* Hannes Rösler, *Großbritannien im Spannungsfeld europäischer Rechtskulturen*, 100 Zeitschrift für vergleichende Rechtswissenschaft [ZVglRWiss] 448, 449-50 (2001); BIRGIT BRÖMMEKAMP, DIE PRESSEFREIHEIT UND IHRE GRENZEN IN ENGLAND UND DER BUNDESREPUBLIK DEUTSCHLAND – EINE VERGLEICHENDE DARSTELLUNG IN VERFASSUNGSRECHTLICHER, ZIVILRECHTLICHER, STRAFRECHTLICHER UND TATSÄCHLICHER HINSICHT (1997).

32. Promulgated on May 23, 1949.

33. *See* Bruce Arnold Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633 (2000) (arguing that emerging democracies should take the German constrained parliamentary government as a model rather than the U.S. style of presidentialism and separation of powers). *But see* Steven G. Calabresi, *The Virtues of Presidential Government: Why Professor Ackerman Is Wrong to Prefer the German to the U.S. Constitution*, *in* 18 CONST. COMMENTARY 51 (2001) (criticizing Ackerman's thesis); Jeremy Sarkin, *The Effect of Constitutional Borrowings on the Drafting of South Africa's Bill of Rights and Interpretation of Human Rights Provisions*, 1 U. PA. J. CONST. L. 176, 184-87 (1998) (pointing out that some elements of the Constitution of South Africa have their origins in German and Canadian constitutional law).

34. Markus Dirk, *Dubber* (Book Review), 40 AM. J. LEGAL HIST. 107 (1996) (reviewing DAVID P. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY (1994)).

35. AS ARTHUR TAYLOR VON MEHREN, 40 THE U.S. LEGAL SYSTEM: BETWEEN THE COMMON LAW AND CIVIL LAW LEGAL TRADITIONS, Centro di studi e ricerche di diritto comparato e straniero, Saggi, conferenze e seminari, 1 (2000), stresses common and civil law tradition more broadly. Tendencies of Eurocentrism are also a cause of critique. *See* Mathias Reimann, *Stepping Out of the European Shadow: Why Comparative Law in the United States Must Develop its Own*

in their strong emphasis on the institutional requirement of free speech in both the First Amendment and the German Constitution.

In regard to legal protection of personality, German and U.S. law also exhibit parallels. They are both still in the formative stage in nearly all sectors of this area, especially with regard to the rights of relatives. Both legal systems reject monetary damages for family heirs in the case of immaterial infringement of the reputation of the deceased.[36] As supporting evidence of the aforementioned legal convergence, the German Federal Supreme Court (*Bundesgerichtshof* [BGH])[37] ruled in its groundbreaking[38] 1999 *Marlene Dietrich* decision that in the case of commercial use of personality, specifically in terms of the name and image of a person, a right to damages exists even when the individual in question has passed away.[39] U.S.-American law, which has been quite progressive in adapting its causes of action, classifies this type of case as a right of publicity,[40]

Agenda, 46 AM. J. COMP. L. 637 (1998).

36. For Germany BGH, Neue Juristische Wochenschrift [NJW] 1974, 1371 – *Fiete Schulze*; *affirmed in* Entscheidungen des Bundesgerichtshofs in Zivilsachen [BGHZ] 143, 214 – *Marlene Dietrich*.

37. The *Bundesgerichtshof* is the highest level of the "ordinary judiciary" in civil and criminal matters. Its decisions are final unless a constitutional aspect comes in or the case has to be referred to the European Court of Justice in Luxembourg. *See* PETER L. MURRAY & ROLF STÜRNER, GERMAN CIVIL JUSTICE (2004).

38. *See* the accounts of Horst-Peter Götting, *Die Vererblichkeit der vermögenswerten Bestandteile des Persönlichkeitsrechts – ein Meilenstein in der Rechtsprechung des BGH*, NJW 2001, 585, 586; *see* Susanne Bergmann, *Publicity Rights in the United States and in Germany: A Comparative Analysis*, 19 LOY. L.A. ENT. L. REV. 479 (1999) (comparing U.S. law and the (former) German law); Horst-Peter Götting, PERSÖNLICHKEITSRECHTE ALS VERMÖGENSRECHTE (1995) 237-242, 273-4; Horst-Peter Götting, *Persönlichkeitsmerkmale von verstorbenen Personen der Zeitgeschichte als Marke*, 103 Gewerblicher Rechtsschutz und Urheberrecht [GRUR] 615, 616-18 (2001); Daniel Biene, *Celebrity Culture, Individuality, and Right of Publicity as a European Legal Issue*, 35 INT'L REV. INDUS. PROP. & COPYRIGHT L. [IIC] 505 (2005); critical Haimo Schack, *Postmortale Verletzung des allgemeinen Persönlichkeitsrechts – „Marlene Dietrich"*, JZ 2000, 1060. Ansgar Staudinger & Rüdiger Schmidt, *Marlene Dietrich und der (postmortale) Schutz vermögenswerter Persönlichkeitsrechte*, Juristische Ausbildung [Jura] 2001, 241; Ingo Frommeyer, *Persönlichkeitsschutz nach dem Tode und Schadensersatz – BGHZ 143, 214 ff. („Marlene Dietrich") und BGH NJW 2000, 2201 f. („Der blaue Engel")*, Juristische Schulung [JuS] 2002, 13; Alexander Jung, *Persönlichkeitsrechtliche Befugnisse nach dem Tode des Rechtsträgers*, AfP 2005, 317 (uttering that the BGH wrote legal history with the *Marlene* decision); Rüdiger Klüber, PERSÖNLICHKEITSSCHUTZ UND KOMMERZIALISIERUNG – DIE JURISTISCH-ÖKONOMISCHEN GRUNDLAGEN DES SCHUTZES DER VERMÖGENSWERTEN BESTANDTEILE DES ALLGEMEINEN PERSÖNLICHKEITSRECHTS 62-66 (2007).

39. BGHZ 143, 214 – *Marlene Dietrich* (Here, the producer of a musical with the translated title *Where Have All the Flowers Gone*? [*Sag' mir, wo die Blumen sind*] permitted a car manufacturer to use a portrait of Marlene Dietrich and the signature "Marlene" for the special edition of a vehicle; he also permitted several merchandising products). For the parallel case, see BGH, NJW 2000, 2201 – *Der blaue Engel* (using a "blue angel" environmental logo, the defendant placed a newspaper advertisement with the headline "to adore the blue angel is not sufficient for us," in order to advertise the environmental compatibility of its products. However, the company only implicitly referred to the environmental logo, and used a photograph of a scene from the film *The Blue Angel.*); *cf.* for merchandising articles regarding a living German singer BGH, Neue Juristische Wochenschrift Rechtsreport [NJW-RR] 1987, 231 – *Nena*.

40. *See* Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977) (dealing with a

which is a far-reaching property right and can thus be inheritable.[41] German law, in contrast, categorizes the problem as an economic aspect of overarching personality rights.[42] Notwithstanding these differences in systemization, the basic trend in accepting post-mortem rights at least *as property* is apparent.

U.S. law takes a more stringent approach when it comes to the deceased's reputation and privacy *as dignity*.[43] Following the notion that "the dead don't hear" and thus that libel and slander are matters between the living, U.S.-American courts refuse to remedy defamation that is aimed at the deceased and affects him or her alone.[44] Yet in regard to the privacy right of protection from false light portrayal, the question is still open. The mentioned restriction of defamation law does not necessarily have to be applicable to the newer tort of false light portrayals.[45]

The issue is of more general relevance. By favoring expression and pecuniary damages[46] U.S.-American law, perhaps, seems to misconstrue the very nature of personality rights, which are primarily of immaterial quality yet significant to society, creating a problem in the choice and extent of available remedies. In German law—as will be detailed in Part IV— death does not stop the state's duty to protect individuals from assaults on human dignity.[47] Decades

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news broadcast of a 15-second human cannonball act, the Supreme Court held that the First Amendment did not permit the broadcasting of the entire performance since the commercial value of the act would be endangered). *See* HUW BEVERLEY-SMITH, THE COMMERCIAL APPROPRIATION OF PERSONALITY 145 et seq. (2002) (dealing with English, Australian, U.S., Canadian and, briefly, German law on the commercial exploitation of attributes of an individual's personality).

41. Currently this is the case in California, Connecticut, Florida, Georgia, Illinois, Indiana, Kentucky, Nebraska, Nevada, New Jersey, Ohio, Oklahoma, Tennessee, Texas, Virginia and Washington. Edward H. Rosenthal, *Rights of Publicity and Entertainment Licensing, in* UNDERSTANDING THE INTELLECTUAL PROPERTY LICENSE 235, 245 (Practising Law Institute ed. 2007) (noting a "growing trend toward the recognition of a post-mortem right of publicity"); Peter L. Felchert & Edward L. Rubint, *The Descendibility of the Right of Publicity: Is There Commercial Life After Death?*, 89 YALE L.J. 1125, 1127 (1980) ("most forms of property are devisable, and it seems reasonable to regard a person's property right in his name or likeness to be devisable as well"); *see also infra* note 239.

42. *See supra* note 36. However, the court has sadly not made use of a comparative reference to U.S. law.

43. *See supra* note 14.

44. *See* Rose v. Daily Mirror, Inc., 31 N.E.2d 182 (N.Y. 1940) (the classic case stating that "libel or slander upon the memory of a deceased person which makes no direct reflection upon his relatives gives them no cause of action for defamation."). This article does not deal with cases where the defamation also affects living people, either because their good name is affected or because the statement contains an affront against their reputation. *See* WILLIAM H. BINDER, *PUBLICITY RIGHTS AND DEFAMATION OF THE DECEASED: RESURRECTION OR R.I.P.?*, 12 DEPAUL-LCA J. ART & ENT. L. & POL'Y 297, 317-322 (2002) (discussing these categories).

45. WEILER, *supra* note 3, at 195.

46. Which is nonetheless in some cases accurate and to a certain degree serves as a model to aspire to, for example, in regard to newer innovations in German law. For the *Marlene* line of thought, see *supra* notes 38, 39 and the accompanying text; for the *Caroline* approach allowing higher damages for deterrence, see BGHZ 128, 1, 16 – *Caroline von Monaco I*; confirmed in BGH, NJW 1996, 984 – *Caroline von Monaco II*; BGHZ 131, 332 – *Caroline von Monaco III*.

47 Under the constitutional "inviolability of human dignity" according to the opening Article of Ger-

after death, a posthumous personality right of the deceased (*postmortales Persönlichkeitsrecht*) may still exist. As mentioned, an *immaterial* infringement of the deceased's reputation and privacy does not lead to awards of damages. But such infringements do allow for non-material remedies, for example, a court order to take the product in question off the market.[48] This Article argues that an expansion of the limited spectrum of remedies in U.S. law would give an alternative and appropriate form of remedy, which could be used to cap high damage verdicts in libel and slander law in general.[49] The Article also addresses the discrepancies in regard to other personality rights and toward criminal law with regard to the coherence of the rule "the dead don't hear." It will also discuss whether a legislative step forward is needed, especially given the unsuccessful Uniform Defamation Act (1991).[50]

The present Article advocates further for establishing a U.S. posthumous personality right. For this, one needs to refer to the larger framework. After all, the posthumous personality right is a special case of the general protection of personality rights (applicable for living people) so the Article has to go well beyond the right to posthumous personality protection and must provide a contextual perspective on free speech. The following third part therefore details the differences and similarities regarding the balancing of freedom of speech with personality rights as well as the role of human dignity in this process. The latter is essential in Germany (being the basis for the posthumous personality rights) and the U.S. law also shows some elements of human dignity. Thus the fourth part will explain the German way of deriving posthumous rights from the human dignity of the deceased that, for example, the relatives administer for him or her. Part five then contrasts this with the U.S. law that in some limited cases has recognised the protection of the harmed feelings of relatives. Here, it is argued that a U.S. posthumous personality right is best established by uniform legislation, but it is more likely that the courts will develop this legal concept resting on the elements of human dignity. The Article would be incomplete without an analysis of the different remedies—depending on the form of violation (newspaper article, book or film), type (opinion or fact) as well as its degree (minor or severe).

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many's Basic Law (Art. 1(1) GG), BVerfGE 30, 173, 194 – *Mephisto*, with two partially dissenting options.

48. This will be further explained in Part V F.

49. *See* WEILER, *supra* note 3, at 141 (raising the question if a right of reply in press cases—and thus the statute at issue in Miami Herald v. Tornillo, 418 U.S. 241 (1974)—should be a part of the legislation to limit excessive damage awards in defamation cases).

50. The draft was not approved by the National Conference of Commissioners on Uniform State Laws. *See* Randall P. Bezanson, *The Uniform Defamation Act, in* REFORMING LIBEL LAW 323 (John Soloski & Randall P. Bezanson eds., 1992).

III.
DIFFERENCES AND COMMONALITIES

A. Ways of Cultivating Free Speech as a Fundamental Constitutional Value

Both constitutional regimes, similar in design and function, recognize the constitutive and stabilizing function[51] of free individual and public formation of opinion through a process of communication[52] as an essential prerequisite to a functioning modern democracy.[53] After all, it is now agreed nearly universally that democracy has an interest in the free flow of information. The statement of Justice William Brennan (1906–1997) in *New York Times v. Sullivan* (1964) that the First Amendment provides that "debate on public issues should be uninhibited, robust, and wide-open"[54] is closely reflected in the German position.[55]

1. Balancing Approach in the Analysis

A central aspect in Germany is the open, case-specific balancing approach the German Federal Constitutional Court employs in nearly all free expression matters, which lower courts are required to utilize in order for their decisions to be held constitutional.[56] In order to determine who has a better claim to protection, the Court has to balance competing or clashing constitutional values against each other (*Güterabwägung*), taking into account all the circumstances of the particular case.[57] The BVerfG addressed this delicate balancing procedure in its famous *Lüth* decision.[58] The Court explained that, because private law rules can count as "general laws"[59] and can legally curtail the basic right to free-

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51. *See* Art. 8(1) GG; *see also* BVerfGE 69, 315, 347 – *Brokdorf* (regarding the freedom of assembly); because of the valve function, the Court stresses the spontaneity of free speech as a prerequisite for the force and variety of public debate, permitting a harsh tone at times; BVerfGE 30, 336, 347; BVerfGE 34, 269, 283 – *Soraya* case from 1973; BVerfGE 54, 129, 139 – *Römerberg talks*.

52. *See* BVerfGE 57, 295, 319 – *third broadcasting* case.

53. *See* BVerfGE 12, 113, 125 – *Schmid-Spiegel*; before BVerfGE 5, 85, 204 – *KPD*; BVerfGE 7, 198, 208 – *Lüth* case issued in 1958.

54. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

55. BVerfGE 12, 113 – *Schmid-Spiegel* case issued in 1961; *see also* CURRIE, *supra* note 4, at 190-192.

56. This is clearly different from formal tests used by the U.S. judiciary.

57. BVerfGE 7, 198, 210-11.

58. BVerfGE 7, 198; For more detail, see *supra* note 30. Another famous case stressed the need for careful balancing. BVerfGE 93, 266 – *Soldiers are Murderers* (or *Tucholsky* case); *see also* Georgios Gounalakis, *"Soldaten sind Mörder,"* NJW 1996, 481.

59. In the sense of Article 5(2) GG. Although the historical meaning is not entirely clear, Basic Law considers general laws as those acts that do not forbid an opinion as such, but rather serve to protect a legitimate interest without regard to any particular opinion and protect a community value superior to the freedom of opinion. BVerfGE 7, 198, 209-10.

dom of expression,[60] they have to be interpreted restrictively in the light of the particular "weight" of this basic right in a democracy.[61] General laws must be read in light of the significant value qualification of Article 5 GG so that the restrictive effect of "general laws" is itself limited. This "seesaw theory of reciprocal effect" (*Wechselwirkungstheorie*)[62] leads to far more protection for freedom of expression than the mere text of Article 5 GG appears to offer.[63]

The BVerfG, citing Article 11 of the Declaration of the Rights of Man and Citizen (1789), regards the right to freedom of expression as a basic human right, as "un des droits les plus precieux de l'homme."[64] According to the Court, this right is absolutely essential to a free and democratic state since it alone enables continuous intellectual debate and the struggle of opinions.[65] The Federal Constitutional Court has clearly looked at the international and comparative scene, but often it slightly disguises its sources.[66] In German academia, in contrast, explicit positive and negative references to the U.S.-American model are quite common. Some criticize the liberal case law of the BVerfG as infringing upon the protection of honor (*Ehrenschutz*),[67] but others, like the present author, claim that the Court is right on the whole.[68] Depending on the premise, the evaluation of U.S. law also varies. Some, to no surprise, identify *New York Times v. Sullivan* as a total mistake, even as scandalous, illiberal and bad for democracy.[69] In their opinion, the protection of individual personality rights in U.S. law is a mere theoretical possibility.[70] Others rightfully stress the special

60. Article 5(1) GG.

61. BVerfGE 7, 198.

62. BVerfGE 7, 198, 209; *see also* BVerfGE 90, 241, 248 – *Holocaust denial* case of 1994.

63. CURRIE, *supra* note 4, at 180, 340. The first two paragraphs of Article 5 GG read: "(1) Every person shall have the right freely to express and disseminate his opinions in speech, writing, and pictures and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship. (2) These rights shall find their limits in the provisions of general laws, in provisions for the protection of young persons, and in the right to personal honor." All quotations of the Basic Law are taken from GERMAN BUNDESTAG, BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY, TEXT EDITION—STATUS: DECEMBER 2000, 2001.

64. BVerfGE 7, 198, 208.

65. BVerfGE 7, 198, 208 (referring to BVerfGE 5, 85, 205).

66. *See, e.g.*, *Lüth*: BVerfGE 7, 198, 208.

67. Rolf Stürner, *Die verlorene Ehre des Bundesbürgers – Bessere Spielregeln für die öffentliche Meinungsbildung?*, JZ 1994, 865; PETER J. TETTINGER, DIE EHRE – EIN UNGESCHÜTZTES VERFASSUNGSGUT? (1995); Fritz Ossenbühl, *Medien zwischen Macht und Recht*, JZ 1995, 633; Walter Schmitt Glaeser, *Meinungsfreiheit, Ehrenschutz und Toleranzgebot*, NJW 1996, 873; Horst Sendler, *Kann man Liberalität übertreiben?*, Zeitschrift für Rechtspolitik [ZRP] 1994, 343; RALF STARK, EHRENSCHUTZ IN DEUTSCHLAND (1996).

68. *See* Hannes Rösler, *Zur Struktur des Allgemeinen Persönlichkeitsrechts und das Recht der persönlichen Ehre in der Wertordnung des Grundgesetzes*, Juristische Schulung [JuS] 1997, 1151; GOUNALAKIS & RÖSLER, *supra* note 31, at 116 et seq. with many further references regarding the disussion.

69. Martin Kriele, *Ehrenschutz und Meinungsfreiheit*, NJW 1994, 1897 (1898, note 3).

70. AXEL BEATER, ZIVILRECHTLICHER SCHUTZ VOR DER PRESSE ALS KONKRETISIERTES

circumstances of the American setting.[71]

The historical development might also explain some of the sentiments behind the German discussion. Perhaps the protection of honor and reputation, in the eyes of some, has a more "honorable" tradition than the right to free speech,[72] although both promote the individual's self-fulfillment in modern society.[73] In favor of the ruling "liberal" position, commentators borrow arguments from the idiosyncratic U.S. nearly[74] "absolutist" free speech approach taken by the Supreme Court as proof that the intermediate position of the BVerfG[75] seems to be a sensible one.[76] The standpoint is also intermediate insofar as it acknowledges that there is no simple choice between the legitimate interests of free speech or defamation law and the protection of privacy.

VERFASSUNGSRECHT – GRUNDSTRUKTUREN IM VERGLEICH VON ENGLISCHEM, US-AMERIKANISCHEM UND DEUTSCHEM RECHT 74 (1996).

71. *See, e.g.,* JÜRGEN STOCK, MEINUNGS- UND PRESSEFREIHEIT IN DEN USA: DAS GRUNDRECHT, SEINE SCHRANKEN UND SEINE ANFORDERUNGEN AN DIE GESETZESGESTALTUNG, 1986; PETRA KRETSCHMER, STRAFRECHTLICHER EHRENSCHUTZ UND MEINUNGSFREIHEIT UND PRESSEFREIHEIT IM RECHT DER BUNDESREPUBLIK DEUTSCHLAND UND DER VEREINIGTEN STAATEN VON AMERIKA (1994); Astrid Stadler, *Persönlichkeitsrecht contra Medienfreiheit – Zivilrechtliche Aspekte der Kontroverse in den U.S.A.*, JZ 1989, 1084; Guido C. Zöllner, *Ehrenschutz in den Vereinigten Staaten von Amerika – Vorbild für Deutschland?*, Zeitschrift für Urheber- und Medienrecht [ZUM] 1997, 719, 731.

72. Ernst-Gottfried Mahrenholz, *Kritik an der Justiz gehört zur Sache*, DRiZ-Interview, Deutsche Richterzeitung [DRiZ] 1995, 35, 37; Peter E. Quint, *Free speech and private law in German constitutional theory*, 48 MD. L. REV. 247, 251 (note 11) (1989) similarly argues that elevated value given to personal honor in the German law of defamation could be seen as a remnant of an aristocratic tradition. For the legal development in Germany, see REINHARD ZIMMERMANN, THE LAW OF OBLIGATIONS – ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION 1085-94 (1996), and Adrian Popovici, *Personality Rights—A Civil Law Concept*, 50 LOY. L. REV. 349 (2004).

73. *See* AMELUNG, *supra* note 21.

74. *See* Morse v. Frederick 127 S.Ct. 2618 (2007) (regarding the rights of schools to limit student speech rights promoting illegal drug use).

75. For an English translation, *see* Ulrich Karpen, *Freedom of Expression as a Basic Right: a German View*, 37 AM. J. COMP. L. 395 (1989); FREDE CASTBERG, FREEDOM OF SPEECH IN THE WEST: A COMPARATIVE STUDY OF PUBLIC LAW IN FRANCE, THE UNITED STATES, AND GERMANY (1960); PNINA LAHAV, PRESS LAW IN MODERN DEMOCRACIES: A COMPARATIVE STUDY (1985); Peter J. Tettinger, *Protection of Freedom of Expression in German Constitutional and Civil Law, in* REPORTS ON GERMAN PUBLIC LAW, 115 (Rudolf Bernhardt & Ulrich Beyerlin eds., 1991); Donald P. Kommers, *The jurisprudence of free speech in the United States and in the Federal Republic of Germany*, 53 S. CALIF. L. REV. 657 (1980); KOMMERS, *supra* note 4, at 360-442; ERIC M. BARENDT, BROADCASTING LAW: A COMPARATIVE STUDY (1993) (dealing with radio and television law in Great Britain, France, Germany, Italy and the U.S.).

76. *See* Friedrich Kübler, *Öffentlichkeit als Tribunal? – Zum Konflikt zwischen Medienfreiheit und Ehrenschutz*, JZ 1984, 541; Friedrich Kübler, *Ehrenschutz, Selbstbestimmung und Demokratie*, NJW 1999, 1281. The then concerned (1987–1999) Federal Constitutional Court judge also defended the Court's position, *see* Dieter Grimm, *Die Meinungsfreiheit in der Rechtsprechung des Bundesverfassungsgerichts*, NJW 1995, 1697; Dieter Grimm, *„Wir machen das Meinungsklima nicht", Antworten auf die Kritik an der Ehrenschutz-Rechtsprechung des BVerfG*, ZRP 1994, 276; GEORG NOLTE, BELEIDIGUNGSSCHUTZ IN DER FREIHEITLICHEN DEMOKRATIE – EINE VERGLEICHENDE UNTERSUCHUNG ZUR RECHTSLAGE IN DER BUNDESREPUBLIK DEUTSCHLAND, IN DEN VEREINIGTEN STAATEN VON AMERIKA SOWIE NACH DER EUROPÄISCHEN MENSCHENRECHTSKONVENTION (1992).

Freedom of expression does not justify the disregard of other interests that deserve constitutional protection. After all, the latter personality rights have their public validity as well: Freedom of expression "does not come naturally to the ordinary citizen but needs to be learned. It must be restated and reiterated not only for each generation, but for each new situation."[77] So the question arises as to how public discourse can be fostered and how the participation of minorities and other groups that are disadvantaged in this regard can be encouraged to participate. Part of the answer is education, providing a good example as well as creating a positive and fair atmosphere of discourse. The latter can be partly cultivated by the law. The rights to speech and media cannot be understood in isolation from other constitutional values. In other words, according to a contextual perspective, free speech must be given certain limits.

2. "Absolutist" Free Speech Position

As to U.S. law, the requirement that Congress shall make no law abridging the freedom of the press, has—despite the absoluteness of the text—not been understood as a total barrier to state intervention. The necessary definitions of "press," "freedom," and also "abridgment" have been influenced by judicial rulings concerning the limits and purposes of freedom of speech.[78] Without doubt the First Amendment was reconceptualized or even "amended" by the U.S. Supreme Court's serious reading and enforcement in 1919.[79] Professor David Rabban, in reviewing the history of the First Amendment, observed that the "Supreme Court decisions in the generation before World War I reflected a tradition of pervasive hostility to the value of free speech."[80] The decisions often simply denied the implicated freedom of expression. The Supreme Court followed the declaratory theory regarding the Bill of Rights: "[T]he first 10 amendments to the Constitution, commonly known as the 'Bill of Rights,' were not intended to lay down any novel principles of government, but simply to embody certain guarantees and immunities which we had inherited from our English ancestors, and which had, from time immemorial, been subject to certain well-recognized exceptions, arising from the necessities of the case."[81]

Further, U.S.-American academia did not recognize that emancipated freedom of communication was more than a piece of English heritage until the early

77. Thomas I. Emerson, *Toward A General Theory of the First Amendment*, 72 YALE L.J. 877, 894 (1963).

78. Frederick Schauer, *The Boundaries of the First Amendment*, 117 HARV. L. REV. 1765 (2004); RANDALL P. BEZANSON, HOW FREE CAN THE PRESS BE? (2003) (analysing nine cases).

79. Schenck v. United States, 249 U.S. 47 (1919); United States v. Debs, 249 U.S. 211 (1919); Frohwerk v. United States, 249 U.S 204 (1919); Abrams v. United States, 250 U.S. 616 (1919).

80. David Rabban, *The First Amendment in Its Forgotten Years*, 90 YALE L.J. 514, 542 (1981); *see also* J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375 (discussing the ideological drift and the changed concepts of free speech).

81. *See* Robertson v. Baldwin, 165 U.S. 275, 281 (1897).

20th century.[82] This development of the modern First Amendment illustrates the necessity of an ever-changing constitutional understanding which enables its application to modern circumstances. Above all, there is no "compulsory" meaning of the First Amendment.[83] It depends on political and cultural context received over time. As a consequence, the nearly absolute priority of free speech has gained a sanctity that sometimes can relegate other legitimate interests, like the protection of personality rights—a development that becomes particularly evident in a comparative perspective.[84]

B. Human Dignity

1. According to German Law (and Beyond)

The constitutional "face" of the German posthumous personality right is inextricably linked to the private aspect of this right. According to the Federal Constitutional Court, human dignity contained in Article 1 of the Basic Law forces German private law judges to accept and shape such a right in detail. As the notion of human dignity is the conceptual and normative backbone of all German constitutional law, it is necessary to explain why it is so prominently located at the beginning of the Basic Law. The different premises help explain why the two legal systems approach the conceptual and normative struggle of "human dignity protection through the law of defamation and privacy" versus "free speech" in distinct manners.

In the shadow of the Holocaust, lawmakers made dignity the cornerstone of Germany's legal architecture binding all three powers. In 1949 Germany, history put not just libertarian declarations, but also a strong notion of dignity on the political and constitutional agenda. The human dignity (*Menschenwürde*) on which the German general personality right, and specifically the posthumous personality right, partly rest is "the supreme value and dominates the entire value system of Basic Rights."[85] This priority in a hierarchical order of values is systemati-

82. Notable are the works of Henry Schofield, *Freedom of the Press in the United States, in* 2 ESSAYS ON CONSTITUTIONAL LAW AND EQUITY 75 (1921) (originally 1914), and Zechariah Chafee Jr., *Freedom of Speech in War Time*, 32 HARV. L. REV. 932 (1919); *see also* ANTHONY LEWIS, MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT 69, 75 (1992).

83. *See* LEONARD W. LEVY, EMERGENCE OF A FREE PRESS (1985) (in contrast to his book LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY (1960)) (now arguing that the First Amendment, even if it was not the Framers' intention, was in practice originally more broadly interpreted by the courts). *See* David A. Anderson, *Levy vs. Levy* (Book Review), 84 MICH. L. REV. 777 (1986) (reviewing L. LEVY, EMERGENCE OF A FREE PRESS, for his change of opinion); David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455 (1983); LEWIS, *supra* note 82, at 51, 54-55.

84. Frederick H. Lawson, *Comparative Law as an Instrument of Legal Culture, in* 2 SELECTED ESSAYS 73 (1977).

85. BVerfGE 6, 32, 41. The German Federal Constitutional Court stresses this constantly in its dignitarian jurisprudence. *See* BVerfGE 27, 1, 6; BVerfGE 30, 173, 193.

cally sound since Article 1 states[86]—without possibility of alteration:[87]

> (1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.
> (2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.
> (3) The following basic rights [including, on the one hand, Article 2(1) GG regarding the right to a free development of one's personality on which the general personality right is based in conjunction with Article 1 GG and, on the other hand, Article 5(1) GG on the freedom of communication] shall bind the legislature, the executive, and the judiciary as directly applicable law.

The transcendental quality of Article 1(1) GG, which has served as a model for nations seeking deliverance from their past through law, is clear.[88] The provision and its interpretation urging the state not just to respect human dignity but to protect it against third-party infringements[89] sets an example for national[90] and perhaps also pan-European[91] standards. Article 1 mirrors the humanistic Kantian underpinning of the individual right of human dignity.[92] But it does not

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86. Official translation by GERMAN BUNDESTAG, *supra* note 63.

87. Amendments to the principles set forth in Arts. 1 and 20 GG as well as fundamental changes affecting the division into *Länder* and their legislative participation are inadmissible according to Art. 79(3) GG.

88. *See* S. AFR. CONST. 1996, Article 10 (providing: "Everyone has the inherent dignity and the right to have their dignity respected and protected."); *see also* 1975 Syntagma (SYN) [Constitution] 2(1) (Greece) (providing: "Respect for and protection of human dignity constitute the primary obligation of the State."); translations based on Sarkin *supra* note 33 and *Ioannis K. Karakostas, Der Schutz der Privatheit (besser: Privatsphäre) von Personen des öffentlichen Lebens im griechischen Zivilrecht*, Zeitschrift für Europäisches Privatrecht [ZEuP] 2003, 114; *see also* Francois Venter, *Human dignity as a constitutional value: a South African perspective, in* RECHT, STAAT, GEMEINWOHL: FESTSCHRIFT FÜR DIETRICH RAUSCHNING (Jörn Ipsen et al. eds., 2001); Jonathan M. Burchell, *The Protection of Personality Rights, in* SOUTHERN CROSS: CIVIL LAW AND COMMON LAW IN SOUTH AFRICA 639 (Reinhard Zimmermann & Daniel Visser eds., 1996).

89. BVerfGE 39 1, 41, 51–*first abortion* case from 1975.

90. *See* CATHERINE DUPRÉ, IMPORTING THE LAW IN POST-COMMUNIST TRANSITIONS: THE HUNGARIAN CONSTITUTIONAL COURT AND THE RIGHT TO HUMAN DIGNITY (2003) (regarding the importation of German law).

91. *See* THE PRINCIPLE OF RESPECT FOR HUMAN DIGNITY (Council of Europe ed., 1999); Jackie Jones, *"Common constitutional traditions": Can the meaning of human dignity under German law guide the European Court of Justice?,* Public Law 167 [2004]; James Q. Whitman, *On Nazi 'Honour' and the New European 'Dignity', in* DARKER LEGACIES OF LAW IN EUROPE: THE SHADOW OF NATIONAL SOCIALISM AND FASCISM OVER EUROPE AND ITS LEGAL TRADITIONS 243 (Christian Joerges & Navraj Singh Ghaleigh eds., 2003) (regarding the aspects of the dignitary regime predating 1945).

92. *See* George P. Fletcher, *Law and Morality: A Kantian Perspective*, 87 COLUM. L. REV. 533 (1987); for the Kantian roots of the German constitutional "image of man" see George P. Fletcher, *Human Dignity as a Constitutional Value*, 22 U. W. ONTARIO L. REV. 171, 178-82 (1984); *Hans-Carl Nipperdey, Die Würde des Menschen, in* I DIE GRUNDRECHTE: HANDBUCH DER THEORIE UND PRAXIS DER GRUNDRECHTE 1 (Franz L. Neuman, Hans-Carl Nipperdey & Ulrich Scheuner eds., 1954); WILHELM WERTENBRUCH, GRUNDGESETZ UND MENSCHENWÜRDE (1958); Hasso Hofmann, *Die versprochene Menschenwürde*, 118 Archiv des öffentlichen Rechts [AöR] 353 (1993); for a new (but also provocative) comment on human dignity, *see* Matthias Herdegen, *in* GRUNDGESETZ-KOMMENTAR, Art. 1(1) (Theodor Maunz & Günter Dürig eds., 49d ed. 2007); Paul Cliteur & René van Wissen, *Human dignity as the foundation for human rights: a discussion of Kant's and*

remain in the philosophical realm; it legally commits German law to this far-reaching inviolable human right. Besides Germany, the protection of human dignity (*dignitas*) is a national principle in many European constitutional regimes with a civilian tradition, for example, France,[93] Spain,[94] Ireland,[95] Greece,[96] Portugal,[97] Sweden,[98] Finland,[99] and Hungary.[100] Human dignity is also mentioned in Article 1 of the European Union Charter of Fundamental Rights,[101] which will soon be put into force.[102]

2. Scope and Role of Human Dignity in the U.S. Constitution

After having detailed the role of human dignity as representing the most fundamental value of the German legal order, it is conceivable that an obstacle

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Schopenhauer's work with respect to the philosophical reflections on human rights, 35 Rechtstheorie 157 (2004); Carlos Ruiz Miguel, *Human Dignity: History of an Idea*, 50 JAHRBUCH DES ÖFFENTLICHEN RECHTS DER GEGENWART 281, 293 et seq. (2002); HERSCHEL BAKER, THE IMAGE OF MAN: A STUDY OF THE IDEA OF HUMAN DIGNITY IN CLASSICAL ANTIQUITY, THE MIDDLE AGES, AND THE RENAISSANCE (1947/1961); VOYAGE AU BOUT DE LA DIGNITÉ: RECHERCHE GÉNÉALOGIQUE SUR LE PRINCIPE JURIDIQUE DE DIGNITÉ DE LA PERSONNE HUMAINE (Centre d'Etudes et de Recherche sur l'Administration Publique, Université Paris I Panthéon-Sorbonne, Stéphanie Hennette-Vauchez et al. eds., 2004); Philippe A. Mastronardi, *Verrechtlichung der Menschenwürde: Transformation zwischen Religion, Ethik und Recht*, *in* MENSCHENWÜRDE ALS RECHTSBEGRIFF 93 (Kurt Seelmann ed. 2004, ARSP-Beiheft 101).

93. Cons. Constit. 27 juillet 1994 Décision n°94-343-344 DC REVUE FRANÇAISE DE DROIT CONSTITUTIONNEL n°20 1er décembre 1994, 799 – Respect for Human Body Act (concluding from the opening paragraph of the preamble to the 1946 Constitution); *cf.* Benoît Jorion, *La dignité de la personne humaine ou la difficile insertion d'une règle morale dans le droit positif*, 115 REVUE DROIT PUBLIC DE LA SCIENCE POLITIQUE EN FRANCE ET A L'ETRANGER 197 (1999); VERONIQUE GIMENO-CABRERA, LE TRAITEMENT JURISPRUDENTIEL DU PRINCIPE DE DIGNITE DE LA PERSONNE HUMAINE DANS LA JURISPRUDENCE DU CONSEIL CONSTITUTIONNEL FRANÇAIS ET DU TRIBUNAL CONSTITUTIONNEL ESPAGNOL (2004).

94. 1978 Constitución [C.E.] art. 10(1) (Spain); cases Tribunal Constitucional S.S.T.C. 120/1990, 150/1991, 212/1996.

95. Ir. CONST., 1937, pmbl.

96. 1975 Syntagma [SYN] [Constitution] arts. 7(2), 106(2) (Greece).

97. 1976 Constitution of the Portuguese Republic Arts. 13(1), 26(2).

98. Regeringsformen [RF] [Constitution] 1:2 (Sweden).

99. 2000 Suomen perustuslaki [Constitution] art. 1 (Finland).

100. 1949 A Magyar Köztársaság Alkotmánya [Constitution] art. 54(1), the provison was added in course of the 1989 amendment; *see supra* note 90.

101. 2000 O.J. (C 364), 1. *See also* Christophe Maubernard, *Le « droit fondamental à la dignité humaine » en droit communautaire: la brevetabilité du vivant à l'épreuve de la jurisprudence de la Cour de Justice des Communautés européennes*, 14 REVUE TRIMESTRIELLE DES DROITS DE L'HOMME 483 (2003); *see* Niall R. Whitty, *Rights of Personality, Property Rights and the Human Body in Scots Law*, 9 EDIN. L.R. 194. 206-08 (2005) (discussing a Scottish and English perspective on dignity in connection with the *actio iniuriarum*); *see also infra* note 113.

102. It was planned that the Charter become compulsory as part of the EU Constitution (2004 O.J. (C 310) 1). Here the provision can be found as Art. II-61. Further reference to human dignity is made at its beginning in Art. I-2. Since the French and Dutch Constitution referenda failed in 2005, it is now agreed that the Charter becomes binding in 2009 with a Reform Treaty (through the drafted art. 6(1) EU Treaty).

for a U.S. posthumous personality right could be that U.S. law does not recognize this broad and at first sight somewhat vague concept. It is notable that the posthumous personality right is not specifically mentioned in the U.S. Constitution, perhaps because it is a comparatively modern legal term.[103] At closer inspection, however, the notion of human dignity lies at the origin of the U.S. Constitution and the roots of the American people. Indeed, the Pilgrims settled in Plymouth in 1620 in an attempt to live with freedom and decency. Additionally, there is a global commitment to human dignity.

That a global commitment to human dignity was documented early by the United Nations further demonstrates that both Germany and the U.S. inherently value human dignity. The preamble and the thirty articles of the United Nations' Universal Declaration of Human Rights of 1948[104] contain five references to the concept of inherent human dignity. The Declaration, drafted approximately at the same time as the Basic Law, also asks the question of how the road to further disaster can be avoided. The end of World War II saw the birth of both the international human rights movement and the United Nations, which was formed on Oct. 24, 1945.[105]

The U.N. Human Rights Declaration represents—as Mary Ann Glendon has put it—"the single most important reference point for cross-cultural discussion of human freedom and dignity in the world today."[106] The Preamble speaks of the "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family [that] is the foundation of freedom, justice and peace in the world," and of the fact that "the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person." The articles section commences with:

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103. Georg Nolte, *European and US Constitutionalism: Comparing Essential Elements, in* EUROPEAN AND US CONSTITUTIONALISM 3, 10 (Georg Nolte ed., 2005).

104. Universal Declaration of Human Rights, adopted and proclaimed by General Assembly resolution 217 A (III) of Dec. 10, 1948. However, the European Convention on Human Rights, signed in Rome on Nov. 4, 1950, does not expressly mention human dignity. This was remedied by Art. 1 of the 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, signed in Oviedo on April 4, 1997 (also by the Council of Europe); *see* Jens Meyer-Ladewig, *Menschenwürde und Europäische Menschenrechtskonvention*, NJW 2004, 981.

105. *See* David Kennedy, *Boundaries in the Fields of Human Rights: The International Human Rights Movement: Part of the Problem?*, EUROP. HUM. RTS. L. REV. 245 (2001) *reprinted in* 15 HARV. HUM. RTS J. 101 (2002) (asserting a critical-pragmatic, but nonetheless sympathetic account of the historical and ideological development of the international human rights movement); David Kennedy, *International Law in the Nineteenth Century: History of an Illusion*, 65 NORDIC JOURNAL OF INTERNATIONAL LAW, 385, 389-90 (1996) *reprinted in* 17 QUINNIPIAC L. REV. 1 (1998) (arguing that the nineteenth century can teach that today's international law is largely rhetorical); DAVID KENNEDY, THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM (2004); *see* Frederick Schauer, *The Exceptional First Amendment, in* AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 29 (Michael Ignatieff ed., 2005) (regarding the methodological and substantive exceptionalism).

106. Mary Ann Glendon, *Knowing the Universal Declaration of Human Rights*, 73 NOTRE DAME L. REV. 1153, 1153 (1998).

"All human beings are born free and equal in dignity and rights."[107] Article 22 proclaims: "Everyone, as a member of society [. . .] is entitled to realization [. . .] of the economic, social and cultural rights indispensable for his dignity and the free development of his personality." Furthermore, Article 23(3) speaks of "an existence worthy of human dignity."[108] The conception of the "self" linked to human dignity is degraded if one is treated as a mere object or means, rather than an inherently valuable being. This anti-instrumentalist notion—of course, influenced by the philosophy of Immanuel Kant (1724–1804)[109]—is combined with a strong communitarian ontology.[110]

Here it is interesting how the Supreme Court in *Gertz v. Robert Welch* explained why defamation law is important:[111]

> The legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood. We would not lightly require the State to abandon this purpose, for [. . .] the individual's right to the protection of his own good name "reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basis of our constitutional system."[112]

Given its fundamental importance for a livable society, the laws of the judicial systems under investigation here stress the equal status of all humans and the value of human dignity, which is essential in fair social interaction.[113]

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107. Art. 1(1) GG, 1st sentence; reprinted above.

108. For which "social" image of the human person is connected with the dignity concept, *see* Glendon, *supra* note 106, at 1172.

109. *See supra* note 92; *cf.* IMMANUEL KANT, METAPHYSICAL ELEMENTS OF JUSTICE: METAPHYSICAL ELEMENTS OF JUSTICE, Pt. 1, 19 (John Ladd trans., Hackett Publishing Company, 2d ed. 1999) (*Grundlegung zur Metaphysik der Sitten*, 1785) ("The supreme basic principle of moral philosophy is therefore: act according to a maxim that can at the same time be valid as a universal law."); *cf.* for the object-formula BVerfGE 30, 1, 26 – *bugging*; *see* comparatively for German law, where the Kantian-communitarian perspective is prevailing, EDWARD J. EBERLE, DIGNITY AND LIBERTY: CONSTITUTIONAL VISIONS IN GERMANY AND THE UNITED STATES (2002).

110. Gregory S. Alexander, *Property as a fundamental constitutional right? The German example*, 88 CORNELL L. REV. 733, 744 (2003); HANS HATTENHAUER, DIE GEISTESGESCHICHTLICHEN GRUNDLAGEN DES DEUTSCHEN RECHTS: ZWISCHEN HIERARCHIE UND DEMOKRATIE (3d ed. 1983); Christian Starck, *The Religious and Philosophical Background of Human Dignity and its Place in Modern Constitutions,* in THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE (David Kretzmer & Eckart Klein eds., 2002), 179.

111. Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974).

112. Citing Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (concurring).

113. Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 1003 (1964) (arguing that the U.S. law contains a dignitarian approach, emphasizing that individuality and human dignity are protected, and criticizing Dean Prosser's division of the right of privacy into four separate torts as impracticable); Edward J. Bloustein, *Group Privacy: The Right to Huddle*, 8 RUTGERS-CAM. L.J. 219, 278 (1977); Robert Post, *Three Concepts of Privacy*, 89 GEO. L.J. 2087, 2088, 2092-98 (2001) (part of a Georgetown symposium on ROSEN, *supra* note 10) (regarding privacy as linked to the concepts of dignity, autonomy and of knowledge creation); Alan Gewirth, *Human Dignity as the Basis of Rights, in* THE CONSTITUTION OF RIGHTS:

3. Extent of Commitment

Differences lie, nonetheless, in the details and the application of the dignitarian commitment. A classic example for the paramount importance of the dignity requirement in German personality law is the case of the then Prime Minister of Bavaria Franz Josef Strauß (1915–1988) who was shown in a magazine caricature as a pig engaged in sexual activities. The Court made clear that in this case the right to freedom of expression does not deserve a higher status than human dignity. Consequently criticism in a formally vilifying or contemptuous way (*Schmähkritik*) that is only marginally linked to any political message does not benefit from its protection.[114] According to the BVerfG, a plainly intentional derogatory attack on the dignity of the caricatured—in which the object no longer bears any human characteristics, but bestial features and is portrayed in a setting of sexual activity (notably a core of intimate life)—deprives the individual in question of personal dignity.[115] The contrast could not be starker to *Hustler Magazine v. Jerry Falwell*,[116] where the Supreme Court in 1988 unanimously decided that a public figure could not recover damages for libel and intentional infliction of emotional distress even when based on a vicious satire or parody.[117] Thus despite sharing the basic concepts, there remains a significant

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HUMAN DIGNITY AND AMERICAN VALUES 10 (Michael J. Meyer & William A. Parent eds., 1992) (arguing that human rights grow out of the notion of human dignity); (dealing with the question of how the dignitarian approach could undermine the First Amendment). *But see* RONALD DWORKIN, FREEDOM'S LAW 1-38 (1996); *infra* note 219; Oscar Schachter, *Human Dignity as a Normative Concept*, 77 AM. J. INT'L L. 849 (1983); David Feldman, *Human Dignity as a Legal Value*, PUBLIC LAW 682 [1999] (part 1), PUBLIC LAW 61 [2000] (part 2); of course this concept plays an important role regarding the excessiveness of capital punishment. *See* Furman v. Georgia 408 U.S. 238, 294 (1972) (Brennan, J., concurring); *see also* Carissa Byrne Hessick, *The Right of Publicity in Digitally Produced Images: How the First Amendment is Being Used to Pick Celebrities' Pockets*, 10 UCLA ENT. L. REV. 1, 6 (2002) (arguing that a digitally altered image can violate a celebrity's right to privacy because it infringes their human dignity, even to an extent not possible by a printed text or an accurate photo); for the German position on privacy law and dignity, *see* BGHZ 13, 334 – *Schacht letters* case from 1954; BVerfGE 35, 202 – *Lebach* case from 1973 (film about a famous crime case; *cf.* Cox Broadcasting v. Cohn, 420 U. S. 469 (1975)); BVerfG, NJW 2000, 1859 – *Lebach II*; BVerfGE 65, 1 – *census* (issued 1983, right to self-determination concerning personal data), and the leading German data protection lawyer Spiros Simitis, *Reviewing Privacy in an Information Society*, 135 U. PA. L. REV. 707, 708 (1987); *see also* MONT. CONST. art. II, § 4 ("The dignity of the human being is inviolable."); Heinz Klug, *The Dignity Clause of the Montana Constitution*, 64 MONT. L. REV. 133 (2003).

114. BVerfGE 75, 369 – *Strauß/Hachfeld*; translation of this 1987 case in 2 DECISIONS OF THE BUNDESVERFASSUNGSGERICHT, FEDERAL CONSTITUTIONAL COURT, FEDERAL REPUBLIC OF GERMANY, pt. 2: Freedom of Speech (Freedom of Opinion and Artistic Expression, broadcasting Freedom and Communication Freedom of the Press, Freedom of Assembly) 1958–1995, 420 (Bundesverfassungsgericht ed., 1998).

115. BVerfGE 75, 369, 379-80.

116. In a parody of a Campari magazine advertisement, the pornographic magazine Hustler described a drunk Falwell having an incestuous encounter with his mother in an outhouse. Falwell, a nationally known minister and commentator on politics and public affairs, sued Larry Flynt, the magazine owner, alleging libel and intentional infliction of emotional distress.

117. Hustler Magazine, Inc. et al. v. Jerry Falwell, 485 U.S. 46 (1988); *see also* Georgios Gounalakis, *Freiräume und Grenzen politischer Karikatur und Satire*, NJW 1995, 809 (comparing

difference as to the extent of the protection.

In sum, the development of a posthumous personality right in the U.S. does not inevitably require a strong concept of human dignity like in Germany. But a stronger dignitarian notion,[118] in addition to the libertarian one,[119] could be fruitful since it would influence the balancing process in a way that at times would be more favorable to personality rights and also fill the current gaps regarding the protection of public figures and minorities. This would also imply acceptance of the humanistic linkage between a community-based free discourse and the necessity for limits to that right in order to protect the dignity of the opinion's target.[120]

IV.
RIGHT OF SUCCESSORS IN GERMANY

Having recapitulated the basics of German free speech and general personality law, the next step is to sketch the specific rights granted to portrayals of the deceased—an area of German personality law that is still developing.

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the two cases); Georg Nolte, *Falwell vs. Strauß: Die rechtlichen Grenzen politischer Satire in den USA und in der Bundesrepublik*, 14 Europäische Grundrechtezeitschrift [EuGRZ] 253 (1988); Hannes Rösler, *Caricatures and Satires in Art Law: The German Approach in Comparison with the U.S., England and the Human Rights Convention*, forthcoming; GESA SIMON, PERSÖNLICHKEITSSCHUTZ GEGEN HERABSETZENDE KARIKATUREN IN DEUTSCHLAND UND FRANKREICH (1995); UWE WOLF, SPÖTTER VOR GERICHT – EINE RECHTSVERGLEICHENDE STUDIE ZUR BEHANDLUNG VON SATIRE UND KARIKATUR IM RECHT DER BUNDESREPUBLIK, FRANKREICHS, ENGLANDS UND DER USA (1996); Christian Hillgruber & Franz Schemmer, *Darf Satire wirklich alles?*, JZ 1992, 946; Dieter Meurer, *Kunst und Recht im Konflikt, in* WAS KOSTET DER SPAß?: WIE STAAT UND BÜRGER DIE SATIRE BEKÄMPFEN, 84 (Nils Folckers & Wilhelm Solms eds., 1997).

118. Of course freedom of expression in the democratic society also has strong dignitarian roots. *See* Leon E. Trakman, *Transforming Free Speech: Rights and Responsibilities*, 56 OHIO ST. L.J. 899, 903-12 (1995) (analyzing the dignitarian and instrumental paradigm).

119. Mary Ann Glendon distinguishes between the dignitarian rights language of Europe and the (more U.S.) libertarian tradition. *See* Angela C. Carmella, *Mary Ann Glendon on Religious Liberty: The Social Nature of the Person and the Public Nature of Religion*, 73 NOTRE DAME L. REV. 1191, 1196-97 (1998); Mary Ann Glendon, *The Forgotten Crucible: The Latin American Influence on the Universal Human Rights Idea*, 16 HARV. HUM. RTS. J. 27 (2003); James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151 (2004). James Q. Whitman, *"Human dignity" in Europe and the United States: The Social Foundations*, 25 HUMAN RIGHTS LAW JOURNAL 17, 22 (2004) (Whitman, correctly urging for guidance by historical sociology, argues that sensibilities differ on either side of the Atlantic and that Continental law follows a Princess-Caroline-of-Monaco sensibility); Giovanni Bognetti, *The Concept of Human Dignity in European and US Constitutionalism*, *in* EUROPEAN AND US CONSTITUTIONALISM, *supra* note 104, at 85.

120. Trakman writes: "It is necessary to preserve the dignity of the target of speech. It is a central means towards communal discourse within a democracy. In ignoring this relationship [already implicit in natural law] between the right to speak and the responsibility for it, the traditional doctrine applied to free speech denies its own roots. In insisting that speech preserves the dignity of the speaker, it ignores the indignity that racist speech inflicts upon its victims. In subscribing to a marketplace in hate, it threatens to undermine the free marketplace in ideas." Trakman, *supra* note 118, at 938.

A. Mephisto Decision

The principle of human dignity—more than even the idea of autonomous communicative development—laid the basis for a specific way of understanding the core purpose of personality rights. To understand how this principle influenced the creation of a post-mortem personality right (*postmortales Persönlichkeitsrecht*), one must analyze the BVerfG's landmark *Mephisto* case mentioned in Part I. This famous German decision, adjudicating posthumous personality representations in literature, illustrates two things. First, it reflects the problem of using artistic creations to further totalitarian political power. Second, it demonstrates the difficulty of the courts in dealing with a mixture of fictional freedom, real-world inspiration of art, and the reference to actual personages who have passed away.

Written by Klaus Mann, *Mephisto* is an obvious portrayal of Gustaf Gründgens. Before the Nazi's rise to power, Mann was close friends with Gründgens and, from 1926–1929, the latter was even married to the author's sister, Erika Mann. In the novel, Mann exaggerated the ambitiousness of his former brother-in-law who had become wealthy and famous through his collaboration with the Nazis. Mann observed this with high interest from abroad—knowing that Gründgens was nonetheless always endangered due to his homosexual tendencies.[121] The character of Höfgen—based on Gründgens—is drawn as a ruthless intellectual, a narcissistic and hysteric cynic who prostitutes his talents and sells out his higher ideals to advance his career in the Nazi regime. When the NSDAP comes to power, the character renounces his wife and his mistress, a black dancer with whom he had a masochistic relationship. The protagonist's apex of success is playing the role of "Mephisto," the devil's assistant in Johann Wolfgang von Goethe's (1749–1832) tragedy "Faust."[122] But, in the end, Höf-

121. *See* Micheal Töteberg, *Nachwort, in* KLAUS MANN, MEPHISTO – ROMAN EINER KARRIERE 392 (10th ed. 2005) (explaining that the idea to take Gründens' life as the basis for the novel was given to Klaus Mann, who at that time searched for the right topic for a "Zeitroman," by an also exiled writer and friend Hermann Kesten (1900–1996) in November 1935 (p. 392-93)). Klaus Mann first hesitated—though he had a strong and irreversible love-hate relationship towards Gründgens and had used his character before in the 1932 exile novel, "Treffpunkt im Unendlichen" (p. 394, 402). By the way, Klaus Mann and Gründgens died from an overdose of sleeping pills, adding to the numerous parallels between the two closely linked antagonists: their homosexuality, intense struggle for acceptance, interest for the opposition between power and intellect, and love for morphine and traveling. *See* EBERHARD SPANGENBERG, KARRIERE EINES ROMANS: MEPHISTO, KLAUS MANN UND GUSTAF GRÜNDGENS: EIN DOKUMENTARISCHER BERICHT AUS DEUTSCHLAND UND DEM EXIL 1925-1981 (1982); Lutz Winckler...*ein richtig gemeines Buch, voll von Tücken*", *Klaus Manns Roman Mephisto, in* KLAUS MANN – WERK UND WIRKUNG 46 (Rudolf Wolff ed., 1984) (citing Klaus Mann's remark towards his mother that the book is a really mean one, filled with perfidies); KLAUS MANN, THE TURNING POINT: THIRTY-FIVE YEARS OF THIS CENTURY—THE AUTOBIOGRAPHY OF KLAUS MANN (1984) (with a new introduction by Shelley L. Frisch) (originally 1942); BVerfGE 30, 173, 175-76, 214 also uses this work to explain Klaus Mann's relationship towards Gründgens); UWE NAUMANN, „RUHE GIBT ES NICHT, BIS ZUM SCHLUß" – KLAUS MANN (1906-1949) (1999); PETER MICHALZIK, GUSTAF GRÜNDGENS: DER SCHAUSPIELER UND DIE MACHT (1999).

122. Gründgens was well-known to the public, his most famous role and theater production was "documented" in 1960 on film—after 30 years of dealing with the figure of Mephistopheles on stage

gen—who is described as the "most depraved of the depraved," as "evil—a blackmailer of the first order" having "a horrible leer"[123]—has to pay the price for his Faustian pact with the Nazi regime. His self-betrayal and loss of sincerity lead to his defeat as an artist and human being, having turned him into "the monkey of power, a clown to entertain murderers."[124] The book epitomizes this through his inability to perform on-stage as Shakespeare's Hamlet.[125]

Nine days after he had received a letter stating that the publication of *Mephisto* would be impossible, Klaus Mann committed suicide. Seven years later, Mann's book was published in East Berlin by the *Aufbau-Verlag*[126] in a first edition of 50,000 copies.[127] The West German publishing houses, which had also been approached by his sister and literary executor Erika Mann, had declined to publish the novel due to the risk of litigation.[128] But, for publication of the 1956 *Aufbau* edition, which appeared twenty years after the initial edition in Amsterdam,[129] the East German censors required only one adjustment. Problematic for them was not the figure modeled after the real-life actor Gründgens, but the one modeled after a theater critic. Since he worked for the East German socialist regime after the war, his name had to be altered for that edition.[130] When, in 1963, the *Nymphenburger Verlagshandlung*, a publishing house based in Munich, announced its intention to print the novel as part of a complete edition of Klaus Mann's works, the adopted son and sole heir of Gründgens filed an injunction. Gründgens had just died while traveling in Manila.

After the court of first instance refused to grant the injunction,[131] the Munich press published the book in September 1965.[132] Gründgens's heir tried to stop further distribution with an interlocutory injunction of the court of second instance.[133] It was declined, though the court ordered that, until its final judgment, a note had to be added to the book to explain that the figures of the book

(Faust, director Peter Gorski, 1960). Peter Gorski was the adopted son of Gründgens, who filed the constitutional complaint.

123. MANN, *supra* note 7, at 136 et seq.

124. MANN, *supra* note 7, at 254.

125. *See* Marc-André Bouchard, *Mephisto against Hamlet: The Internal Tyranny and Seduction of Primitive Idealization*, 10 CANADIAN J. PSYCHOANALYSIS/REVUE CANADIENNE DE PSYCHANALYSE 91 (2002) (on the basis of the *Mephisto* film).

126. KLAUS MANN, MEPHISTO – ROMAN EINER KARRIERE (1956).

127. Töteberg, *supra* note 121, at 410.

128. *Id.*

129. *See supra* note 8.

130. Dr. Ihrig (referring to Herbert Ihering) was changed to Dr. Radig. *See* Töteberg, *supra* note 121, at 410. It was possible to buy the edition in West Germany. In an attempt to stop the book's dissemination, Gründgens's lawyer bought all the copies at the central station book shop of Frankfurt on the Main. Töteberg, *supra* note 121, at 411.

131. LG Hamburg, Aug. 25, 1965, docket number 15 O 81/64; *reprinted in* Archiv für Urheber- und Medienrecht [UFITA] 51 (1969), 352.

132. Töteberg, *supra* note 121, at 411.

133. OLG Hamburg, March 10, 1966, docket number 3 U 372/1965; *reprinted in* RECHTSPRECHUNG ZUM URHEBERRECHT, Vol. VI, OLGZ 64 (Erich Schulze ed., 1979).

were figments of Klaus Mann's artistic imagination. In the final ruling of the court of second instance Gründgens's heir obtained the desired injunction prohibiting the publication of the book. This "duel of the dead," as a famous literary critic put it,[134] then went to the Federal Supreme Court as the highest private law court. It upheld the decision in 1968.[135] But the publisher brought a constitutional complaint claiming that the court order infringed both his rights to freedom of speech (Article 5(1) GG)[136] and to narrative artistic freedom (Article 5(3) GG).[137]

In 1971, the constitutional review affirmed the prior ruling granting the injunction. The BVerfG held that the decision did not unconstitutionally influence the publisher's right to freedom of expression, since the human dignity of the deceased was of overriding constitutional value. At the beginning of its reasoning, the Federal Constitutional Court stressed the breadth of the right to individual freedom (*individuelles Freiheitsrecht*) of artistic expression as guaranteeing both the creative work produced and the impact it has on others. As the Court put it, the freedom of art covers not just the "sphere of creation" (*Werkbereich*)—the artist's independence to choose and treat a topic, free from attempts by the state to encroach upon his or her aesthetic judgment—but also the necessary and thus inseparable "sphere of effect" of the artistic work (*Wirkbereich*), like publication and dissemination.[138] Since the latter must be interpreted comprehensively, Article 5(3) GG also protects intermediaries, such as publishers and distributors. The Court then addressed the special problem of the freedom of art, guaranteed in Article 5(3) GG:

> Yet there are limits to this freedom. The freedom incorporated in Article 5(3), 1 GG, like all basic rights, is rooted in the Constitution's conception of man as a responsible person free to develop within society.[139] The absolute nature of the guarantee of artistic freedom means that its limits are to be found only within the Constitution itself. The freedom of art is not subject to mere statute, it cannot be qualified by the general legal system or be at the mercy of any vague clause about essential interests of state and society which lacks constitutional basis and is uncontained by the rule of law. If the guarantee of artistic freedom gives rise to any conflict, it must be resolved by construction in terms of the order of values enshrined in the Basic Law and in line with the unitary system of values which underlies it.[140]

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134. Marcel Reich-Ranicki, *Das Duell der Toten – Gegen das Verbot des Romans "Mephisto" von Klaus Mann*, DIE ZEIT, March 18, 1966, at 18.

135. BGHZ 50, 133 arguing with the protection of the right to a fair description of a person's life (*Lebensbild*), not unlike the doctrine of false light of some U.S. states; *see* Arno Buschmann, *Zur Fortwirkung des Persönlichkeitsrechts nach dem Tode*, NJW 1970, 2081.

136. *See supra* note 63.

137. Article 5(3) GG reads: "Art and scholarship, research, and teaching shall be free."

138. BVerfGE 30, 173, 189.

139. The Court refers to BVerfGE 4, 7, 15-6; BVerfGE 7, 198, 205; BVerfGE 24, 119, 144; BVerfGE 27, 1, 7.

140. BVerfGE 30, 173, 193; translation taken from MARKESINIS & UNBERATH, *supra* note 4, at 400-01 (J. A. Weir trans.).

Subsequently, the Court explained the inevitability of creating harmony between the freedom of art and human dignity, the latter being the highest constitutional principle.[141] Given the effect an artistic, but exaggerated portrayal can have on an interpersonal and societal level, it can infringe on an individual's claim to societal esteem and value.[142]

Having explained this inner-constitutional limit to art, the Court next looked at the decisions of the inferior courts. Agreeing with the lower courts, the Constitutional Court ruled it would be incompatible with the constitutional command of the inviolability of human dignity, if individuals could be freely disparaged after death. Hence death does not terminate the duty of the state to protect individuals from assaults on dignity.[143] In contrast to the BGH,[144] the Court held that the personality right does not even exist with limited force—as the lower court had ruled—but expires entirely on demise. Thus, Article 2(1) GG on which the general personality right is based can only be invoked for living people and "potential" or future persons (i.e. the unborn).[145] However, since according to German law it is inconsistent with human dignity to permit an individual to be degraded or humiliated after death, the wider scope of Article 1 GG urges for an acceptance of a posthumous personality right in the case of deceased persons.

In addressing the strong tension between the conflicting rights and interests, the Court stresses that the individual's right to social respect and esteem is not *per se* superior to the freedom of art. Conversely, even though art's specific characteristics have to be taken into account, it may not disregard the rights of others. That is why the degree of artistic alteration or creative alienation of the person used as inspiration for the narrative figure is decisive. The Court elaborates on the necessary considerations in the balancing process:[146]

> Only by weighing all the circumstances of the given case can one decide whether the publication of a work which artistically deploys true details about an actual person poses a serious threat of encroachment on the protected area of his person-

141. *See also* BVerfGE 45, 187, 223 – *life imprisonment* case.

142. *See* Diana Zacharias, *Zur Abgrenzung von Menschenwürde und allgemeinem Persönlichkeitsrecht*, NJW 2001, 2950; Bernhard v. Becker, *Überlegungen zum Verhältnis von Kunstfreiheit und Persönlichkeitsrecht*, AfP 2001, 466; Ulrich Karpen & Bianca Nohe, *Die Kunstfreiheit in der Rechtsprechung seit 1992*, JZ 2001, 801.

143. BVerfGE 30, 173, 194.

144. BGHZ 50, 133, 136, 139. By 1913, the predecessor, the Reichgericht, already had explained that a corpse is not ownerless, and the personality rights of the person can extend after death. RG Warneyer 1913 nr. 303 (363); Entscheidungen des Reichsgerichts in Zivilsachen [RGZ] 100, 171, 173 (1920) (regarding the case of the last resting place). In 1954, the BGH followed in BGHZ 15, 249 regarding the memories of Cosima Wagner (1837–1930), widow of Richard Wagner (1813–1883) and Director of the Bayreuth Festival from his death to 1908. However, already KANT approved of "the claim to a good name after death." *Supra* note 110, at 96.

145. BVerfGE 30, 173, 194.

146. BVerfGE 30, 173, 195; translation once again taken from MARKESINIS & UNBERATH, *supra* note 4, at 401-02 (J. A. Weir trans.).

> ality. One consideration must be whether and how far the artistic treatment of the material and its incorporation into the work as an organic whole have made the "copy" [*Abbild*] independent of the "original" [*Urbild*] by rendering objective, symbolical, and figurative what was individualized, personal, and intimate. If such an aesthetic appraisal reveals that the artist has indeed produced, or even intended to produce, a "portrait" of the "original", the outcome will depend on the extent of the artistic alienation and how seriously the "falsification" damages the reputation or memory of the subject.

In other words, the protection of the deceased depends on the apparentness of the portrayal and on the serious violation of the posthumous personality rights caused by the falsification. All in all, the *Mephisto* decision stands for two separate concepts. On the one hand it deals with the proper scope of the freedom of art, while on the other it represents the fundamental decision "blessing" the development of a post-mortem personality right.[147] In its ruling, the Court was faithful to Article 1 of the Basic Law, but it also established an inner-constitutional limit to the otherwise unlimited artistic freedom (*verfassungsimmanente Schranke*),[148] since the dignity clause provides the principal justification for allowing limitations of the freedom of art.

B. Further Development

With regard to the current status of Gründgens's rights, the BVerfG's ruling has been "reversed" by reality. Eighteen years after Gründgens's death, the novel was surprisingly published in West Germany—with great success—by the *Rowohlt Verlag*.[149] The release was planned with utmost secrecy and the printed copies were transported across the German border to Denmark in order to avoid injunctions.[150] The book climbed to No. 1 on the best-sellers list and sold over 300,000 copies during the first three months.[151] The Hungarian, West German and Austrian co-produced film *Mephisto* was also released in 1981 (omitting the sexual aspects of the figure Höfgen) and received two prizes in Cannes and the

147. For the further development, see Heinz-Joachim Pabst, *Der postmortale Persönlichkeitsschutz in der neueren Rechtsprechung des BVerfG*, NJW 2002, 999; Fedor Seifert, *Postmortaler Schutz des Persönlichkeitsrechts und Schadensersatz – Zugleich ein Streifzug durch die Geschichte des allgemeinen Persönlichkeitsrechts*, NJW 1999, 1889; MARION BASTON-VOGT, DER SACHLICHE SCHUTZBEREICH DES ZIVILRECHTLICHEN ALLGEMEINEN PERSÖNLICHKEITSRECHTS (1997); Albrecht W. Bender, *Das postmortale allgemeine Persönlichkeitsrecht: Dogmatik und Schutzbereich*, Versicherungsrecht [VersR] 2001, 815 (dealing with photos of the dead politician Barschel lying in a tub, where he had committed suicide); Axel Stein, *Der Schutz von Ansehen und Geheimsphäre Verstorbener – Zugleich eine Stellungnahme zu jüngeren höchstrichterlichen Entscheidungen*, Zeitschrift für das gesamte Familienrecht [FamRZ] 1986, 7.

148. Article 5(3) GG.

149. KLAUS MANN, MEPHISTO – ROMAN EINER KARRIERE (1981).

150. Translated versions of the work had been previously published in 1975, by a French publisher, and in 1977 in the United States.

151. Klaus Kastner, *Freiheit der Literatur und Persönlichkeitsrecht*, NJW 1982, 601; RAFAELA BOCKSLAFF, DIE BEHANDLUNG DES „MEPHISTO-FALLES" ALS BEISPIEL FÜR DIE PROBLEMATIK DER VOLLSTRECKUNG VON BUNDESVERFASSUNGSGERICHTLICHEN ENTSCHEIDUNGEN (1987); Töteberg, *supra* note 121, at 413-14.

Oscar for the Best Foreign Language Film.[152] This time the feared litigation by Gründgens's adopted son did not arise.

Both artistic works and an audiobook are currently available in Germany, and the novel has not lost its attraction. Even a play called *Mephisto* modeled after Klaus Mann's novel opened in 2005 at the Schauspielhaus Hamburg—a better venue could not have been chosen, since the director of the theatre from 1955 to 1963 was Gründgens himself. The Hamburg Court of Appeal (*Oberlandesgericht*, the last instance entitled to find facts) determined[153] in 1966 that Gründgens was a so-called person of contemporary history[154] (*Person der Zeitgeschichte*) and that his memory was still vivid in the social sphere.[155] Therefore, the duty to respect the deceased person's rights still existed at the time of BVerfG's ruling. But the need and, in turn, the obligation of the state to protect the defunct against image falsification diminishes as an individual's public memory fades.[156]

C. Following Cases

In sum, the general requirement for respect and for acceptance of human standards survives death so that the image people have of someone else (*Lebensbild*), even if he or she has passed away, is protected from serious injuries. A court of appeal validated such a serious injury in the case of a physician who died in 1965.[157] The case involved a scathing review of a work of the late German writer Heinrich Böll (1917–1985), who had received the Nobel Prize for Literature in 1972; the Federal Constitutional Court confirmed the protection of the dead.[158] The Federal Supreme Court also found an infringement of the posthumous personality right when the signature of Emil Nolde (1867–1956) was misused on a faked painting.[159] A court of appeal affirmed a violation in the imitation of the characteristic voice of a deceased comedian for a radio advertisement.[160] But, no doubt, the last two cases also raise copyright as well as trade

152. With an ingenious Klaus-Maria Brandauer as Höfgen (director István Szabó).

153. The BVerfG is not empowered to substitute its own evaluation of the case facts or legal merits under laws ranked below the Basic Law for that of the authorized court.

154. *See* Susanne Bergmann, *Publicity Rights in the United States and in Germany: A Comparative Analysis*, 19 LOY. L.A. ENT. L. REV. 479, 507 et seq. (1999) (allowing for less protection in this categfory than in other cases).

155. *Supra* note 133.

156. BVerfGE 30, 173, 196.

157. OLG München, NJW-RR 1994, 925. It was claimed that the physician performed sadistic, forced abortions during the Third Reich.

158. BVerfG, NJW 1993, 1462; for a summary of this decision, see KOMMERS, *supra* note 4, at 430.

159. BGHZ 107, 384; for an English translation of this 1989 decision, see 22 IIC 273 (1991).

160. OLG Hamburg, NJW 1990, 1995 – *Heinz Erhardt*. Similarly BGH, GRUR 1984, 907, *also reprinted in* Wettbewerb in Recht und Praxis [WRP] 1984, 681 (advertisement for fresh cell cosmetics by a scientist who had died 13 years before); for an English translation, see 16 IIC 426 (1986).

mark issues and what U.S. lawyers would classify as the right of publicity protecting the commercial exploitation of attributes of an individual's personality. An infringement was, however, denied when a right-wing party claimed that the famous politician Wilhelm Kaisen (1887–1979) from Bremen would have voted for them. Here the court argued[161] that this statement, uttered by a legal political party,[162] was a statement of opinion (not fact) and is thus especially protected by the Constitution.

As discussed in Part II, a major shift in German posthumous law—making it necessary to differentiate more clearly between protection of the reputation and privacy as dignity or as similar to property—was prompted by the 1999 *Marlene Dietrich* decision.[163] For the first time, the Federal Supreme Court allowed damages (instead of an injunction against publication) to be recovered by heirs for a posthumous infringement of the general personality right based on a commercial exploitation of the decedent's personality, like the use of her name, voice, or image. In *Marlene* this happened as part of the marketing strategy for a musical about Marlene Dietrich (1901–1992), with corresponding merchandise products—bags, t-shirts, watches, calling cards, pins, a special edition automobile, the "Lancia Marlene" by Fiat, and advertisements for cosmetics by Ellen Betrix with the heading "Marlene-Look" —all without consent of the only daughter and sole heir of the actress. The decision, which was later in substance affirmed by the BVerfG,[164] makes clear that the right of personality according to Article 1 and 2 GG does not just protect non-material interests, but also commercial aspects, for example, the asset-like advertising capability of a person—living or dead.[165]

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161. OLG Bremen, NJW-RR 1995, 84.

162. According to Art. 21(2) GG, in Germany there is the possibility of banning political parties by the BVerfG, but only when their aims or the actions of their adherents infringe upon the Constitution; *see* BVerfGE 5, 85 – *KPD* (prohibition) and BVerfGE 107, 339 – *NPD* (2003) (no prohibition); *see* Raymond Youngs, *Freedom of Speech and the Protection of Democracy: German Approach*, [1996] PUBLIC LAW 225, 226-27. *Contra* Healy v. James, 408 U.S. 169 (1972); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Noto v. United States, 367 U.S. 290 (1961).

163. BGHZ 143, 214; *see supra* note 39 and the accompanying text.

164. BVerfG, NJW 2006, 3409; for an English translation see 38 IIC 226 (2007).

165. BGHZ 143, 214 and BGH, NJW 2000, 2201; VOLKER BEUTHIEN, *Schützt das allgemeine Persönlichkeitsrecht auch kommerzielle Interessen der Person?: Kritik an den Marlene-Dietrich-Entscheidungen des BGH, in* PERSÖNLICHKEITSGÜTERSCHUTZ VOR UND NACH DEM TODE 75 (2002); ANNA GREGORITZA, DIE KOMMERZIALISIERUNG VON PERSÖNLICHKEITSRECHTEN VERSTORBENER: EINE UNTERSUCHUNG DER RECHTSFORTBILDUNG DURCH DEN BUNDESGERICHTSHOF IN DEN MARLENE-DIETRICH-URTEILEN VOM 1. DEZEMBER 1999 82 et seq. (2003); SABINE CLAUS, POSTMORTALER PERSÖNLICHKEITSSCHUTZ IM ZEICHEN ALLGEMEINER KOMMERZIALISIERUNG 37 et seq. (2004); for international private law aspects see Jan Kropholler & Jan v. Hein, *Der postmortale Persönlichkeitsschutz im geltenden und künftigen Internationalen Privatrecht, in* FESTSCHRIFT FÜR ANDREAS HELDRICH 793 (Stephan Lorenz et al. eds., 2005); Hans-Jürgen Ahrens, *Vermögensrechtliche Elemente postmortaler Persönlichkeitsrechte* im *Internationalen Privatrecht, in* FESTSCHRIFT FÜR WILLI ERDMANN 3 (Hans-Jürgen Ahrens et al. eds., 2002); JÜRGEN GLEICHAUF, DAS POSTMORTALE PERSÖNLICHKEITSRECHT IM INTERNATIONALEN PRIVATRECHT: UNTER BESONDERER BERÜCKSICHTIGUNG DES FRANZÖSISCHEN RECHTS (1999); more generally ROLF DANCKWERTS, PERSÖNLICHKEITSRECHTSVERLETZUNGEN IM DEUTSCHEN, SCHWEIZERISCHEN UND US-

There are clear signs of an inevitable commercialization of the German personality right (and of the private sphere), because the infringement standard is lower. Thus, the commercialization is also foreseeable considering the remedies, since, in contrast to the cases where compensatory damages for non-pecuniary harms are requested, the claimant in commercial cases does not have to show that the infringement is extremely intense.[166] Up to now this has not led to a "gold-digging" mentality in Germany. But it remains something of an open question for U.S. lawyers whether non-monetary remedies are available, such as the retraction of false statements[167] or injunctive orders preventing the publication of whole books.[168]

D. Time Span

Though the German posthumous personality right is by no means restricted to well-known people, but instead extends to people the public is interested in to a lesser degree,[169] the protection period is contingent upon the particularities of the case, particularly the importance of the issue, the renown of the person in question, and the intensity of the infringement.[170] Thus even though the post-mortem protection of personality rights does not last forever and becomes more limited as time passes, it also has no fixed expiration date. Protection loses its significance only when the image and memory of the deceased fades.[171] For example, the protection period of a very famous artist, like expressionist painter Emil Nolde (1867–1956), can extend for more than 30 years after death.[172] The 1967/68 draft of a law to restructure the protection of the rights of personality and reputation proposed a time limit of 30 years after death for all claims related to these rights, out of an effort to account for the progressive decline in worthi-

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AMERIKANISCHEN INTERNATIONALEN PRIVATRECHT: EIN PLÄDOYER FÜR DAS PERSONALSTATUT (1999).

166. BGHZ 143, 214; BGH, NJW 2000, 2201. *See* Artur-Axel Wandtke, *Zur Kommerzialisierung des Persönlichkeitsrechts*, Kunstrecht und Urheberrecht [KUR] 2003, 144; *see* Gerhard Wagner, *Geldersatz für Persönlichkeitsverletzungen*, ZEuP 2000, 200; *futhermore* KEVIN V. HOLLEBEN, GELDERSATZ BEI PERSÖNLICHKEITSVERLETZUNGEN DURCH DIE MEDIEN (1999); Amelung, *supra* note 21; Tilman Hoppe, *Profit from Violation of Privacy Through the European Tabloid Press*, 6 MAASTRICHT JOURNAL OF EUROPEAN AND COMPARATIVE LAW 75 (1999); NORMANN WITZLEB, GELDANSPRÜCHE BEI PERSÖNLICHKEITSVERLETZUNGEN DURCH MEDIEN (2002).

167. BGH, NJW 1974, 1371 – *Fiete Schulze.*

168. Of course injunctive remedies are presently rare in the U.S.; for discussion of prior restraint, see Part V F 2.

169. OLG München, NJW-RR 1994, 925, 925-26.

170. BGHZ 107, 384, 392.

171. OLG München, NJW-RR 1994, 925. The exhibition of remains of a Neanderthal man is not an infringement of "his" personality, as is bizarrely pointed out in the Swiss book THOMAS GEISER, DIE PERSÖNLICHKEITSVERLETZUNG INSBESONDERE DURCH KUNSTWERKE 89 (1990).

172. BGHZ 107, 384 (393); *see* OLG Köln, NJW 1999, 1969 – *Konrad Adenauer* (regarding a case involving the first Chancellor of West Germany (from 1949–1963)) (*see infra* note 188).

ness of protection, but this expiration date was not made into law.[173] Ultimately the act failed due to insufficient political support regarding other matters.

However, that the rights expire after a certain time (more or less parallel to the limitation period),[174] makes sense, not just because everything on earth is transitory, but also because the public memory in the social sphere diminishes over the years.[175] Balancing free speech with the posthumous dignity in order to find the right time span can be, of course, difficult. Parallel to the ten-year rule of § 22 of the Artistic Creations Act of 1907 (Kunsturhebergesetz [KUG]), dealing with the unauthorized publications of pictures, the BGH has recently limited the heritable *financial* elements of the personality rights to ten years after death.[176]

E. Point of Reference and Right to Sue

Linked to the present and future extent of the counter-rights against publications is the matter of who really holds the posthumous personality right. In other words, since the right can only be realized through the heirs, the question arises if the rights belong to the deceased or to the heirs. According to German law one has to make a clear distinction between the bearer of the right violated and the person or entity entitled to sue. So the deceased's rights and not the family's are at stake. The deceased's rights to be taken care of, as should be noted here, can be of diverse kind. The German posthumous personality right has also been dealt with in connection with the right to "custody" of the dead, the validity of fire funerals, organ transplantations,[177] physician confidentiality,[178] pictures of a post-mortem examination,[179] a commemorative coin series picturing

173. § 12(2), sentence 2 of a failed reform proposal for the BGB: Entwurf eines Gesetzes zur Neuordnung des zivilrechtlichen Persönlichkeits- und Ehrenschutzes, BT-Drucks. III nr. 1237 (1959); *see also* Heldrich, *Der Persönlichkeitsschutz Verstorbener, in* RECHTSBEWAHRUNG UND RECHTSENTWICKLUNG – FESTSCHRIFT FÜR HEINRICH LANGE, 163, 173 (Kurt Kuchinke ed., 1970) (criticizing this inflexible limitation).

174. *See* Bürgerliches Gesetzbuch [BGB] [Civil Code], § 197(1) (regarding the thirty years limitation period). Before 2002 this was the standard limitation period, § 195 BGB old version.

175. BVerfGE 30, 173, 196.

176. BGHZ 169, 193 – *kinski-klaus.de* (reacting to the BVerfG's statement in NJW 2006, 2409 that the Constitution does not recognize a posthumous protection of personality against a commercial exploitation that does not involve an infringement of human dignity, but that it also does not oppose it. Of course, under the perspective of intellectual property law there might be a different outcome). *See* Nikolaus Reber, *Die Schutzdauer des postmortalen Persönlichkeitsrechts in Deutschland und den USA (von Marlene Dietrich über Klaus Kinski zu Marilyn Monroe): ein Irrweg des Bundesgerichtshofs?*, Gewerblicher Rechtsschutz und Urheberrecht – Internationaler Teil [GRUR Int.] 2007, 492.

177. ADAMANTIA KALOUDI, PRESSEFREIHEIT UND PERSÖNLICHKEITSSCHUTZ – EIN TYPISCHER GRUNDRECHTSKONFLIKT IM VERGLEICH DER DEUTSCHEN, DER US-AMERIKANISCHEN UND DER GRIECHISCHEN RECHTSORDNUNG 141 (2000).

178. Andreas Spickhoff, *Postmortaler Persönlichkeitsschutz und ärztliche Schweigepflicht*, NJW 2005, 1982 (insurance law).

179. BGHZ 165, 203 – *Mordkommission Köln*.

former German Chancellor Willy Brandt (1913–1992)[180] and the use of a philosopher's name by an association.[181]

Since the action is based on the serious distortions of the reputation and the image[182] of the deceased, according to German law, the heirs act for the defunct to protect serious infringements of his or her dignity. A financial compensation, as stated,[183] is not possible for non-material, i.e. dignitarian infringements, since damages for pain and suffering serve to satisfy the injured living person. Only the commercial components of a right of personality can be passed on to the heirs (like to the daughter of Marlene Dietrich), but not the non-material aspects of the right of personality.[184] This non-inheritability of the non-material aspects of the general personality right and the exclusion of damages demonstrates, according to the German courts, that the relatives have not suffered any harm in this regard. This opinion is persuasive since issues that could be acceptable to relatives, could impugn the public memory of a deceased (e.g. regarding political, religious, or sexual orientation).[185] Therefore, suffering experienced by family members is categorically distinct from the intrinsic dignity of the deceased.

The judiciary and the majority of legal scholars are thus rightly of the opinion that the immaterial posthumous personality right still refers to the dead, not to his or her relatives.[186] But the right to sue against defamatory statements lies with those who are close relatives (not necessarily heirs), confidantes, and those who were asked to sue by the deceased. Others with active legitimization to sue are meritorious organizations (e.g. trusts) that have the task of protecting the heritage of the defunct.[187] Representation by one of them or a "combined" action of those eligible is admissible.[188]

180. BGH, NJW 1996, 593.

181. OLG München, NJW-RR 2001, 42 – *Wolfgang-Harich-Gesellschaft e.V.*

182. *See* OLG Köln, NJW 1999, 1969, 1970 – *Konrad Adenauer.*

183. *See supra* Part II.

184. BGHZ 143, 214; BGH NJW 2000, 2197.

185. *See* Heldrich, *supra* note 173, at 171.

186. ANNETTE FISCHER, DIE ENTWICKLUNG DES POSTMORTALEN PERSÖNLICHKEITSSCHUTZES: VON BISMARCK BIS MARLENE DIETRICH 68 (2004). *But see* Peter Westermann, *Das allgemeine Persönlichkeitsrecht nach dem Tode seines Trägers*, FamRZ 1969, 561, 566; *but cf.* Knut Müller, POSTMORTALER RECHTSSCHUTZ: ÜBERLEGUNGEN ZUR RECHTSSUBJEKTIVITÄT VERSTORBENER (1996) (regarding the problems associated with this).

187. BGHZ 107, 384, 389 – *Emil Nolde.*

188. *See* OLG Köln, NJW 1999, 1969 (describing an example in which a radical party in an election advertisement stated that Konrad Adenauer (1876–1967) would have voted for the party).

V.
DEVELOPING A COMMON LAW POSTHUMOUS PERSONALITY RIGHT

A. Strict Common Law Position

All over the globe, the common law position on posthumous personality rights is quite strict. Because the reputation is considered personal, it follows the English tort law rule of "actio personalis moritur cum persona" (personal action dies with the person).[189] This implies that according to Roman law the dead had no personality rights,[190] allowing the heirs to sue only for disparaging the memory of the deceased.[191] Claims for libel and slander as strictly personal causes of action are precluded when a statement is made about a defunct. According to the common law, he or she does not have any surviving rights which could be violated. A person's estate, descendants, or relatives have no opportunity to bring an action if the offending statement does not also indirectly affect a member of the family or estate.[192] To successfully make a case for libel, according to U.S. law, the plaintiff must show that (1) the defendant published (2) a defamatory, i.e. a reputation lowering, statement (3) concerning the *plaintiff*.[193] Regarding

189. JOHN G. FLEMING, LAW OF TORTS 741 (9th ed. 1998); R. M. Williamson, *Actio Personalis moritur cum Persona in the Law of Scotland*, 10 L. Q. REV. 182 (1894).

190. Of course, this has also influenced civil law regimes. For example, compare Swiss law with its Art. 31(1) Schweizerisches Zivilgesetzbuch [ZGB], stating that the personality begins with life after completed birth and ends with death; *see* Bundesgerichtsentscheidungen [BGE] 109 II, 353 – *Paul Irmiger* (1983) and BGE 104 II 225 – *Witwe Holder* (1978). Relatives can sue for violation of their own rights. *See* Marie-Theres Frick, PERSÖNLICHKEITSRECHTE – RECHTSVERGLEICHENDE STUDIE ÜBER DEN STAND DES PERSÖNLICHKEITSSCHUTZES IN ÖSTERREICH, DEUTSCHLAND, DER SCHWEIZ UND LIECHTENSTEIN 35 (1991); *see also* Esther Knellwolf, POSTMORTALER PERSÖNLICHKEITSSCHUTZ: ANDENKENSCHUTZ DER HINTERBLIEBENEN (1991) (Swiss perspective); Esther Knellwolf, *Postmortaler Persönlichkeitsschutz: neuere Tendenzen der Rechtsprechung*, Zeitschrift für Urheber- und Medienrecht [ZUM] 1997, 783 (Swiss perspective); Iris Eisenberger, *Postmortaler Grundrechtsschutz am Beispiel des Persönlichkeitsschutzes, in* NORM UND NORMVORSTELLUNG – FESTSCHRIFT FÜR BERND-CHRISTIAN FUNK, 175 (Iris Eisenberger et al. eds., 2003) (Austrian focus).

191. *See* ERNST RABEL (1874–1955), GRUNDZÜGE DES RÖMISCHEN PRIVATRECHTS 35 (2d ed. 1955). As is commonly known, Rabel is the founder of modern (German) comparative law; *see* Hannes Rösler, *Siebzig Jahre Recht des Warenkaufs von Ernst Rabel – Werk- und Wirkgeschichte*, 70 RabelsZ 793 (2006).

192. *Cf.* The Queen v. Ensor, 3 TIMES LAW REPORTS [T.L.R.] 366, 367 [1887] (regarding the "of and concerning" requirement); *see also* Lisa Brown, *Dead but Not Forgotten: Proposals for Imposing Liability for Defamation of the Dead*, 67 TEX. L. REV. 1525 n.2 (1989). For the Bath Club case, defaming the deceased English Prime Minister Gladstone, see Götz Böttner, *Protection of the Honour of Deceased Persons—A Comparison between the German and the Australian Legal Situations*, 13 BOND L. REV. 109, 116-17 (2001) (explaining the legal situation according to Australia's different States and Territories); Alberto Bernabe-Riefkohl, *Que descanse en paz: la causa de acción por difamación de personas fallecidas*, 70 REV. JUR. U.P.R. 917 (2001) (translated: May it rest in peace: the cause of action by defamation of dead persons).

193. *See* William Prosser & W. Page Keeton, PROSSER AND KEETON ON THE LAW OF TORTS § 111, at 778-784 (5th ed. 1984).

the limitation of defamation claims to the lifetime of the individual, the Restatement (Second) of Torts is also unmistakably clear: "One who publishes defamatory matter concerning a deceased person is not liable either to the estate of the person or to his descendants or relatives."[194]

B. Chances for a Family Discourse

Can one simply "transplant"[195] the German posthumous personality right? The answer is probably not. When one examines the influences of U.S.-American constitutionalism upon foreign constitutional development[196] it becomes clear that not simple one-to-one copying, but coherent and redrafted constitutional borrowings are the road to success. The conceptual and cultural embedding is decisive. Comparative law can provide the chance to self-reflect and to re-evaluate norms and basic legal assumptions.[197] As depicted, there is a principally similar conception of human nature which underlies both German and U.S.-American constitutional regimes. Admittedly, in its struggle to leave the National Socialist past behind and due to the deep rift left by the war in German lives and the German consciousness, German adopted a very explicit and specific body of laws. For example, while the United States tends to omit responsibility for speech, German law contains many specifics about the illegality of hate speech.[198]

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194. RESTATEMENT (SECOND) OF TORTS, § 560 (1977); the Reporter's notes in support of the Section refer to the Massachusetts case Hughes v. New England Newspaper Publishing Co., 43 N.E.2d 657, 658 (1942); *see also* Kelly v. Johnson Pub. Co., 325 P.2d 659 (1958); Insull v. New York World-Telegram Corp., 172 F.Supp. 615 (N.D. Ill. 1959), *aff'd*, 273 F.2d 166 (C.A.7), *cert. denied*, 362 U.S. 942; Bradt v. New Nonpareil Co., 79 N.W. 122 (1899); *Rose*, 31 N.E.2d 182, *reargument denied*, 33 N.E.2d 548; Turner v. Crime Detective, 34 F.Supp. 8 (N.D. Okl. 1940); Benton v. Knoxville News-Sentinel Co., 174 Tenn. 661, 130 S.W.2d 106 (1939). *But see* CAL. CIV. CODE § 3344.1 (West 2003) (granting publicity rights to "deceased personalities.").

195. *See* ALAN WATSON, LEGAL TRANSPLANTS (1974); ALAN WATSON, LAW OUT OF CONTEXT (2000); *but see* Pierre Legrand, *The Impossibility of Legal Transplants*, 4 MAASTRICHT JOURNAL OF EUROPEAN AND COMPARATIVE LAW [MJ] 111 (1997); Pierre Legrand, *Comparative Legal Studies and Commitment to Theory*, 58 MOD. L. REV. 262 (1995).

196. *See* Rösler, *supra* note 30 (referencing further materials).

197. Günter Frankenberg, *Critical Comparisons: Re-Thinking Comparative Law*, 26 HARV. INT'L L.J. 411 (1985) (arguing that neutral comparison is impossible); *cf.* Alexander, *supra* note 111, at 778 (arguing that "[t]he point of the comparative enterprise is not to find models to mimic, but to remove our interpretive blinders and enhance our expressive transparency. We cannot morph other constitutions, but we can still learn from them."); David Kennedy, *The Methods and Politics of Comparative Law, in* COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS 345 (Pierre Legrand and Roderick Munday eds., 2003) (stressing how strikingly little is known about the politics of comparative law); Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225 (1999); Hannes Rösler, *Rechtsvergleichung als Erkenntnisinstrument in Wissenschaft, Praxis und Ausbildung*, JuS 1999, 1084 (part 1) and 1999, 1186 (part 2).

198. *See* Friedrich Kübler, *How Much Freedom for Racist Speech?: Transnational Aspects of a Conflict of Human Rights*, 27 HOFSTRA L. REV. 335 (1998); James Q. Whitman, *Enforcing Civility and Respect: Three Societies*, 109 YALE L.J. 1279 (2000); Winfried Brugger, *Ban On or Protection of Hate Speech? Some Observations Based on German and American Law*, 17 TUL. EUR. & CIV. L.F. 1 (2002); Michel Rosenfeld, *Hate Speech in Comparative Perspective: A Comparative Analysis*,

But this by no means renders a mutual inspiration process undesirable or even unattainable. As stressed in Part II, the argument that implication of the First Amendment precludes international legal comparisons is unpersuasive. After all, the Founders were influenced by European ideas and (counter-)models when creating the Constitution, and did not intend to stop looking abroad after they had finished their highly progressive work.[199] In today's converging world, blossoming foreign jurisprudence on freedom of expression opens the door for an international community of liberal constitutions.[200] Common and civil law blend and overlap in particular regarding constitutional law and the constitutionally influenced private law. This offers exceptional learning opportunities on all sides.[201] It is also interesting to note that German law, due to the constitutional resemblances to American law, is more frequently cited in U.S. Supreme Court decisions than other civil law jurisdictions.[202] Therefore, the German posthumous personality right has some potential to inspire a common law equivalent.

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24 CARDOZO L. REV. 1523 (2003).

199. David Fontana, *Refined Comparativism in Constitutional Law*, 49 UCLA L. REV. 539, 575-76 (2001) ("The Founders wanted comparativism to be as much a part of constitutional interpretation as it was of constitutional creation. Comparative insights had undeniable influence on the Founders, and nowhere did they indicate that these insights would be restricted just to 1787. Rather, their acceptance of certain universalist intellectual ideas and their interest in the experiential lessons of political science seem to indicate that they wanted comparative materials to always be used.").

200. See Chief Justice William H. Rehnquist, *Constitutional Courts—Comparative Remarks, in* GERMANY AND ITS BASIC LAW: PAST PRESENT AND FUTURE 411, 412 (Paul Kirchof & Donald P. Kommers eds., 1993), who similarly, but surprisingly wrote: "For nearly a century and a half, courts in the United States exercising the power of judicial review [for constitutionality] had no precedents to look to save their own, because our courts alone exercised this sort of authority. When many new constitutional courts were created after the Second World War, these courts naturally looked to decisions of the Supreme Court of the United States, among other sources, for developing their own law. But now that constitutional law is solidly grounded in so many countries, it is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process." In *Atkins v. Virginia*, 306 U.S. 304, 321 (2002) (Rehnquist, C.J., dissenting) he drew attention to the "defects in the Court's decision to place weight on foreign laws." *See also* Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479 (2003), at 1514-5 n.114 (proving in detail that nearly every member of the current Court has referred to foreign or international law or practice to explain interpretations of the American Constitution). *See* Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191 (2003); Justice Stephen Breyer, *Changing Relationships Among European Constitutional Courts*, 21 CARDOZO L. REV. 1045 (2000). *See also supra* note 18; Juliane Kokott, *From Reception to Transplantation to Convergence of Constitutional Models in the Age of Globalization – With Particular Reference to the German Basic Law, in* CONSTITUTIONALISM, UNIVERSALISM AND DEMOCRACY: A COMPARATIVE ANALYSIS 71 (Christian Starck ed. 1999).

201. *See* Rebecca Lefler, *A Comparison of Comparison: Use of the Foreign Case Law as Persuasive Authority by the United States Supreme Court, the Supreme Court of Canada, and the High Court of Australia*, 11 S. CAL. INTERDISC. L.J. 165 (2001) (stating that the dialogue today is often just one-way, with the Supreme Court denying the participation).

202. *See* Harding, *supra* note 18, at 420 n.69; *cf.* David S. Clark, *The Use of Comparative Law by American Courts*, 42 AM. J. COMP. L. 23 (Supp. 1994) (noting that "there is scant legal literature on the use of foreign and comparative law in United States courts because courts rarely cite foreign law." He found, nonetheless, the exception of the two new areas of international civil procedure and of international criminal law; David S. Clark, *The Use of Comparative Law by American Courts, in* THE USE OF COMPARATIVE LAW BY COURTS 297 (Ulrich Drobnig & Sjef van Erp eds., 1999).

C. Possible Features of Integration

Currently there are some gaps regarding the protection of the deceased, not only having to do with the English "the dead don't hear" rule, but rather having to do with the status free speech enjoys in the U.S. With the actual-malice rule established by *Sullivan*, U.S. law has considerably overturned the common-law position of a strict punishment for the dissemination of false negative speech—in order to cultivate political speech by not chilling true negative speech.[203] Since the inception of this new understanding of the First Amendment, entirely driven by the concern about self-censorship of speech, the First Amendment has been used in an openly metaphorical way. Defending free speech has somehow become a central part of the U.S.-American socio-legal culture[204] and occupies the political and rhetorical high ground.[205] This common attitude, however, seems to block the central question of the purpose of free speech. Open societies[206] have to encourage optimal speech conditions. Yet notably, repression of free speech cannot occur solely through active measures of the state, but also must omit effective legal protection.[207] Regarding the abstract status of rights, it thus does not make much difference whether the endangerment results from state actions or from another source.

Protecting certain counter-values to free speech can actually defend and foster freedom of speech. Exercising First Amendment rights exposes the speaker to certain risks; risk of public attention, and risk that, after death, his or her personality and achievements will be adulterated by misrepresentations. These risks can unintentionally chill speech by deterring the speaker from participating in the first place. It may be difficult to die in peace and dignity if one knows that one's reputation in the public memory and one's life-time achieve-

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203. Michael Passaportis, *A Law and Norms Critique of the Constitutional Law of Defamation*, 90 VA. L. REV. 1985, 2038 (2004). Passaportis also points out that *Sullivan* was decided at the time of the zenith of the civil rights movement and that harsh Southern state defamation laws were used to deter commentaries on the racial situation in the South. *Id.* at 2040.

204. *See* David A. Anderson, *Metaphorical Scholarship*, 79 CALIF. L. REV. 1205, 1219 (1991) (reviewing STEVEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE (1990)). Some advance a dissent-based theory of free speech as a core value of the U.S.A. STEVEN H. SHIFFRIN, DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA (1999); for different speech and media theories, see LAST RIGHTS: REVISITING FOUR THEORIES OF THE PRESS (John C. Nerone ed., 1995) (dealing with the classic FRED S. SIEBERT, THEODORE PETERSON & WILBUR SCHRAMM, FOUR THEORIES OF THE PRESS: THE AUTHORITARIAN, LIBERTARIAN, SOCIAL RESPONSIBILITY, AND SOVIET COMMUNIST CONCEPTS OF WHAT THE PRESS SHOULD BE AND DO (1956/1978)).

205. For the overuse of the First Amendment, see Frederick Schauer, *First Amendment Opportunism, in* ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA 174 (Lee Bollinger & Geoffrey Stone eds., 2002).

206. *See* KARL RAIMUND POPPER, OPEN SOCIETY AND ITS ENEMIES, Vol. 1: THE SPELL OF PLATO, 2. Vol.: THE HIGH TIDE OF PROPHECY: HEGEL, MARX AND THE AFTERMATH (5th ed. 1971).

207. OWEN M. FISS, THE IRONY OF FREE SPEECH 5-26 (1996) (dealing with silencing effect of speech and arguing that state intervention enhances freedom by broadening the terms of public debate and integrates those under-funded, underrepresented or disadvantaged voices who are often overwhelmed or intimidated, like victims of hate speech and pornography).

ments can be destroyed without the possibility of defense. Of course, blanket protection cannot be extended to the reputation of the dead. However, the existence of a narrower posthumous dignitary right could encourage free speech; for example, through the participation in the public discourse or the publication of personal matters.

It is thus not in all instances enough to leave the discovery of the truth to the marketplace of ideas. Many American scholars of the First Amendment who vehemently defend a laissez-faire approach overlook current market failures[208] by overemphasizing the uniqueness of speech. The failure of the marketplace of ideas highlights the need for corrective regulation,[209] especially in regard to defenseless minorities and the deceased. Courts are obligated to intervene because the dead are speechless and because quite often the relatives do not have the same access and presentation capability to the process of communication as the deceased did. There is thus a public interest associated with the protection against defamatory statements, similar to what the English Judge Lord Nicholls stated in *Reynolds v. Times Newspapers Ltd.* about the value of reputation: "Reputation is an integral and important part of the dignity of the individual. It also forms the basis of many decisions in a democratic society which are fundamental to its well-being [. . .]. Protection of reputation is conducive to the public good. It is in the public interest that the reputation of public figures should not be debased falsely."[210]

To ensure this acceptance with regard to the deceased, the U.S. would have to incorporate a posthumous personality right into its own fabric of constitutional values and tort laws. It would need to find an American analogue to the foreign version presented here. Helpful for integrating the posthumous personality right into U.S. law could be an equal chances dimension:[211] A structure and

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208. For a different criticism of the "market theology" and a suggestion for a reform, see CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH, 241-252 (1995) (preferring a Madisonian "deliberative democracy" model); *cf.* Alain Sheer & Asghar Zardkoohi, *An Analysis of the Economic Efficiency of the Law of Defamation*, 80 NW. U. L. REV., 364 (1985) (dealing with the optimal degree of self-censorship and the rules that have replaced the common law strict liability as economic problems); Paul C. Weiler, *Defamation, Enterprise Liability, and Freedom of Speech*, 17 U. TORONTO L.J. 278, 306, 309, 333-43 (1967); Richard A. Epstein, *Was* New York Times v. Sullivan *Wrong?*, 53 U. CHI. L. REV. 782, 802-03 (1986) (doubting that the situation was improved by the adoption of the actual malice rule); John L. Diamond, *Rethinking Media Liability for Defamation of Public Figures*, 5 CORNELL J.L. & POL'Y 289 (1996).

209. For the reasons why media markets need regulation, see C. EDWIN BAKER, MEDIA, MARKETS, AND DEMOCRACY 7 (2002) (stressing the special nature of media products: they are "not toasters.").

210. Reynolds v. Times Newspapers Ltd., [2001] 2 AC 127, 201.

211. The author has developed this in regard to English and German law. GOUNALAKIS & RÖSLER, *supra* note 31, at 127 et seq.; Hannes Rösler, *Das Verhältnis von Parlament, Gerichtsbarkeit und Privilegierung im Ehrenschutz, oder: London, a Town Named Sue – Entscheidung des House of Lords vom 23. März 2000 mit Anmerkung*, ZEuP 2003, 155, 172 (on the occasion of *Hamilton* v. *Al Fayed* [2000] 2 All E.R. 224 et seq.); *see* Friedrich Kübler, *Ehrenschutz, Selbstbestimmung und Demokratie*, *supra* note 76, at 1284; Joachim Scherer, *Pressefreiheit zwischen Wahrheitspflicht und Wahrheitsfindung – Schutz der Massenmedien vor den Rechtsfolgen unwahrer*

climate that encourages free expression within a frame of equal chances in the communication process installs the state in a protective role for disadvantaged minorities and the speechless, which encompasses the deceased as they can no longer speak. Free speech in order to criticize the Government is one thing; free speech disadvantaging the speechless is another matter.[212]

The concept of equal chances in the process of communication would add to the free-market-of-ideas concept without inhibiting the free flow of information and opinions since proportionality concerning state intervention in speech acts is one of its core elements. Also, generally there is no societal interest in false communication when there is no sufficient counterbalance by the *forum publicum*. Here the publication of information is not likely to be a gain in the net-knowledge of society. In addition, the public does not always realize the falseness of facts and it does not counterbalance them sufficiently when the targeted person is speechless. Thus, the constitutionalization of U.S. defamation law led to an underestimation of the social costs of wrong statements.

The German example illustrates that the classical common law argument against a posthumous personality right, which is that the boundaries of such an action would be too difficult to establish, does not have to be correct. In addition, it does not have to disproportionately limit freedom of expression in the general sense or have to deter creative rights in particular. A posthumous personality right should only be of predominant importance in cases of severe infringements. This is above all true for creative works which depend on the use of real-life inspirations. But in cases of severe infringements of personality rights, freedom of speech has to step back.[213] Even in such cases, however, blocking publication is a last resort and can be rendered unnecessary by modifying fictional works to make them increasingly abstract or by correcting the wrong statements in non-fictional works clearly referring to personality aspects of the living or deceased person. If this obligation is construed narrowly enough, freedom of speech is not chilled to a relevant extent.

Furthermore, the argument that a posthumous personality right could deter valuable historical research[214] is not necessarily correct. Since truth is commonly a defense to libel charges, such a right will give historians the incentive to publish accurate, factually-based statements. A further hurdle to overcome is the classic common law rule, still active in England,[215] which stipulates that a com-

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Tatsachenbehauptungen im amerikanischen und deutschen Recht, EuGRZ 1980, 49, 53-54.; *see also* BVerfGE 25, 256 – *Blinkfüer* case issued 1969.

212. Basil S. Markesinis, *The Right to be Let Alone versus Freedom of Speech, in* FOREIGN LAW AND COMPARATIVE METHODOLOGY: A SUBJECT AND A THESIS 382, 396 (1997) (asserting that much can be learned from the fine art of balancing interests undertaken by German judges).

213. BVerfG, docket numer 1 BvR 1783/05, June 13, 2007, currently only reported at juris online/Entscheidungen – *Esra*.

214. Rex the King v. Topham, 100 Eng. Rep. 931, 933 (1791) (K.B.).

215. *See* Duncan Lamont, *Speaking Ill of the Dead*, The Guardian, Aug. 11, 2003 (criticizing English Law regarding a defamatory statement about the dead British Ministry of Defence and Iraq weapons expert David Kelly, who committed suicide in July 2003).

menced action must end with the death of the claimant and cannot be continued by his or her heirs.[216] U.S. law on this topic is a bit more complicated. According to survival statutes in some states, a claim can be passed on, but defamation actions are commonly excluded from their coverage.[217] For instance, according to Massachusetts law, libel actions cannot survive the death of the plaintiff.[218]

A clearer acceptance of the human dignity aspect of the U.S. privacy and defamation law, where these institutions would also afford protection to the affected individual's human dignity interest, would pave the way for a better understanding of the purpose of defamation and privacy laws as well as an element of rights expansion.[219] As Justice Potter Stewart (1915–1985) observed, the reason reputation enjoys protection from unjustified invasion and wrongful hurt is to safeguard the dignity and worth of every human being.[220] Recognition of the underlying dignitarian notion and of its great importance for the individual's sense of identity, integrity, and self-worth[221] could lead to the acceptance of the concept that one is entitled to a rightful reputation, extending physical existence by virtue of one's own life and contributions to society.

As discussed, German law derives the posthumous right of personality from human dignity. Opponents of the proposal to further integrate human dignity in U.S. law can make a slippery slope argument[222] that accepting dignity as a key element of U.S. law would have a far-reaching impact not limited to just the posthumous right of personality, but leading to a reversal of all First Amendment precedents. But this argument misreads the constructive meaning and positive implications of the human dignity concept in civic republican

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216. *Cf.* Broom v. Ritchie 6 F 942 (1904) (a somewhat more favorable, therefore exceptional judgment from Scotland (being in general more influenced from the Continent)); *see* Böttner, *supra* note 192, at 116-17; *see* Decisions, 40 COLUM. L. REV. 1267, 1268 n.5 (1940).

217. PROSSER & KEETON, *supra* note 193, § 126, at 943; *see* Canino v. New York News, Inc., 96 N.J. 189, 475 A.2d 528 (1984) (stating that an action for libel survives the death of the defamed); *see also* Grégoire Loiseau, *Des droits patrimoniaux de la personnalité en droit français*, 42 MCGILL L.J. 319 (1997) (supplying many comparative references).

218. Jonathan M. Albano, *Defamation, in* I MASSACHUSETTS TORT LAW MANUAL § 7.3.2 (2002).

219. According to German law, human dignity protects both sides; that is, the speaker and the audience of his communication. Stressing, however, just the theoretical nexus between human dignity and speech, and advocating for a broad protection of free speech by utilizing dignity and equality as independent doctrinal justification. *See* DWORKIN, *supra* note 16. *But see* Frederick Schauer, *Speaking of Dignity, in* THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES 178 (Michael J. Meyer & William A. Parent eds., 1992) (recognizing that dignity could also be used to restrict free speech); Guy E. Carmi, *Dignity—The Enemy from Within: A Theoretical and Comparative Analysis of Human Dignity as a Free Speech Justification*, 9 U. PA. J. CONST. L. 957, 960, 986 (2007).

220. Rosenblatt v. Baer, 383 U.S. 75, 92 (1966), *cited in* Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974).

221. *See* Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation and* Hustler Magazine v. Falwell, 103 HARV. L. REV. 601, 616-17 (1990).

222. *See* Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026 (2003).

thought (going beyond classical individualism, also incorporating social connections).[223] As mentioned in Part III B, notions of dignity have implicit constitutional rank, since the moral and political natural law philosophy of dignity attributing intrinsic value to humans lies at the source of the whole project of the American nation and its constitutional regime. This dignity is the supreme value controlling the entire system of basic rights; that the human dignity of a person endures after death, however, is, admittedly, a more dominant idea in Germany.

But the general feasibility of fitting these ideas into a common law framework is illustrated by the Australian Law Reform Commission, which not only suggested a national defamation law for the Commonwealth of Australia,[224] but also the possibility for relatives to obtain a correction order, declaration, or three-year injunction with respect to a defamatory statement. A recovery for compensatory damages was not planned under this regime.[225] Similarly, in 1995 the Community Law Reform Committee of the Australian Capital Territory suggested that the Attorney General change the common law rules so that the personal representative of the defamed decedent could sue on behalf of the estate if the defamatory statement was made within twelve months after the demise.[226] Excluding the recovery of damages, as it was proposed in Australia and as practiced in Germany,[227] seems appropriate since the defamed cannot be compensated and it makes sense to avoid rewarding "gold-digging" relatives. However, allowance for other remedies is imperative. As indicated, there is a legitimate interest in communicating the truth to the public, while there is no necessity to protect obviously false or defamatory statements. When some wrong statements are corrected, there is a societal win, as the truth can be discerned.

D. High Value of Artistic Expressions as a Special Issue

It should be stressed that this article is about post-mortem personality rights in general, but the issue gets particularly sensitive when the depiction takes place in artistic works. This happened in the Dewey and *Mephisto* cases men-

223. Alexander, *supra* note 110, at 743, 744: "To American ears, 'human dignity' strongly resonates of the individualist outlook associated with classical liberalism, making the constitutional right negative rather than positive in character. [...] [R]ather, the Basic Law has decided in favor of a relationship between individual and community in the sense of a person's dependence on and commitment to the community, without infringing upon a person's individual value." Schauer, *supra* note 219, at 184. For the U.S., some claim that "arguments from dignity seem much more plausibly to generate arguments for restricting various kinds of speech than for protecting it." Carmi, *supra* note 219.

224. Australian Law Reform Commission, Report No 11, *Unfair Publication: Defamation and Privacy*, 42-47 (1979).

225. *Id.* at 100, 102; Böttner, *supra* note 192, at 119-20.

226. Australian Capital Territory Community Law Reform Committee, *Report No 10 Defamation* (1995); Böttner, *supra* note 194, at 120, 133 (favoring a more flexible solution like in Germany).

227. *Supra* Part II.

tioned in the introduction. Artistic expressions are highly valued.[228] They require special legal attention because, on balance, artistic works tend to be progressive, and are often met with resistance by the general public. But the society might, in the long run, recognize that creative works can turn out to be highly valuable. Indeed, as is demonstrated by the German law, art needs clear and strong constitutional protection.

Also U.S.-American commentators make use of the special protection requirements of "art." They argue that fiction should be protected from libel claims because fiction cannot severely damage one's reputation. It is claimed that, "[g]iven fiction's limited potential for actually injuring an individual's reputation, libel should be kept on a particularly short leash when it goes prowling after fiction. The absence of truth as a defense makes it all the more necessary that courts provide maximum protection for works of fiction."[229] But even fiction can transport a core of truth for the audience, despite the fact that the creator does not claim to say the truth. It is correct that people do not necessarily have to misinterpret fiction for fact. Most readers, viewers etc. are aware that works they consume are fictional, since they never pretend to be otherwise. Although there is a difference between history and fiction, in certain instances, for example, popular semi-documentary features, the distinction between fact and fiction can be blurred. These creative works are an example of a broader fusion of fiction and fact described in the introduction. Such pieces can incite film audiences or book readers to assume at least a "core of truth" in the depiction. After all, artistic works often use the reality background as an incentive to watch or buy the piece in question.

Thus the proposed concept is not one of aesthetic control leading to the ban of artwork which is realistic and derogatory and to overregulation with the risk of uneven application in practice by governments likely to single out political enemies; rather it is tailored to the narrow line of cases where a posthumous personality right is seriously infringed and where close relatives sue. Dignity, just like freedom of expression, does not trump in every case; it is all about the balance. As such, creators of fiction would still enjoy broad rights of expression and there would still be the right to take some "creative license". But in clear depictions of the Dewey and *Mephisto* variety, the central question is one of alienation of the persona used for inspiration.[230] The solution suggested here requires a high degree of awareness so that, for example, a book does not get

228. This issue cannot be dealt with sufficiently in the confines of this Article. *See* Rösler, *supra* note 117.

229. Martin Garbus & Richard Kurnit, *Libel Claims Based on Fiction Should Be Lightly Dismissed*, 51 BROOK. L. REV. 401, 421 (1985). *See also* David A. Anderson, *Avoiding Defamation Problems in Fiction*, 51 BROOK L. REV. 383, 392 (1984) (discussing era of "faction" and "docudrama"); Paul A. LeBel, *The Infliction of Harm Through the Publication of Fiction: Fashioning a Theory of Liability*, 51 BROOK. L. REV. 281, 348, 349 (1985); Diane Leenheer Zimmerman, *Real people in fiction: cautionary words about troublesome old torts poured into new jugs*, 51 BROOK. L. REV. 355, 369 (1985) (all from a symposium on defamation in fiction).

230. *See supra* note 146 and the accompanying text.

banned as a result of the manipulation of ulterior motives. Therefore, the approach advocated here requires clear guidelines and liberal case law that limits the application of the concept to really severe cases.

It should be noted that the *Hoodlum* film is mainly used as an example for the fiction-fact trend. Its theatrical poster vividly illustrates a technique used to give the appearance of authenticity.[231] The background is covered with a collage of signatures, stamps of historic dates and reprints of police and court documents making it look highly official. Of course, this can be seen just as "historical fiction", as an artistic genre. But this method contributes to the viewers' assumption that the piece is based on (at least some) historic facts. In addition, digitalization makes it easy to import historical figures into new settings and portray these figures as acting and behaving in ways that the facts do not support. Yet, what we see is habitually what we believe.[232] Movies and books often address this issue by including disclaimers. This is a sensible thing to do and in many cases sufficient. But in certain, severe types of violations these notices can easily become a fig leaf. For example, someone writes a book describing his or her former lover and everyone knows or assumes that the details must be true since other general facts fit in with reality.[233] Where books are concerned however, the argument, with regard to television, that people who channel surf could simply pass over the disclaimer carries less weight.

E. Achieving Coherence by the Courts or by the Legislators?

Ideally, a balanced legal order should not only protect against the described encroachments of personality rights when there is an economic value linked to this protection, for example, through the publicity rights as a form of property, treating fame as a commodity and as a fourth branch of privacy.[234] U.S. law protecting the deceased's reputation and privacy as *property*[235] merely applies to celebrities, and lacks the protection of *dignity*, which would apply to other individuals as well.[236] The question arises whether the judiciary or the legislature is

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231. *See* Wikipedia, http://en.wikipedia.org/wiki/Hoodlum_(film).

232. *See generally* ARTHUR BERGER, SEEING IS BELIEVING: AN INTRODUCTION TO VISUAL COMMUNICATION (3d ed. 2007).

233. This is the case regarding the *Esra* book, which will be dealt with shortly. *See infra* note 264.

234. WEILER, *supra* note 3, at 215; *cf.* Alice Haemmerli, *Whose Who? The Case for a Kantian Right of Publicity*, 49 DUKE L.J. 383 (1999) (persuasively arguing for a federal right of publicity); *supra* note 41.

235. Post, *supra* note 14.

236. Due to the lack of law of privacy, in Great Britain this is not only true in the case of deceased; *see* Martin Soames, *Are you worth it?*, The Guardian, Oct. 20, 2003 ("The moral of this story is, if you want to protect your private life make sure your image has commercial value"); James M. Left, *Not For Just Another Pretty Face: Providing Full Protection Under the Right of Publicity*, 11 U. MIAMI ENT. & SPORTS L. REV. 321 (1994) (dealing with whether an estate is protected after death); for German law, see. Gerhard Wagner, *Prominente und Normalbürger im Recht der Persönlichkeitsverletzungen*, VersR 2000, 1305.

the best locus for establishing a post-mortem personality right. Currently, there are some U.S.-American statutory precedents through the extension of the rights of publicity. At present the right to publicity of living people is recognized in about twenty-five U.S. States, by statute[237] or the common law, of which seventeen[238] also acknowledge the transmissibility of this right upon death.[239] Thus here U.S. law already recognizes post-mortem rights.

But concerning the non-commercial personality aspects, U.S. courts regard the violated rights as those of the families, not those of the deceased. This is one of the major constructive differences between the two approaches. In *The Perfect Storm* lawsuit, examing a major Hollywood movie's use of the unlicensed likeness of two seamen who drowned in a fishing vessel, the District Court of Florida ruled that neither its production nor its marketing violated Florida's right of publicity statute.[240] However, the Court of Appeals for the Eleventh Circuit later gave the remaining family members a right to recover damages for invasion of the families' relational privacy rights, because of humiliation and wounded

237. However, the 1994 Indiana law should not apply retroactively to establish rights of publicity that Marilyn Monroe (1926–1962) did not have at the time of her death; Shaw Family Archives Ltd. v. CMG Worldwide Inc., 434 F. Supp. 2d 203 (S.D.N.Y. 2006); Daniel Biene, 38 IIC 2007, 859 (case comment).

238. J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY, 6.3, 6.8 (2d ed. 2001); J. Thomas McCarthy, *The Human Persona as Commercial Property: the Right of Publicity*, 19 COLUM.-VLA J.L. & ARTS 129, 132 (1995); Melissa B. Jacoby & Diane Leenheer Zimmerman, *Foreclosing on Fame: Exploring the Uncharted Boundaries of the Right of Publicity*, 77 N.Y.U. L. REV. 1322, 1324 (2002); Brent W. Stricker, *In Memory of Lost Heroes: Protecting the Persona Rights of Deceased Celebrities*, 31 MCGEORGE L. REV. 611 (2000); *see also* B. St. Michael Hylton & Peter Goldson, *The New Tort of Appropriation of Personality: Protecting Bob Marley's Face*, 55 CAMBRIDGE L.J. 56 (1996) (dealing with the Jamaican Supreme Court's recognition of a patrimonial property right of personality).

239. *See supra* note 41. For example, the Supreme Court of Georgia argues similar to the BGH in its *Marlene Dietrich* decision (*see supra* note 167 and accompanying text) regarding descendibility: Martin Luther King, Jr. Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc., 250 Ga. 135, 145, 296 S.E.2d 697, 705 (1982) ("If the right of publicity dies with the celebrity, the economic value of the right of publicity during life would be diminished because the celebrity's untimely death would seriously impair, if not destroy, the value of the right of commercial use."); Factors Etc., Inc. v. Pro Arts, Inc., 579 F.2d 215, 221 (2d Cir. 1978) (arguing that Elvis Presley's property rights must survive his death because otherwise there would be "a windfall in the form of profits from the use of Presley's name and likeness"); Elvis Presley Enters., Inc. v. Elvisly Yours Inc., 936 F.2d 889 (6th Cir. 1991). For other parallels, see Susanne Bergmann, *Publicity Rights in the United States and in Germany: A Comparative Analysis*, 19 LOY. L.A. ENT. L. REV. 479 (1999). *Cf.* F. Jay Dougherty, *The Right of Publicity: Towards a Comparative and International Perspective*, 18 LOY. L.A. ENT. L. REV. 421 (1998); F. Jay Dougherty, *All the World's Not a Stooge: The "Transformativeness" Test For Analyzing a First Amendment Defense to a Right of Publicity Claim Against Distribution of Artworks*, 27 COLUM.-VLA J.L. & ARTS 1 (dealing with the problem of the chilling effect on speech in the conflict between property rights and free speech rights of visual artists who depict real people); Alana-Seanne M. Fassiotto, *Fred Astaire Dances Again: California Passes the Astaire Celebrity Image Protection Act*, 10 DEPAUL-LCA J. ART & ENT. L. & POL'Y 497 (2000).

240. Tyne v. Time Warner Entm't Co., LP, 204 F. Supp. 2d 1338, 1341 (M.D. Fla. 2002) *construing* Loft v. Fuller, 408 So. 2d 619 (Fla. Dist. Ct. App. 1981) (involving the book and movie *The Ghost of Flight 401*).

feelings caused by the disclosure of pictures of a deceased body.[241] This position, that only the living can actually suffer, is a much more common form of protection. U.S. courts are thus generally more concerned about family members than about deceased. Here it becomes obvious that U.S. law could directly connect to the rights of the harmed relatives without having to develop a post-mortem personality right from the human dignity of the deceased as German law does.

Due to the strict position of the common law, a possible way to establish a corrective new cause of action for the tortious infringement of a deceased person is by means of statute,[242] as was proposed in Australia.[243] But obviously, the courts in the U.S. and Germany are also empowered to make far-reaching constitutional decisions on what should be allowed and what should be prohibited in an egalitarian society. This is why the judiciary can be quicker than the legislative branch in responding to the exploitation and misuse of personality. As a result, parliaments are increasingly unwilling to fundamentally reform the current legal situation or even to demystify the gray areas where freedom of expression collides with other rights and interests. There can be no serious doubt about the truth that courts in a democracy, governed by the imperfect rule of the majority, have—generally speaking—a special role in protecting minorities[244] and, therefore, will be continuously embroiled in the controversy over how to establish an appropriate equilibrium between competing private interests.

It should be noted that the mentioned post-mortem right of publicity in some U.S. States has been recognized under common law, but more often by explicit statute.[245] So ideally the shortcomings of the current media-friendly U.S. law should urge the legislator to establish a more effective and conceptually coherent legislation on false light portrayal and defamation law. This would allow the media enough of the vital "breathing space" necessary to remain open and largely unrestricted.[246] Especially when one considers that desecration of the memory of the dead can constitute a crime,[247] it becomes obvious that, according to current U.S. law, already today some non-commercial aspects of the per-

241. Tyne v. Time Warner Entm't Co., L.P., 336 F.3d 1286 (11th Cir. 2003); *see also* Jordan Tabach-Bank, *Missing The Right of Publicity Boat: How* Tyne v. Time Warner Entertainment Co. *Threatens to "Sink" The First Amendment*, 24 LOY. L.A. ENT. L. REV. 247 (2004).

242. Böttner, *supra* note 192, at 131 (arguing that only a statute has a chance).

243. *See supra* notes 226 and 228 (Australian reform proposals).

244. Hannes Rösler, *Grundrechte als Minderheitenschutz*, JuS 1999, 309.

245. But then, the proposed Uniform Defamation Act failed; *cf.* the accompanying text to *supra* note 50; David A. Anderson, *Is Libel Law Worth Reforming?*, 140 U. PA. L. REV. 487 (1991).

246. Expression, as a variation of the "chilling effect" argument, taken from New York Times Co. v. Sullivan, 376 U.S. 254, 272 (1964).

247. *See* Raymond Iryami, *Give the Dead Their Day in Court: Implying a Private Cause of Action for Defamation of the Dead from Criminal Libel Statutes*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1083 (1999). In Germany, the disparagement of the memory of deceased persons is also punishable. According to § 189 StGB, the one who disparages the memory of a deceased person can be punished with a fine or with imprisonment for not more than two years.

sona deserve protection. Thus, a new cause of action could also help to harmonize the inconsistent value decisions of tort and criminal law. Also, what of the borderline cases where a person is rendered unconscious for an extended period? Hoffmann LJ makes a persuasive statement on this point, writing: "It is demeaning to the human spirit to say that, being unconscious, he can have no interest in his privacy and dignity, in how he lives or dies."[248] Finally, in the "dead hand control" of trust law—a distinct Anglo-American legal institution—the deceased donor's wishes and interests are strongly protected by the State courts.[249]

However, to anticipate rapid fundamental reforms is overenthusiastic, desirable as they may be in the abstract. Taking all this into account, not just the legislature but also courageous courts could develop an up-to-date reputational posthumous personality right, first for (the U.S. tort law of) false light portrayal and then for defamation law more generally.[250] This would be similar to how the U.S. courts acted with enhanced creativity in the establishment of the right of privacy. It would also follow the post-1949 German courts which have been bold and active institutions in enunciating and working out the parameters of a liability for infringing upon posthumous personality rights.

F. In Addition: Broadening the Palette of Available Remedies

As regards the limited variety of remedies available in Anglo-American media and entertainment law, a further shortcoming must be addressed.

1. Right of Reply

More than thirty years after the U.S. Supreme Court's ruling in *Miami Herald v. Tornillo*,[251] U.S. courts are still neglecting alternatives to exorbitant damage awards. For example, a right of reply—the historical roots of this concept are found geographically in France and functionally in press law[252]—is viewed with skepticism in the Anglo-American countries, but is taken for granted on the European Continent[253] and elsewhere in the world.[254] In *Miami Herald v. Torn-*

248. Airedale NHS Trust v. Bland, [1993] AC 789, 829. In a complaint by the Tolkien family, the British Press Complaints Commission (PCC) decided that it was not possible to invade the privacy of someone who was dead (26 January 2003, Report 62). *See supra* note 12, at 37, First Cumulative Updating Supplement, 4.55.

249. In the U.S. the orphans' courts are in charge. Orphans' courts are a mechanism for dealing with wills and estates in some jurisdictions on the East Coast. It appears that probate courts serve a similar function in other states.

250. Stern, *supra* note 26 (avering that false light invasion of privacy, "defamation's half-sibling", has caused much criticism due to overlap and duplication, thus proposing a supplementary new tort of wrongful misrepresentation of living characters).

251. Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974).

252. Hannes Rösler, *Pressegegendarstellungen gegen Meinungen – das europäische Erwiderungsrecht als Maßstab?*, ZRP 1999, 507 note 1 and 2.

253. *See* the Council of Europe's Recommendation Rec (2004) 16 of the Committee of Ministers to member states on the right of reply in the new media environment adopted by on Dec. 15,

illo, the Court ruled that the right of reply statutes passed by some States, requiring newspapers that had criticized political candidates to give them space to respond, infringed the First Amendment. In contrast to the general concept of the special responsibility of the media in Europe, the Supreme Court claimed that press responsibility was a desirable goal, but could not be ordained by law, as there is no corresponding mandate in the Constitution.[255] The government could not force a newspaper to publish information. In broadcasting, though, the equal opportunities requirement of the Federal Communications Commission based on Section 315 of the Communications Act requires equal air time for all major candidates competing for political office. However, the preceding broader fairness doctrine, which was the model for the mentioned States' press rules and which required radio and television broadcasters to air contrasting views on controversial public issues, was abolished in 1987 (though it had been held to be constitutional in 1969).[256]

In contrast to the United States, the broadcasting laws of the European Continent allow rights of reply for everyone sufficiently affected; that is, not just for candidates. In Germany the *Gegendarstellung* is limited to factual statements, whereas the French *droit de réponse* can also be invoked against opinions, but the costs have to be partly borne by the responding party.[257]

A right of reply in the U.S. would be especially easy to put into practice on the Internet, as it offers comparatively cheap and effective methods of replying

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2004.

254. *See* JESSICA ANNABELL EBERT, DIE GEGENDARSTELLUNG IN DEUTSCHLAND UND DEN USA – DAS GEGENDARSTELLUNGSRECHT ALS BEITRAG ZUR GEWÄHRLEISTUNG VON PERSÖNLICHKEITSSCHUTZ UND MEINUNGSVIELFALT IN DEN MASSENMEDIEN, 1997; KATERINA KOCIAN ELMALEH, GEGENDARSTELLUNGSRECHT, DROIT DE RÉPONSE: EINE RECHTSVERGLEICHENDE STUDIE ZUM MEDIENRECHT VON DEUTSCHLAND, FRANKREICH UND DER SCHWEIZ, 1993; BIRTE TIMM, TATSACHENBEHAUPTUNGEN UND MEINUNGSÄUßERUNGEN – EINE VERGLEICHENDE DARSTELLUNG DES DEUTSCHEN UND DES US-AMERIKANISCHEN RECHTS DER HAFTUNG FÜR EHRVERLETZENDE ÄUßERUNGEN (1996); Rösler, *supra* note 252; *see also.* Alexander Bruns, *Persönlichkeitsschutz und Pressefreiheit auf dem Marktplatz der Ideen*, JZ 2005, 428 (commending—with comparative perspective—the French system of legal remedies).

255. *Miami Herald*, 418 U.S. at 256. In U.S. law, a great deal of preferential treatment is given to the press, but mostly not arising from constitutional sources. *See* David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 528 (2002).

256. *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969) (due to scarcity of the broadcasting spectrum). This physical scarcity argument is not persuasive any longer. *See also* Hugh Carter Donahue, THE BATTLE TO CONTROL BROADCAST NEWS: WHO OWNS THE FIRST AMENDMENT? 76-78 (1989); Guy E. Carmi, *Comparative Notions of Fairness: Comparative Perspectives on the Fairness Doctrine with Special Emphasis on Israel and the United States*, 4 VA. SPORTS & ENT. L.J. 275, 291-92 (2005).

257. Rösler, *supra* note 254 (with further references). For more on the German right of reply, see Friedrich Kübler, *Gegendarstellung und Grundgesetz*, AfP 1995, 629; Rolf Groß, *Die Gegendarstellung im Spiegel von Literatur und Rechtsprechung*, AfP 2003, 497; Walter Seitz, German Schmidt, & Alexander Schoener, DER GEGENDARSTELLUNGSANSPRUCH – PRESSE, FILM, FUNK UND FERNSEHEN (3d ed. 1998); Benjamin Korte, DAS RECHT AUF GEGENDARSTELLUNG IM WANDEL DER MEDIEN (2002).

that save on print, paper and high distribution costs.[258] Many printed newspapers offer freely accessible online-versions (e.g. the content of the New York Times is offered mainly without charge). Where implemented, there could be a section or link after the press text offering or leading to the reply. This concept is long-sighted since media content on the Internet is growing dramatically and this is putting the traditional publishing companies under pressure to publish online. Moreover, in the age of the Internet the physical scarcity doctrine of the electromagnetic spectrum (whereby the limited nature of cable slots on telephone poles etc. constitutes a "natural monopoly") used by the Supreme Court to justify a hands off approach to the press, is of only limited persuasiveness.[259]

These suggestions would be incomplete without exploring the consequences of a new right of reply.[260] This novel instrument would undoubtedly shift U.S. law in three respects: first, in lieu of monetary compensation it would permit an immaterial form of remedy that could be used to put a cap on high damage verdicts in defamation law;[261] second, it would partly mitigate the difficulty presented by the actual-malice standard; and, finally, it would add an equal chances dimension to the free market of ideas.

2. Publication Ban and other Reliefs

The obligation to remove a work from the market is a very problematic infringement. German courts are very careful with decisions in that direction.[262]

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258. *See* David R. Johnson & David Post, *Law and Borders—The Rise of the Law in Cyberspace*, 48 STAN. L. REV. 1367, 1381-82 (1996) (favoring this proposition). However, the cost aspect is not everything as the Supreme Court stressed in *Miami Herald*, 418 U.S. at 258: "Even if a newspaper would face no additional costs to comply with a compulsory access law [...] the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors. A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment." However, the Court found: "It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time."

259. Christopher S. Yoo, *The Rise and Demise of the Technology-Specific Approach to the First Amendment*, 91 GEO. L.J. 245 (2003).

260. However, it is unclear if a posthumous "Gegendarstellungsrecht" exists so that relatives could, for example, enforce the right to publish a reply that was still written by the deceased. In cases of infringement of the dimity, there exists a posthumous right of reply. *See* Roland Rixecker, *Anhang zu § 12 Das Allgemeine Persönlichkeitsrecht, in* MÜNCHENER KOMMENTAR ZUM BGB 245 (5th ed. 2006); *see also* Matthias Prinz & Butz Peters, MEDIENRECHT – DIE ZIVILRECHTLICHEN ANSPRÜCHE 134 (1999).

261. WEILER, *supra* note 3, at 141, and *supra* note 49.

262. *See* BverfG, Aug. 29, 2007, docket numers 1 BvR 1223/07 to 1 BvR 1226/07, currently only reported at juris online/Entscheidungen. (The decision allows the broadcast of the TV drama "Contergan—A Single Tablet" in November 2007. The film is about the historical backgrounds of a pharmaceuticals scandal involving the sleeping pill "Contergan" that was on the market from 1957 to 1961. The taking of such a tablet during pregnancy led to about 10,000 to 12,000 disabled children worldwide. The pharmaceuticals company Grünenthal had complained about gross historical

Nonetheless, in the summer of 2007, after years of litigation[263] and for only the second time after the *Mephisto* case, the German Federal Constitutional Court ruled in favour of an injunction prohibiting the publication of a book.[264] The case concerned the highly biographical novel *Esra*, by Maxim Biller, who is known for his viperish and polemic attitude. The book had been published in 2003 and tells the unsuccessful love story of Esra and the first person narrator. The Court ruled that the book infringes upon the privacy of Biller's former (but alive) girlfriend, because she was unambiguously personified by Esra and the novel graphically narrates the most intimate details of the sexual relationship between the literary character and the first person narrator.

It was held that the artistic freedom "in the case of a literary work in the form of a novel is to be qualified in a way specific to art."[265] Therefore a novel has to be examined differently from a biography or a specialized book. As a basic principle it was laid down that an "assumption of the fictionality of a literary text exists",[266] even in a case where real life persons are recognizable. The right to utilize models from reality is part of the artistic freedom. For that reason, the mother of Biller's former girlfriend was not awarded with an injunction herself, although she was portrayed as a dominant, manipulative and mentally disordered alcoholic. A prohibition requires more than mere recognizability.

But the proximity of personal privacy and human dignity leads to the necessity of the "absolute and inviolable protection of a core area of private life."[267] This includes "in particular the expression of sexuality," so that the artistic freedom has to give way.[268] The Court writes in this regard:

> A direct correlation exists between the degree to which the author creates an aesthetic reality on the one hand and the intensity of the infringement of privacy on the other hand. The more model and image correspond, the more the privacy is infringed. The more the artistic reproduction touches on particularly protected dimensions of privacy, the higher the degree of fictionalization has to be to prevent an infringement of privacy.[269]

The German Federal Constitutional Court found fault with the "detailed narration of the most intimate details of a woman, who was evidently identifi-

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inaccuracies, for example, regarding the reluctance to compensate victims.) *See* Bernd Rüthers & Michael Berghaus, *Der ungerechte Zorn des Dichters – oder: Literaturgeschichte contra Persönlichkeitsschutz? Zur Veröffentlichung ehrverletzender Falschbehauptungen in Schriftstellerbriefen*, JZ 1987, 1093.

263. *See* LG München, ZUM 2004, 234; OLG München, Apr. 6, 2004, docket number 18 U 4890/03; BGH, NJW 2005, 2844; *cf.* Karl-Heinz Ladeur & Tobias Gostomzyk, *Mephisto reloaded – Zu den Bücherverboten der Jahre 2003/2004 und der Notwendigkeit, die Kunstfreiheit auf eine Risikobetrachtung umzustellen*, NJW 2005, 566.

264. BVerfG, June 13, 2007, docket number 1 BvR 1783/05, currently only reported at juris online/Entscheidungen.

265. *Id.* at headnote 2.

266. *Id.*

267. *Id.* ¶ 88.

268. *Id.*

269. *Id.* at headnote 4.

able as the intimate partner of the author."[270] The Court criticized too little artistic modification and too much exhibitionistic realism, which led to the easy recognizability of Esra, especially as her real-life model had been awarded with the German film prize.[271] Again it has to be stressed that such prohibitions are exceptions under German law. The case of *Esra* is particularly exceptional in that the author is seen as consciously instigating the recognizability of concrete persons and the depiction of intimate details. For this reason reality superseded artistic fiction. Nonetheless, it is certainly regrettable that even an amended reprint covering the reproaches did not stand a chance.

A U.S.-American prohibition to publish a defamatory work would collide with the doctrine barring prior restraint,[272] historically seen as the sole purpose of the First Amendment[273] and now regarded as one of its core guarantees.[274] The constitutional doctrine that, apart from a few narrow exceptions, the government cannot prohibit a publication beforehand, even though the communication is clearly assailable after publication in criminal or other proceeding, is quite firm. So here the idea of court orders to take the product in question from the market[275] or not to publish it at all is of very limited persuasiveness. But the U.S. discussion could be enriched by focusing on the expansion of the range of alternatives to monetary damages,[276] such as the mentioned right of reply, but

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270. *Id.* ¶ 102.

271. In the novel this was changed into Fritz-Lang-prize (referring to Fritz Lang (1890–1976) who created the 1927 silent science fiction movie *Metropolis*).

272. *Cf.* Christina E. Wells, *Bringing structure to the law of injunctions against expression*, 51 CASE W. RES. L. REV. 1 (2000) (arguing that the Supreme Court's jurisprudence heavily disfavoring injunctions against expression is in disarray); Helmut Steinberger, *Freedom of the Press and of Broadcasting and Prior Restraints, in* VÖLKERRECHT ALS RECHTSORDNUNG, INTERNATIONALE GERICHTSBARKEIT, MENSCHENRECHTE, FESTSCHRIFT FÜR HERMANN MOSLER 909 (Rudolf Bernhardt et al. eds., 1983); for recent developments in English law, see A. T. H. Smith, *Freedom of the Press and Prior Restraint*, 64 CAMBR. L.J. (2005), 4.

273. Especially based on the influential COMMENTARIES ON THE LAWS OF ENGLAND by William Blackstone (1723–1780), published from 1765–1769; *see* Lewis, *supra* note 83, at 54, 60.

274. Near v. Minnesota *ex rel.* Olson, 283 U.S. 697 (1931) (holding that a state statute allowing injunctions against periodicals would be a prior restraint and is thus invalid under the First Amendment).

275. *See generally,* Marian Paschke & David-Alexander Busch, *Hinter den Kulissen des medienrechtlichen Rückrufanspruchs*, NJW 2004, 2620; Josef Franz Lindner, *Der Rückrufanspruch als verfassungsrechtlich notwendige Kategorie des Medienprivatrechts*, ZUM 2005 203; MALTE MATTHIAS KLINGE, POSTMORTALER PERSÖNLICHKEITSSCHUTZ GEGEN BUCHVERÖFFENTLICHUNGEN IM SYSTEM DES FRANZÖSISCHEN DELIKTSRECHTS: EINE RECHTSVERGLEICHENDE ANALYSE ANHAND KASSATIONSGERICHTLICHER URTEILE, 2006.

276. *See* Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 CALIF. L. REV. 772, 856 (1985); Joseph H. King, Jr., *Pain And Suffering, Noneconomic Damages, And The Goals Of Tort Law*, 57 SMU L. REV. 163 (2004); Paul DeCamp, *Beyond State Farm: Due Process Constraints on Noneconomic Compensatory Damages*, 27 HARV. J.L. & PUB. POL'Y 231 (2003); John Hayes, *The Right to Reply: a Conflict of Fundamental Rights*, 37 COLUM. J.L. & SOC. PROBS. 551, 569-575, 583, n.140 (2004) (dealing with English, German, French and European law and arguing that many restrictions present in the Uniform Correction or Clarification of Defamation Act 1994 could also be transferred just as effectively to a U.S. right to reply); Gyong Ho Kim & Anna R. Pad-

also the withdrawal, correction or clarification of factually false statements.[277]

3. Uniform Correction or Clarification of Defamation Act

Such alternative models are not unthinkable under U.S. law as proven by the 1994 Uniform Correction or Clarification of Defamation Act (UCCDA), proposed by the National Conference of Commissioners on Uniform State Laws, which provides for retractions. It creates a significant incentive to publish prompt corrections or clarifications of false statements in print, electronic, and Internet media that tend to injure an individual's reputation. A defamed person can only maintain an action for defamation if he or she makes a timely request for a correction or clarification. In libel lawsuits where a correction or clarification has been made in a way to reach the segment of the population at large, the UCCDA limits the types of damages that can be recovered. Monetary damages can only be awarded for actual economic loss, not for loss of reputation or punitive damages. But, however sensible this approach appears, the UCCDA is presently only adopted by North Dakota. The UCCDA could substitute for the patchwork of state retraction and correction statutes and should be passed by more states since a quickly-restored reputation is a better remedy than awarding enormous damages that promote a gold-digging mentality. It also prevents big publishing houses from gaming the system by printing defamatory material and taking the risk that they will not be brought to court or that the book will be a bestseller and is worth the cost of damages.

VI.
CONCLUDING REMARKS

Perhaps this Article's focus on the German constitutional and tort law on the one hand and the sometimes markedly different common law practice on the other hand[278] can only provide food for thought. This might be true in regard to the proper scope of freedom of expression, the reform of remedies in media and

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don, *Uniform Correction or Clarification of Defamation Act: An Alternative to Libel Suits*, 20 COMM. AND THE LAW 53 (1998); Charles Danziger, *The Right of Reply in the United States and Europe*, 19 N.Y.U. J. INT'L. L. & POL. 171 (1986); Maryann McMahon, *Defamation Claims in Europe: A Survey of the Legal Armory*, 19 WTR COMM. LAW 24 (2002) (considering England, the Netherlands, France, Germany, Spain, and Italy); *see also* Marc A. Franklin, *A Declaratory Judgment Alternative to Current Libel Law*, 74 CALIF. L. REV. 809 (1986).

277. Alexander Bruns, *Access to Media Sources in Defamation Litigation in the United States and Germany*, 10 DUKE J. OF COMP. & INT'L L. 283, 285-291 (2000); RENATE DAMM & KLAUS REHBOCK, WIDERRUF, UNTERLASSUNG UND SCHADENSERSATZ IN DEN MEDIEN (3d ed. 2007).

278. But not on the criminal law, which is generally of declining importance in this matter. *See* Friedrich Kübler, *Rechtsvergleichendes Generalreferat, in* DIE HAFTUNG DER MASSENMEDIEN, INSBESONDERE DER PRESSE, BEI EINGRIFFEN IN PERSÖNLICHE ODER GEWERBLICHE RECHTSPOSITIONEN 123, 130-31 (Gerald Dworkin et al. eds., 1972); *cf.* JOACHIM WOLF, DER STRAFRECHTLICHE SCHUTZ DER PERSÖNLICHKEIT GEGEN UNBEFUGTE KOMMERZIALISIERUNG: UNTER BERÜCKSICHTIGUNG DES SCHUTZES DURCH DAS ZIVILRECHT 194 (1999); *contra supra* note 247.

entertainment law (and the role of courts more generally) and the sanctity of "the dead don't hear" rule. In summary, the traditional common law position is that the publication of defamatory material about a deceased person does not give rise to a cause of action by relatives or an organization having the task of protecting the deceased's reputation, and that even a commenced action often has no survivability. This approach is contrasted with the wide-ranging protection for deceased persons in Germany, which is only—quite flexibly—limited by the passage of time.

Regarding *Hoodlum*'s portrayal of Dewey, mentioned above, there is at least a theoretical basis for relatives to file a claim under German law. There are some parallels to the *Mephisto* case concerning the a priori value of artistic works. Indeed, there were even more reasons in favor of publishing Klaus Mann's novel. Written in the difficult times of exile, his book pursued the noble ambition of criticizing a totalitarian regime, of warning the German nation, and of revealing the individuals (especially artists)[279] striving for success and social advancement in a dictatorship. Klaus Mann did not primarily write for financial gain or entertainment. In contrast, he was driven by the seriousness of the matter and the torment of seeing his own blindfolded nation heading down the road to disaster.[280]

While Klaus Mann artistically exaggerated his figure, modeled after Gründgens but bearing a different name, the makers of the *Hoodlum* film expressly named Dewey and showed him in a clear historical setting performing acts that the average viewer would believe to be accurate, even though he might not have been involved in them at all.[281] It is therefore quite likely that the film makers knew of the falsity or acted with reckless disregard of the truth.[282] In either case there is an aspect of defamation in the fiction. Thus the question is one of alienation of the persona used for inspiration. But as the film makers did not attempt such alienation of persona, and as the bribery of Dewey is just a historic lie, this artistic depiction does not deserve extensive protection. After all, it would have been an easy and legally proportional interference of artistic freedom for the film makers to have used a more abstracted depiction of Dewey.

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279. Another Nazi affiliated artist was Leni Riefenstahl (1902–2003), who shot the 1934 film "Triumph des Willens" about the "Reichsparteitag" in Nürnberg, and a documentary about the 1936 Olympic games in Berlin.

280. Many regard the result of the case (that is, the printing ban on Klaus Mann's *Mephisto*) as judicial error. *See, e.g.*, KARL LARENZ & CLAUS-WILHELM CANARIS, 2/2 LEHRBUCH DES SCHULDRECHTS 529 (13th ed. 1994). *Cf.* Reinhard Zimmermann, *Gesellschaft, Tod und medizinische Erkenntnis – Zulässigkeit von klinischen Sektionen*, NJW 1979, 569, 573.

281. In contrast to the undeniable involvement of Gründgens in the Nazi regime, *see* Töteberg *supra* note 123; *see also* WEILER, *supra* note 3, at 196 (regarding *Hoodlum*).

282. The proof of such actual malice is commonly required for false light claims. *Cf.* Time Inc. v. Hill, 385 U.S. 374, 388 (1967) (holding that the First Amendment precluded recovery for "false reports of matters of public interest in the absence of proof that the material was published with knowledge of falsity or in reckless disregard of the truth."); Cantrell v. Forest City Publishing Company, 419 U.S. 245 (1974).

In order to avoid a gap in legal protection that can have the unintended affect of chilling freedom of speech, courts must step in on behalf of the deceased, because the dead are speechless. Only then can courts achieve the principle of equal chances, necessary to finding a balance between freedom and equality, discussed here. This concept can also be used to explain why politicians and people with easy access to the public should be less protected than others: they can defend themselves. But after death this opportunity has passed for them like for everybody else. This Article has also highlighted the lack of coherence between "the dead don't hear" rule on the one hand, and the defamation law and the criminal libel statutes on the other hand, in order to support the development of a posthumous personality right.

In addition, the trends of digitalization and internationalization speak in favor of developing dignitarian posthumous personality rights in the United States. Taking the practice of the entertainment business into account, the perils of falsifications will gain in significance by further technological progress allowing for the rendition of dead persons as virtual characters nearly indistinguishable from their deceased model as part of films, "documentations," music clips, advertisements, or—with even more freedom for the viewer—video games and progressed interactive amusements.[283] In addition, the interpenetrations of worldwide collecting, marketing and distribution of information and entertainment products also increase the necessity for transregional standards of protection eliminating borders of national private law,[284] as well as for clear (and forum-shopping limiting) rules of tortious adjudicatory authority and applicable private international law.[285] Thus, the extended sphere of mass communication urges for an adjustment of the existing regime to balance freedom of expression and personality rights.

But even when one bears in mind—as stressed above—the different indigenous social conditions and legal settings, the question remains whether German practice and scholarly arguments could incite a rethinking process in U.S. law that is still imbued by constitutional and cultural exceptionalism due to the rigid and formal understanding of the First Amendment. Taking into account the path-dependency of U.S. First Amendment jurisprudence,[286] reform will

283. Though in a "History v. Hollywood" situation—in other words in a Marilyn-Monroe-type, or James-Dean-type case—this would often have a strong economic or publicity impact. *See* Matthias Lausen, *Der Schauspieler und sein Replikant*, ZUM 1997, 86; Holger Gauß, *Oliver Kahn, Celebrity Deathmatch und das Right of Publicity – Die Verwertung Prominenter in Computer- und Videospielen in Deutschland und den USA*, GRUR Int. 2004, 558.

284. *See* Hannes Rösler, *Eliminating of National Private Law—Potentials Analysis of EU Private Law, the CISG and the Principles*, 3 THE EUROPEAN LEGAL FORUM – FORUM IURIS COMMUNIS EUROPAE [EuLF] – English edition 205 (2003).

285. For the place of publication of Internet material as well as jurisdictional issues of cyberlibel, *see* High Court of Australia opinion in *Dow Jones & Co. v. Gutnik*, (2002) 210 C.L.R. 575 (Austl.). The decision has attracted global interest, since it ruled that an article on the Internet is considered to be published at the place it is read, rather than the place it once originated.

286. *See* Frank I. Michelman, *Integrity-Anxiety? in* AMERICAN EXCEPTIONALISM AND HUMAN

likely involve some shift from speaker-focused values toward community-oriented values and toward imbedding the First Amendment in a larger constitutional and philosophical setting which includes dignity as a basic underlying value. Indeed, U.S. personality and free speech law, based on the concept of liberty and especially protective against government intrusions,[287] already possesses a potential countervailing dignitarian approach. Protection of a posthumous personality right as a broader expression of a fair social interaction could ultimately contribute to the establishment of a system of greater fair speech.[288]

RIGHTS, *supra* note 105, at 241.

287. Whitman, *supra* note 119, 113 YALE L.J. 1151, 1161 (2004) (contrasting this at 1211 with the Continental traditions of dignity, respect, and personal honor, where in other words a kind of socially based personhood gives everybody the right to a respectable public face).

288. *See generally* 1 and 2 JÜRGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION (Thomas McCarthy trans., Beacon Press, Boston 1987) (for the communicative concept of an "ideal speech situation").

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Bargaining in the Shadow of Violence: The NPT, IAEA, and Nuclear Non-Proliferation Negotiations

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ABSTRACT

The NPT non-proliferation regime is both a multilateral treaty of international law and a dispute system designed to manage conflict over the use of nuclear technology. The system seeks to balance the competing desires of member-states to have access to peaceful nuclear technology and to provide national security. In the course of implementation, the system must handle disputes over alleged violations of the NPT and IAEA safeguards agreements. Negotiations, crucial to the functioning of the NPT dispute system, are undertaken in the shadow of the law and the shadow of violence. The NPT and any relevant agreement signed with the IAEA serve as a legal endowment, a set of rules that allocate rights and obligations for all parties involved. This legal framework acknowledges and incorporates various means of coercion, including the use of armed force, in order to enforce those rights and obligations. Still, the system has no monopoly on coercion and violence, as states can act outside of the system's structure to influence actors within it. This article applies dispute systems design principles to analyze the NPT as a dispute system for nuclear proliferation concerns, and examines three case studies of non-proliferation negotiations—North Korea, Iran, and Pakistan—to see how negotiations were influenced by legal endowments and the shadow of violence.

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INTRODUCTION

"I am haunted by the feeling that by 1970, unless we are successful, there may be 10 nuclear powers instead of 4, and by 1975, 15 or 20."[1]

Events of the last few years have caused many to fear that President Kennedy's prediction may indeed come true, albeit four decades later. India and Pakistan's nuclear tests in May 1998, North Korea's recent nuclear test on October 9, 2006, and Iran's ongoing uranium enrichment program have fueled speculation of an impending wave of proliferation.[2] To date, there are nine countries that are recognized as possessing nuclear weapons: the United States, Russia, the United Kingdom, France, China, Israel, India, Pakistan, and North Korea.[3] In addition, there are a host of countries that have the materials and know-

1. President John F. Kennedy made this statement in March 1963. William J. Broad & David E. Sanger, *Restraints Fray and Risks Grow as Nuclear Club Gains Members*, N.Y. TIMES, Oct. 15, 2006, at A1.

2. North Korea's test has sparked fears that South Korea, Japan, and Taiwan may move towards possessing nuclear weapons capabilities of their own. Emma Chanlett-Avery & Sharon Squassoni, NORTH KOREA'S NUCLEAR TEST: MOTIVATIONS, IMPLICATIONS, AND U.S. OPTIONS 9 (C.R.S. Report for Congress, Oct. 24, 2006), *available at* http://www.fas.org/sgp/crs/nuke/RL33709.pdf. Many countries in the Middle East, including "Bahrain, Egypt, Jordan, Kuwait, Oman, Qatar, Saudi Arabia, Syria, Turkey, Yemen and the seven sheikdoms of the United Arab Emirates," have reportedly expressed interest in acquiring nuclear energy technology in response to Iran's nuclear enrichment program. William J. Broad & David E. Sanger, *With Eye on Iran, Rivals Also Want Nuclear Power*, N.Y. TIMES, Apr. 15, 2007, at A1.

3. The United States, Russia, the United Kingdom, France, and China are the five Nuclear Nonproliferation Treaty (NPT) recognized nuclear-weapon states; India, Pakistan, and Israel are de facto nuclear-weapon states outside of the NPT system. Arms Control Association, *Nuclear Weapons: Who Has What at a Glance*, Apr. 2005, *available at*

how to rapidly manufacture a nuclear bomb, for example, Japan, and a few countries that are seeking to develop enrichment and/or reprocessing capabilities that would enable them to produce the fissile material necessary for a nuclear weapon, for example, Iran.[4] Even if these countries do not actually develop nuclear arsenals or test nuclear weapons, there is a fear that they will develop "near-nuclear arsenals" or "virtual deterrence" capabilities.[5] In other words, countries will develop all the capabilities necessary to produce and test a nuclear weapon, but instead of doing so they will technically remain in the Nuclear Nonproliferation Treaty (NPT)[6].

Given the nuclear proliferation challenges facing the globe, the NPT has come under increasing scrutiny as to its effectiveness in preventing and curtailing proliferation.[7] The NPT, which entered into force in 1970, is the bedrock of the global non-proliferation regime. It divides member states into nuclear-

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http://www.armscontrol.org/factsheets/Nuclearweaponswhohaswhat.asp. North Korea has tested a nuclear weapon and is considered by most intelligence estimates to have enough fissile material for a few nuclear devices, so it is listed here as a current nuclear power, but negotiations are underway that may eventually lead to North Korea's abandonment of nuclear weapons. However, North Korea's nuclear test on October 9, 2006 may have been a failure, which further complicates efforts to classify its nuclear power status. Richard L. Garwin & Frank N. von Hippel, *A Technical Analysis of North Korea's Oct. 9 Nuclear Test*, ARMS CONTROL TODAY, Nov. 2006, *available at* http://www.armscontrol.org/act/2006_11/NKTestAnalysis.asp.

4. Broad & Sanger, *supra* note 1 ("Mohamed ElBaradei, the director general of the I.A.E.A., has estimated that up to 49 nations now know how to make nuclear arms, and he has warned that global tensions could push some over the line."). There are generally two types of nuclear weapons—those made with highly enriched uranium (most relevant for the Iran case, and also relevant for the second stage of the North Korea case), and those made from plutonium (most relevant for the first stage of the North Korea case). Natural uranium contains only 0.7% of the U-235 isotope, which is fissile or fissionable—the rest is the stable U-238 isotope. Enriching uranium is a process by which the percentage of fissile U-235 is increased in a given amount of uranium. For most energy production needs, uranium enrichment need only reach the level of 1.8-3% U-235. For a highly-enriched uranium weapon, however, the percentage of U-235 must be almost 93%. GARY T. GARDNER, NUCLEAR NONPROLIFERATION: A PRIMER 2-3, 6, 16 (1994). Plutonium, or P-239, is a byproduct of the nuclear energy fuel cycle and is highly fissile. P-239 is extracted from spent nuclear fuel rods in reprocessing facilities. *Id.* at 5-6, 19.

5. Andrew Grotto, *Who's Next?*, WASH. POST, Oct. 15, 2006, at B3. The concept of "virtual arsenals" was developed as a means of promoting nuclear disarmament among the nuclear-weapon states. Nuclear-weapon states could dismantle their nuclear weapons to limit the number of operational nuclear devices, thereby limiting the role that nuclear weapons play internationally and preserving the core element of deterrence, as the arsenals could be reconfigured in a short period of time depending on national security concerns. *See* MICHAEL MAZAAR, ed., NUCLEAR WEAPONS IN A TRANSFORMED WORLD: THE CHALLENGE OF VIRTUAL NUCLEAR ARSENALS (1997). This concept, however, can also be applied to would-be proliferants seeking elements of deterrence while remaining within the legal strictures of the NPT. Germany and Japan are often cited as having a "virtual deterrence" capability because their mastery of the nuclear fuel cycle and strong industrial base give them the capacity to quickly develop nuclear weapons if the need were to arise. T.V. PAUL, POWER VERSUS PRUDENCE: WHY NATIONS FORGO NUCLEAR WEAPONS 59 (2000).

6. Treaty on the Non-Proliferation of Nuclear Weapons, *opened for signature* July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 (entered into force Mar. 5, 1970) [hereinafter NPT].

7. *See generally* JOSEPH CIRINCIONE, BOMB SCARE: THE HISTORY AND FUTURE OF NUCLEAR WEAPONS (2007); Mario E. Carranza, *Can the NPT Survive? The Theory and Practice of U.S. Nuclear Non-proliferation Policy after September 11*, 27 CONTEMP. SECURITY POL'Y 489 (2006).

weapon states and non-nuclear-weapon states, allocating rights and responsibilities between them. It charges the International Atomic Energy Agency (IAEA) with monitoring and safeguarding nuclear material to ensure that peaceful nuclear endeavors do not result in nuclear weapons proliferation. The NPT is a multilateral treaty of international law, but it is also a dispute system designed to manage conflict over the use of nuclear technology between member-states. The system seeks to manage the competing desires of member-states to have access to peaceful nuclear technology and to provide national security. In the course of implementation, the system must handle disputes over alleged violations of the NPT and IAEA safeguards agreements.

The NPT represents a unique dispute system—it is designed to reduce the incentives of non-nuclear-weapon states to proliferate by a) offering them assistance and access to peaceful nuclear technology, and b) encouraging the nuclear-weapon states to move towards disarmament. The stakes are inordinately high—on the one hand, possession of nuclear weapons can virtually guarantee security against attack by other states. On the other hand, proliferation by one state increases the incentives for other states, especially neighboring states, to proliferate in order to preserve their own security and avoid potential nuclear blackmail, thereby increasing the security risks for the initial proliferant and other nearby states.[8] Moreover, the period in which a state is in the act of proliferating, or is suspected to be in the act of proliferating, is extremely unstable and dangerous due to the risk of a preventative attack by other states seeking to thwart the proliferant's nuclear ambitions.[9] The proliferating period is also wrought with the danger of nuclear accidents due to the largely clandestine nature of most proliferation efforts.[10] It is in this period that the NPT dispute system is most important and most vulnerable.

Negotiations—between the IAEA and the suspected proliferant, and between global powers and the suspected proliferant—are crucial to the functioning of the NPT dispute system. These negotiations are undertaken in and influenced by the shadow of the law and the shadow of violence. On the one hand, the NPT and any relevant agreement signed with the IAEA serve as a legal endowment, a set of rules that allocate rights and obligations for all parties involved.[11] This legal endowment is couched within the larger NPT/IAEA dispute system which allocates roles to various actors, frames the issues in contention using measurable criteria, centralizes the source of information gathering and

8. For a complete debate over the potential benefits and harms from proliferation, including analysis of proliferation incentives, see SCOTT D. SAGAN & KENNETH N. WALTZ, THE SPREAD OF NUCLEAR WEAPONS: A DEBATE RENEWED (2003). *See also* CIRINCIONE, *supra* note 7, at 51-58; THE NUCLEAR TIPPING POINT: WHY STATES RECONSIDER THEIR NUCLEAR CHOICES (Kurt M. Campbell et al. eds., 2004).

9. Scott D. Sagan, *More Will be Worse*, *in* SAGAN and WALTZ, *supra* note 8, at 61.

10. *Id.* at 78.

11. For a discussion of the influence of legal bargaining endowments, see Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968-69, 978-80 (1979).

processing, and adds iterations in potential disputes, prolonging the time available to negotiate a resolution. On the other hand, states in their individual and collective capacities have recourse to means of coercion and violence to achieve security objectives. States can unilaterally use economic sanctions or military force to implement their own national security objectives. In addition, the United Nations Security Council (UNSC), acting under Chapter VII, can authorize the use of armed forces or other measures not involving the use of armed forces, including economic sanctions, to "maintain or restore international peace and security."[12] Indeed, by stipulating recourse to the UNSC at various levels of the dispute process, the NPT/IAEA system incorporates the shadow of violence within its legal structure.

Although there is considerable literature analyzing and criticizing the NPT and the IAEA, this article seeks to apply dispute systems design (DSD) principles[13] to analyze the NPT as a dispute system for nuclear proliferation concerns. Part I of this article presents a list and description of relevant DSD principles for multilateral treaties like the NPT. Part II discusses the structure of the NPT system, including provisions for IAEA monitoring and inspection of facilities, potential penalties for violations of the NPT, provisions for withdrawal from the system, and finally, an assessment of the NPT structure in light of the applicable DSD principles from Part I. Part III of this article will look at three case studies of non-proliferation negotiations—North Korea, Iran, and Pakistan—to see how the negotiations were influenced by legal endowments and the shadow of violence. These cases were chosen because they constitute the three most recent negotiation efforts with countries that have significant nuclear programs.[14] Each case study will include a background to the dispute, the relevant legal issues at

12. U.N. Charter arts. 39, 41 (authorizing measures not involving armed forces), 42 (authorizing the use of armed forces).

13. DSD refers to an emerging field of negotiation theory that focuses on the manner in which organizations, institutions, and legal regimes handle conflict. This field seeks to improve the management of conflicts by developing best practices for designing institutions to effectively cope with and manage conflict. A dispute system refers to any system that manages conflict, for example, the tort law system, workers' compensation systems, grievance procedures, sexual harassment policies, arbitration systems, the WTO dispute system, *etc.*

14. North Korea is of interest because it recently tested a nuclear weapon after having withdrawn from the NPT; Iran was chosen because it is within the NPT system and is basing its claim to uranium enrichment on the legally-endowed NPT right to develop civilian nuclear technology; and Pakistan was included because it is a country outside the NPT system that tested its nuclear devices in the face of strong international pressure to refrain from testing. Libya was not chosen because its nuclear program was not very well developed; India was not chosen because it first tested a nuclear device in 1974; and Israel was not chosen because of the lack of information over negotiations for it to cease its nuclear program. There are many other cases of potential research interest that are beyond the scope of this article, including countries that a) inherited nuclear weapons but chose to surrender them and join the NPT (for example, Belarus, Kazakhstan, and Ukraine), b) developed nuclear weapons via indigenous programs, but later decided to dismantle the weapons and the program (for example, South Africa), c) started nuclear weapons programs but decided to end them (for example, Argentina, Brazil, Libya, South Korea, and Taiwan), and d) started nuclear weapons programs but were prevented by external force from developing nuclear weapons (for example, Iraq). Arms Control Association, *supra* note 3.

play, the implicit and explicit coercive means made available, and an analysis of the dispute system as it functioned in that particular case. Part IV will discuss potential improvements to the NPT/IAEA dispute system given the applicable DSD principles and the lessons learned from the case studies.

I.
APPLICABLE DISPUTE SYSTEMS DESIGN PRINCIPLES

Much of DSD literature concentrates on developing institutional structures for the effective management of conflict within dispute systems at the local or national level. This includes, for example, systems for small- to medium-sized organizations, policy-making dispute systems, alternatives to the tort law system, *etc.* The NPT, however, is a system designed for sovereign and independent nation-states that can legally develop nuclear technology outside of the NPT system. Nonetheless, many of the DSD principles that are useful at the local or national level are also helpful for systems at the international level.

In general, dispute systems approaches can be placed into three categories: those that focus on the parties' interests, those that focus on the parties' rights as defined by the system, and those focusing on the parties' power to effectuate change outside of the system.[15] The approaches are meant to inform the focus of the system being designed, that is, whether the system encourages the parties to resolve disputes through interest-based negotiations, on a predetermined allocation of rights, or on the distribution of power between the parties. The interest-based approach, which demands attention to the core motivating concerns of the parties and stresses the use of interest-based negotiations, is often seen as the most cost-effective and efficient design method.[16] In addition to focusing on the means of dispute resolution, various DSD principles also stress factors such as system membership, the scope of the system's subject-matter coverage and jurisdiction, centralization of information and access, allocation of decision-making control, and systemic flexibility.[17]

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15. WILLIAM L. URY ET AL., GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT 7-19 (1993).

16. *Id.* at 42-52. In promoting the interest-based approach, Ury *et al.* present six DSD principles: 1) Put the focus of dispute resolution efforts on the parties' interests; 2) Build in "loop-backs" to negotiation throughout the process to encourage the parties to devise mutually-agreed-upon solutions; 3) Provide low-cost rights- and power-based backup means of resolution in case interest-based negotiations fail, for example, mediation or arbitration; 4) Build in means for the parties to consult with system administrators before, and provide feedback to them after, using the system; 5) Arrange procedures in a low-to-high-cost sequence to maximize cost effectiveness; and 6) Provide the necessary motivation, skills, and resources for the parties to effectively use the system. *Id.* at 42. These principles feature prominently among the principles discussed *infra* in detail.

17. Khalil Z. Shariff, *Designing Institutions to Manage Conflict: Principles for the Problem Solving Organization*, 8 HARV. NEGOT. L. REV. 133, 134 & 141-42 (2003). Shariff lists seven DSD principles that can be summarized as follows: 1) Include all interested stakeholders and those likely to be affected by the institution; 2) Broad coverage of issues of interest to the institution's members; 3) Depth of jurisdiction to take action within the areas of coverage; 4) Build central sources of in-

The following ten DSD principles are the most relevant in analyzing a multilateral framework that affects the entire world, like the NPT non-proliferation regime:

1. Seek universal state membership, especially of those states that would be important targets of regulation in the regime, and allow interested non-state parties to be involved.
2. Allocate legal endowments to protect parties that are more vulnerable to coercion given imbalances in the distribution of economic, military, and political power across states.
3. Focus dispute resolution efforts on the interests of the immediate parties in light of the interests of the collective membership.
4. Rely on and loop back to negotiations throughout the process.
5. Provide for rights- and power-based backups, arranged in a low-to-high-cost sequence to maximize cost effectiveness.
6. Use an independent and neutral body with specialized knowledge and capacity to monitor and police the system and to function in a consultative role.
7. Allow broad and deep coverage of the issues related to the regime's purpose.
8. Connect the goals of the regime to oversight, monitoring, and implementation mechanisms.
9. Vest control over decisions with the most interested and affected parties, except in the case of power back-ups, where control should lay with a recognized representative body of the international community.
10. Provide for meaningful periodic review mechanisms of the system based on measurable criteria.

First, because nuclear proliferation affects the security of all states and people, universal state membership should be a primary goal, with unofficial status available for specialized and interested non-governmental organizations (NGOs) and interest groups. Because possession of nuclear weapons or nuclear energy technology outside of the system has security implications for parties within the system, it is essential that all parties, particularly those in possession of nuclear weapons and technology, are within the system so that dispute mechanisms are utilized to contest a party's violations. Otherwise, for actions outside of the system, there is no way to mold state behavior through the use of legal endowments, and there is less of a chance of encumbering the use of force through an iterative, controlled dispute process. NGOs should have some form of recognized interaction with the system because they can bring highly valuable sources of intelligence, expertise, advocacy, and oversight resources to supplement the system.[18]

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formation gathering and dissemination and specialized institutional capacity; 5) Decentralize and multiply conversations among members in multiple forms and fora; 6) Vest control over decisions in the most interested and affected parties; and 7) Regularly review the institution's design and integrate lessons learned. *Id.* at 143-56. Some of Shariff's principles also feature prominently among the principles discussed *infra*. The elements that were incorporated from Ury *et al.* and Shariff's lists were adjusted to reflect an international environment as opposed to a domestic one.

18. Unofficial or observer-like status for certain approved NGOs can supplement the system, especially where state action or compliance may be unreliable. Even though states technically represent their populations, NGOs may be more forthcoming with criticism about a state's compliance with its NPT obligations. International NGOs can also help unite groups of people from different countries behind a common cause related to nuclear policy, thereby strengthening the voice of grass-

Second, the regime's legal endowments, that is, the rights that the regime allocates to the various parties, should be calibrated to protect the rights of parties that are least capable of enforcing or defending their rights outside of the system. In the NPT context, because nuclear-weapon states posses so much coercive potential relative to non-nuclear-weapon states, the non-nuclear-weapon states should benefit from a legal endowment that protects its right to develop peaceful civilian nuclear technology, even in the face of coercive opposition from nuclear-weapon states that would oppose such developments.

Third, disputes within the system need to be resolved according to the competing interests of the affected parties, as they are the most directly concerned with the outcome of the dispute. However, the overall goals of the system must also play a salient role in the resolution of the dispute because the totality of the membership is interested in the outcome, even though not all members have the most vested regional interests at stake in the particular dispute.

Fourth, in order to maximize member autonomy and ensure that the most durable solutions to conflicts are developed, the system should rely on negotiations as much as possible.[19] Interest-based negotiations that are framed within the established rights and obligations of the NPT system should increase the probability that a viable solution to the conflict will be reached. However, as recognized in the fifth principle, there must be rights- and power-based backups in case negotiations ultimately fail, and they should be arranged in a way to maximize the efficiency of their use.[20] Thus, in addition to maximizing the availability of and reliance on negotiation, other means of facilitating conflict resolution, such as arbitration, mediation, or judicial remedies, should be considered.

Principle six acknowledges that because monitoring of nuclear facilities and dissemination of peaceful nuclear technology is important for the system to function, an independent and neutral body with specialized knowledge and capacity is essential. The IAEA plays this role within the NPT system. As per principle seven, the system should have competence to address all issues related to the core goals of the system, for example, nuclear energy development concerns, enrichment technology concerns, arms control agreements, *etc.* Principle eight is important because it requires that the goals of the system have independent means of supervision in order to ensure that the system does not overfocus on some goals while neglecting others. This principle serves as a means of

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roots movements. While unlimited NGO participation may be unreasonable, participation within limits defined by agreement of the state parties should be encouraged. The U.N. provided for such regulated involvement by NGOs at the 2005 NPT review conference. U.N., Aide Memoire for Non-Governmental Organizations, *available at* http://www.un.org/events/npt2005/AideMemoire.pdf.

19. *See* URY ET AL., *supra* note 15, at 52-56.

20. *See id.* at 56-60. Ury *et al.* view rights-based back-ups as appeals to contractually recognized entitlements or to independent arbiters of disputes, for example, courts or arbitrators. *Id.* at 7. Power-based actions refer to those actions taken to coerce the other party, for example, economic sanctions, military strikes, *etc. Id.* at 7-8.

testing whether the regime is effective in balancing the competing goals that often underlie the grand bargain involved in multilateral treaties.

The issue of control addressed in principle nine is especially important. Simply vesting control over decisions with the most interested parties is not enough because the decision to use power-backups by some interested parties may lead to severely negative ramifications for other state parties.[21] Thus, where power back-ups are contemplated, control over such decisions should lie with international representative bodies, for example, the United Nations Security Council (UNSC).[22] Finally, the tenth principle demands meaningful periodic review of the system, that is, a review that evaluates the system with reference to the ten DSD principles listed above, and with regard to the system's overall performance in light of measurable criteria. Such criteria could include the number of new proliferants, progress towards disarmament measured by changes in the level of nuclear-weapon states' arsenals, levels of cooperation over peaceful nuclear technology, *etc.*

II.
THE NON-PROLIFERATION DISPUTE SYSTEM

A. Structure of NPT/ IAEA Non-Proliferation Regime

1. Nuclear Non-Proliferation Treaty (NPT)

The NPT is founded on the core value that no state should possess nuclear weapons. In expressing this value, the NPT is structured around three goals: non-proliferation, peaceful use of nuclear technology, and disarmament. The world according to the NPT is divided into official nuclear-weapon states, and non-nuclear-weapon states. A nuclear-weapon state is defined as one that has "manufactured and exploded a nuclear weapon or other nuclear explosive device prior to January 1, 1967,"[23] which includes the United States, Russia, the United

21. In other words, if the United States or Israel, both very interested in Iran's nuclear program, were to launch military strikes on Iranian nuclear facilities, that action would cause serious complications and problems for other states in the region, who may oppose such action but lack the means of preventing the action from happening.

22. Despite the many flaws in the UNSC, it is currently the only option recognized by the U.N. Charter in terms of an international representative body having the authority to approve the use of force or multilateral sanctions against other states. Relying on the UNSC better safeguards the rights and interests of other states because it ensures a minimum level of international approval for some of the most lasting and violent power options available, especially compared to the alternative of unilateral actions by any interested state. Thus, where decisions regarding the use of power-backups have to be made, the UNSC is currently the best option available, outside of attempting to create a new structure with similar powers. For a proposal to create such a new "Counsel on Weapons of Mass Destruction," see Richard Butler, *Improving Nonproliferation Enforcement*, 25 WASH. Q. 133 (2003).

23. NPT art. IX ¶ 3.

Kingdom, France, and China. The nuclear-weapon states pledge not to transfer nuclear weapons to any other state or assist in their development,[24] and non-nuclear-weapon states party to the treaty agree not to receive, develop, or seek to develop nuclear weapons.[25]

The basis of enforcing this non-proliferation pledge is found in Article III of the treaty, which requires non-nuclear-weapon states party to the treaty to accept comprehensive IAEA safeguards. The comprehensive safeguards agreement, to be negotiated by the state and the IAEA, allows the IAEA to verify that the non-nuclear-weapon state is not diverting nuclear technology for weapons purposes.[26] The safeguards agreement covers "all source or special fissionable material in all peaceful nuclear activities" carried out under the state's control.[27] All states party to the treaty pledge not to provide fissionable material or the means to produce it unless it is subject to IAEA safeguards.[28]

In promoting the peaceful use of nuclear energy, the NPT reaffirms the "inalienable right" of states to develop, research, and use nuclear energy "without discrimination" for peaceful purposes.[29] Cooperation and the exchange of equipment, materials, and technology in furtherance of such peaceful use of nuclear energy are encouraged.[30] Nuclear-weapon states also undertake, under proper international observation and procedures or via bilateral agreements, to provide non-nuclear-weapon states with the potential benefit from any peaceful application of nuclear explosions.[31]

Finally, the NPT seeks eventual disarmament. Article VI requires that each party "undertake to pursue negotiations in good faith" to cease the nuclear arms race and comply with nuclear disarmament treaties subject to strict international control.[32] In furtherance of this objective, the NPT notes the possibility of states creating regional nuclear weapons-free zones.[33]

While member states are expected to follow the guidelines of the NPT, they retain the sovereign right to withdraw from the treaty if "extraordinary events" relating to nuclear weapons have "jeopardized [their] supreme interests."[34] A state making such a withdrawal must give three-months notice to the other NPT parties and the UNSC, and such notice must include a statement explaining the

24. *Id.* at art. I.
25. *Id.* at art. II.
26. *Id.* at art. III ¶ 1.
27. *Id.*
28. *Id.* at art. III ¶ 2.
29. *Id.* at art. IV ¶ 1.
30. *Id.* at art. IV ¶ 2.
31. *Id.* at art. V.
32. *Id.* at art. VI.
33. *Id.* at art. VII.
34. *Id.* at art. X ¶ 1.

extraordinary events jeopardizing its supreme national interests.[35]

The NPT also includes a list of review procedures that ensure the treaty's effectiveness in the face of this state autonomy. Five years after the treaty's entry into force, member states are expected to organize a conference to review the operation and success of the NPT "with a view to assuring that the purposes of the Preamble and the provisions of the Treaty are being realized."[36] If member states then feel compelled to hold further review conferences, they may vote to do so at subsequent intervals of five years. Furthermore, the treaty requires that a second conference be held twenty-five years after the treaty enters into force. At this final conference, the parties will decide, by majority vote, whether the treaty should continue in force indefinitely, or whether it should only be extended incrementally for additional five-year periods.[37]

2. International Atomic Energy Agency (IAEA)

In 1957, well before the NPT entered into force, the International Atomic Energy Agency was founded and charged with promoting peaceful nuclear cooperation. Its motto, "Atoms for Peace," provides a clear indication of the Agency's objectives. The IAEA's official purpose is to "accelerate and enlarge" atomic energy's contribution to world peace, health, and prosperity, and to ensure, through assistance and monitoring, that the technology does not further any military purpose.[38] Much of the IAEA's work involves encouraging and assisting in research, development, and application of peaceful uses of atomic energy.[39] The IAEA's most important job, however, is the monitoring and safeguarding of nuclear material to prevent its use for weapons purposes in accordance with the provisions of the NPT and its dispute system.

The Statute of the IAEA authorizes the Agency to "establish and administer safeguards designed to ensure that special fissionable and other materials, services, equipment, facilities, and information . . . under [IAEA] supervision or control are not used in such a way as to further any military purpose."[40] In carrying out the safeguard functions, the IAEA is empowered to examine facility designs, prescribe health and safety measures, require operational records to ensure accountability of fissionable material, call for progress reports, send inspectors who are to have access to all places, data, and personnel associated with nuclear materials, equipment, or facilities under a safeguard agreement, and suspend or

35. *Id.* For a proposal to amend the withdrawal clause of the NPT, see Raven Winters, *Preventing Repeat Offenders: North Korea's Withdrawal and the Need for Revisions to the Nuclear Non-Proliferation Treaty*, 38 VAND. J. TRANSNAT'L L. 1499 (2005).

36. NPT art. VIII ¶ 3.

37. *Id.* at art. X ¶ 2.

38. Statute of the IAEA art. II, Oct. 23, 1956, 8 U.S.T. 1039, 276 U.N.T.S. 3 (entered into force July 29, 1957) [hereinafter IAEA Statute].

39. *Id.* at art. III ¶ 1.

40. *Id.* at art. III ¶ A.5.

terminate assistance to a state if they are found in violation of the agreements and fail to take corrective measures.[41] In order to gain authorization to administer safeguards in each state, the Agency must enter into a comprehensive safeguards agreement, specific project agreement, or "voluntary offer" agreement.[42] These agreements determine the scope of the IAEA's monitoring and verification powers. Monitoring can include routine inspections of principal nuclear facilities or ad hoc inspections of transferred safeguarded nuclear materials,[43] as well as short-notice inspections of undeclared facilities, if the state has negotiated an *Additional Protocol* safeguards agreement.[44] *Additional Protocol* inspec-

41. *Id.* at art. XII ¶ A.

42. Non-nuclear-weapon states party to the NPT are required to negotiate comprehensive safeguards agreements with the IAEA. NPT art. III ¶ 1. Comprehensive safeguards agreements place "all source or special fissionable material in all peaceful nuclear activities" under the IAEA inspections regime. *Id.*; IAEA Information Circular, *The Structure and Content of Agreements Between the Agency and States Required in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons*, ¶ 2, INFCIRC/153 (Corrected), June 1972, *available at* http://www.iaea.org/Publications/Documents/Infcircs/Others/infcirc153.pdf. Agreements under INFCIRC/66/Rev.2 apply IAEA safeguards only to the nuclear material, facilities, or items specified in that agreement itself. IAEA Information Circular, *The Agency's Safeguard's System*, ¶ 15, INFCIRC/66/Rev.2, Sept. 16, 1968, *available at* http://www.iaea.org/Publications/Documents/Infcircs/Others/inf66r2.shtml. The NPT nuclear-weapon states have special "voluntary offer" agreements with the IAEA which allow the Agency to apply safeguards to nuclear material in facilities selected by the Agency from a list provided by the NPT nuclear-weapon state. IAEA, *Safeguards Statement for 2006*, *available at* http://www.iaea.org/OurWork/SV/Safeguards/es2006.pdf, at 8.

43. IAEA Information Circular INFCIRC/66/Rev.2, *supra* note 42, at ¶¶ 45-54. Routine inspections include audits of records and reports, verification of the amount of safeguarded nuclear material, examination of principal nuclear facilities, and review of operations at principal nuclear facilities and research and development facilities containing safeguarded nuclear material. *Id.* at ¶ 49. Special inspections can be undertaken if the study of a report makes such an inspection desirable, if any unforeseen developments require immediate action, or if a substantial amount of safeguarded nuclear material is being transferred outside of the state's jurisdiction. *Id.* at ¶ 53-54. Ad hoc inspections are typically used to verify a state's initial reporting of nuclear material, and to verify material involved in international transfers. IAEA, IAEA Safeguards Overview: Comprehensive Safeguards Agreements and Additional Protocols, *available at* http://www.iaea.org/Publications/Factsheets/English/sg_overview.html. "Safeguards visits" relate to verification of facility design and operation information. *Id.* The first North Korean crisis spawned the terminology of inspections for "continuity of safeguards information," which referred to inspections for the purposes of maintaining IAEA safeguarding and monitoring equipment. JOEL S. WIT ET AL., GOING CRITICAL 43-44 (2004).

44. Arms Control Association, Fact Sheets, *The 1997 IAEA Additional Protocol at a Glance*, Jan. 2005, *available at* http://www.armscontrol.org/factsheets/IAEAProtocol.asp. Given the experience of North Korea and Iraq, the IAEA sought to fill potential gaps in the coverage of its inspections regime. It produced a model Additional Protocol that member states can voluntarily agree to in order to grant the IAEA greater access to and coverage of the state's domestic nuclear program, including any location where nuclear material is or may be present. IAEA, Model Protocol Additional To The Agreement(S) Between State(S) And The International Atomic Energy Agency For The Application Of Safeguards, INFCIRC/540 (Corrected), *available at* http://www.iaea.org/Publications/Documents/Infcircs/1998/infcirc540corrected.pdf. As of May 2007, 81 states have Additional Protocol agreements in force. IAEA, Strengthened Safeguards System: Status of Additional Protocols, *available at* http://www.iaea.org/OurWork/SV/Safeguards/sg_protocol.html.

tion agreements give the IAEA increased access and more robust options for carrying out its safeguarding and inspecting duties.[45]

The IAEA Statute also lays out a protocol for the regulation of state action. In the case of state non-compliance with IAEA safeguards, IAEA inspectors must send a report to the Director General, who then transmits the report to the IAEA Board of Governors.[46] After direct negotiation attempts with the state fail, the Board of Governors reports the non-compliance to all Agency members and also to the UNSC and U.N. General Assembly.[47] The Board may then take measures to cease IAEA assistance and rescind IAEA materials and support.[48] The statute also allows members of the IAEA to withdraw from the Agency by providing notice in writing to that effect.[49] Finally, the statute stipulates that when there are disputes over the interpretation or application of the IAEA statute that cannot be resolved through negotiations, and parties are unable to agree on any other forum or mode of settlement, the issue is referred to the International Court of Justice (ICJ).[50]

The Statute of the IAEA is supplemented by IAEA guidelines on the basic structure and content of comprehensive safeguards agreements between the IAEA and states party to the NPT.[51] The guidelines specify the details of the inspections and monitoring relationship between the IAEA and the NPT member state, including the specific procedures and backups for dispute settlements. In dispute settlement cases, one party may consult the other regarding questions of interpretation or application, and the member state may request that a particular question be considered by the Board of Governors.[52] If a dispute over the interpretation or implementation of the agreement, unrelated to a decision of the Board regarding non-compliance, cannot be settled by negotiation, it must be settled by binding arbitration.[53] Similarly, disputes over access for inspectors are handled according to this same order of procedures. The following table provides a diagram of the NPT/IAEA dispute system.

45. For comprehensive information on the status of Safeguards Agreements and Additional Protocol status, see IAEA, Safeguards Current Status, *available at* http://www.iaea.org/OurWork/SV/Safeguards/sir_table.pdf.

46. IAEA Statute at art. XII § C.

47. *Id.*

48. *Id.*

49. *Id.* at art. XVIII § D.

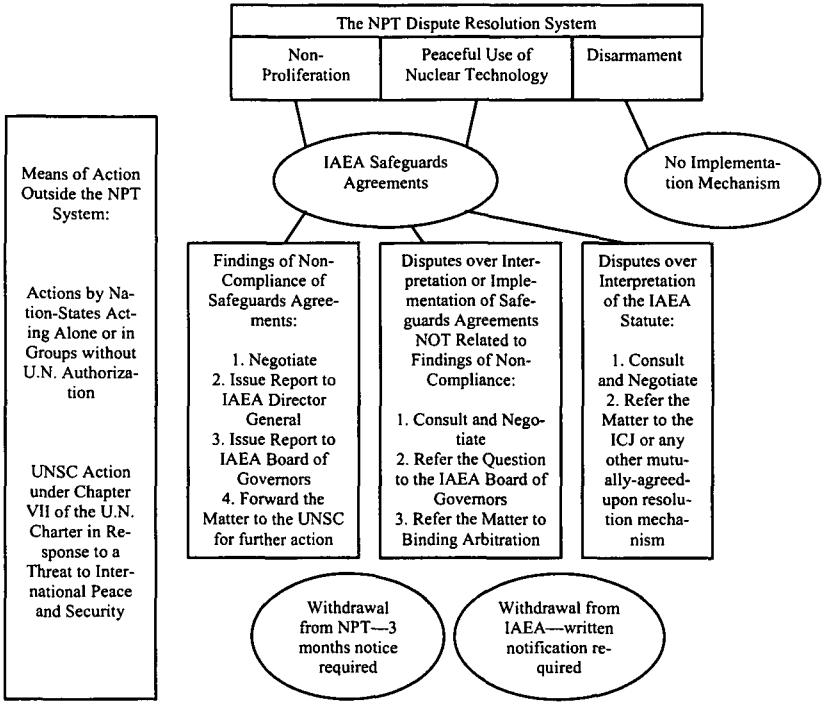
50. *Id.* at art. XVII § A.

51. IAEA Information Circular INFCIRC/153, *supra* note 42.

52. *Id.* at ¶ 20-21.

53. *Id.* at ¶ 22. The guidelines also provide for the naming of arbitrators—each party designates an arbitrator, and the two arbitrators elect a third arbitrator to be the Chairman. The tribunal is to select the arbitral procedure. *Id.*

TABLE 1
DIAGRAM OF NPT/IAEA DISPUTE SYSTEM



B. Analysis of NPT as a Dispute System

Having outlined and diagrammed the basic structure of the NPT non-proliferation regime, I now proceed to analyze the system based on the ten DSD principles outlined above.

1. Seek universal state membership, especially of those states that would be important targets of regulation in the regime, and allow interested non-state parties to be involved.

Nuclear proliferation affects the security of all states, and the possession of nuclear weapons by any one state increases the chances that other states might also seek to acquire nuclear weapons in response. Furthermore, because the NPT system aims to achieve eventual disarmament of nuclear-weapon states, full membership is essential to ensuring that all states in possession of nuclear weapons participate in the process. Any nuclear-weapon state outside of the system will generate proliferation incentives for states within the system, thereby

weakening the effectiveness of the system's ability to both limit proliferation and achieve ultimate disarmament.

Although universality of membership is recognized as an "urgent priority" for the NPT,[54] four critical states are not parties to the treaty: Israel, India, Pakistan, and North Korea.[55] Out of 193 states, 187 are NPT members. While that ratio is impressive, the non-participation of four states that possess nuclear weapons is quite debilitating to the NPT because those states influence the incentives for other states to proliferate. Of a total of nine states possessing nuclear weapons, only five are NPT members—44% of states that possess nuclear weapons are not NPT members. The problematic membership deficit, seen in this way, is glaring. Those non-member nuclear-weapon states reduce the chances that any of the nuclear powers will ever give up their weapons, thus reducing the incentives for states to remain in the NPT system.[56]

Clearly the NPT intended to include all states within its system, but as a system it has thus far been unable to achieve that goal. In the face of non-universal membership, the rest of the parties to the treaty have to work to isolate the impact from treaty outliers, and also to create incentives, both positive and negative, for a) treaty members to remain within the treaty, and b) non-treaty members to eventually join the treaty. The system could be faulted for failing to persuade India, Pakistan, and Israel to join the treaty in the first place, for example, for not providing enough security assurances, or not helping to alter the security environment through nuclear weapons-free zones or other security-building measures. The NPT is also subject to criticism for not being imaginative enough in finding ways to include the remaining few states within the system, or to restructure the system with another tier of members below the five originally recognized nuclear-weapon states.[57] Such changes could have helped to create a universal system, though that would come at the expense of sacrificing some of the regime's credibility, as many states could forcefully argue that including the four non-NPT nuclear states in the NPT as anything but non-nuclear-weapon states would reward them for non-compliance with the treaty. An additional hurdle would be to secure the support needed to make such

54. Principles and Objectives for Nuclear Non-Proliferation and Disarmament ¶ 1, NPT/CONF.1995/32/DEC.2, May 11, 1995 ("Universal adherence to the Treaty on the Non-Proliferation of Nuclear Weapons is an urgent priority. All States not yet party to the Treaty are called upon to accede to the Treaty at the earliest date, particularly those States that operate unsafeguarded nuclear facilities. Every effort should be made by all States parties to achieve this objective.").

55. United Nations, Status of Multilateral Arms Regulation and Disarmament Agreements, *available at* http://disarmament.un.org/TreatyStatus.nsf.

56. For a discussion of the implications of the exclusion of these four countries from the NPT and some potential options for including the four states in the current NPT regime, see David S. Jonas, *Variations on Non-Nuclear: May the "Final Four" Join the Nuclear Nonproliferation Treaty as Non-Nuclear Weapon States While Retaining Their Nuclear Weapons?*, 2005 MICH. ST. L. REV. 417 (2005).

57. *See id.*

changes to the system, though it could also be possible to have a separate agreement relating to those countries that would not require tinkering with the NPT.

NGOs, either domestic NGOs focusing on a particular country's NPT obligations or international NGOs focused on global nuclear policy such as disarmament, can play an important supplementary role in regimes like the NPT. First, these organizations can play the role of local watchdog in terms of pressuring their home state to comply with NPT requirements. Such internal political pressure may be an important factor in the way some states make decisions regarding nuclear policy.[58] Second, these groups can serve a technical function by helping to uncover violations of the treaty and alerting the IAEA and other states about clandestine nuclear activity.[59] Furthermore, NGO groups can help in developing ideas for changes within the regime to improve its effectiveness, or general oversight and advocacy for across-the-board regime compliance.[60] While the role of NGOs need not be institutionalized within the treaty structure, their contributions to the system should be welcomed and encouraged. In the NPT context this involvement has been positive.

Though lack of universality is an impediment to its long-term success, the NPT has done fairly well throughout the years in preventing more widespread proliferation. The NPT has survived for over thirty-five years with Israel, India, and Pakistan outside of the system and with only one country, North Korea, leaving the treaty to proliferate. North Korea is arguably the NPT's only major failure because Israel, India, and Pakistan were never NPT members. Ultimately, some states just might not want to take the NPT deal and give up the option of possessing nuclear weapons—perhaps because their security environment is such that they are distrustful of arms control and security guarantees, or perhaps because they are skeptical that the nuclear-weapon states will ever fully disarm. Nonetheless, the membership challenge will continue to plague the NPT, espe-

58. For example, the UK's nuclear delivery system is based on submarine-launched Trident missiles. There is an ongoing debate, which has motivated nuclear abolitionists in the UK, as to whether the submarine fleet should be upgraded because to do so might contravene the NPT requirement that states work towards disarmament. Eric Hundman, *U.K. Trident Debate Energizes Opposition to Nuclear Weapons*, CDI, Mar. 21, 2007, *available at* http://www.cdi.org/program/document.cfm?documentid=3883&programID=32.

59. Such non-governmental whistle-blowing activity was important in uncovering information about the Israeli and Iranian nuclear programs. For the story of Mordechai Vanunu's revelation of Israel's nuclear program, see, *e.g.*, MARK GAFFNEY, DIMONA: THE THIRD TEMPLE? THE STORY BEHIND THE VANUNU REVELATION (1989). The National Council of Resistance of Iran has made multiple revelations of Iran's nuclear program. *See* National Council of Resistance of Iran, Foreign Affairs Committee, Nuclear Revelations, *available at* http://www.ncr-iran.org/content/blogcategory/107/151/.

60. The 2005 NPT review conference included participation by NGO groups. *See, e.g.*, U.N., Aide Memoire for Non-Governmental Organizations, *supra* note 18, *available at* http://www.un.org/events/npt2005/AideMemoire.pdf; Non-Governmental Organizations' Statements to the States Party to the Seventh Review Conference of the Treaty on the Non-Proliferation of Nuclear Weapons, May 11, 2005, *available at* http://www.lcnp.org/disarmament/npt/ArtVIcompliance.pdf.

cially as it deals with North Korea's proliferation.

2. Allocate legal endowments to protect parties that are more vulnerable to coercion given imbalances in the distribution of economic, military, and political power across states.

In a regime designed to enhance security like the NPT, it is impossible to ignore imbalances in the distribution of economic, military, and political power across states. For instance, so long as the nuclear-weapon states retain their nuclear weapons, they can a) potentially use or threaten to use nuclear weapons in an offensive or confrontational manner, b) more easily deter other states from attacking them given the threat of nuclear retaliation, at least as compared to non-nuclear-weapon states, and c) potentially use or threaten to use conventional weapons in an offensive or confrontational manner more readily due to the ultimate defensive security in possessing nuclear weapons. These factors are particularly important for states that view a nuclear-weapon state as a security threat because protecting against such a threat will always require assessing the potential use of nuclear weapons. Also, countries with stronger economies are able to afford more defense expenditures, enhancing their ability to provide for national security through military and other means. Furthermore, wealthy countries can more readily develop indigenous nuclear technologies, allowing them to independently develop nuclear capabilities without assistance or cooperation from the nuclear-weapon states or the IAEA.

Given the potential for nuclear-weapon states to abuse their power, and given that certain countries are more affluent in terms of economic, military, and political resources, the legal endowment provided by the NPT regime should protect the rights of non-nuclear-weapon states since they are giving up the right to possess nuclear weapons that would otherwise be inherent in the nature of sovereignty. In this respect, the NPT does clearly provide that non-nuclear-weapon states have the "inalienable right" to develop, research, and use nuclear energy "without discrimination" for peaceful purposes.[61] Furthermore, rather than recognizing a right to possess nuclear weapons, NPT article VI requires that parties to the treaty "undertake to pursue negotiations in good faith" on efforts to cease the nuclear arms race and achieve nuclear disarmament through a treaty on complete disarmament under strict international control.[62]

This legal endowment allows states, assuming that there are no contrary obligations, for example, from UNSC resolutions, to develop enrichment and reprocessing technologies that could pose significant potential proliferation risks. The solution to these risks, however, lies not in altering the legal endowment, but rather in providing alternatives that would persuade non-nuclear-states to refrain from developing those technologies, and in ensuring that the system has

61. NPT, *supra* note 6, art. IV ¶ 1.

62. *Id.* at art. VI.

effective monitoring and safeguarding provisions to ensure that those technologies are used only for peaceful purposes. Even though non-nuclear-weapon states can still be subject to various means of coercion by nuclear-weapon states, the NPT does clearly guarantee their right to peaceful nuclear development while simultaneously encouraging disarmament.

3. Focus dispute resolution efforts on the interests of the immediate parties in light of the interests of the collective membership.

Negotiations and dispute resolution efforts should focus on the interests of the immediate parties to the dispute while also taking care to address the interests and concerns of the collective membership. The IAEA, as a representative body of member states, embodies this approach because it carries out its mandate bearing its responsibilities for the collective, while operating within the confines of the specific agreements that it negotiates with each individual member state. Whether negotiations between member states over non-proliferation disputes effectively focus on the interests of the parties is a question that should be posed in assessing particular negotiation efforts.

4. Rely on and loop back to negotiations throughout the process.

Negotiation plays a very big role in the NPT non-proliferation regime. States are encouraged to negotiate with one another over disputes. Article III of the NPT stipulates that states are to negotiate safeguards agreements with the IAEA, thereby allowing states to specify the inspection and monitoring procedures that they are most comfortable with. Article IV of the treaty encourages parties to cooperate over civilian use of nuclear technology in bilateral or multilateral contexts. Article VI commits members to negotiate in good faith over effective measures to achieve an end to the arms race, for example, a test ban treaty, and also to negotiate a treaty of general disarmament. The three-month window of time in Article X for withdrawal of a state from the NPT is provided specifically to give states time to negotiate with the state seeking withdrawal. Allowing this time to negotiate proved effective with North Korea in 1993, though not in 2006.

The IAEA agreements also rely heavily on negotiations to resolve disputes and disagreements between the IAEA and the state subject to its monitoring. First, any disputes over the interpretation or application of the IAEA statute are to be settled by negotiation, and only if such negotiations fail will the disputes either go to the ICJ or to any other dispute settlement option chosen by the parties. Second, safeguards agreements between the IAEA and the member states are to be negotiated between the parties. Disputes that arise from those agreements and that do not involve issues of non-compliance go to negotiation first and binding arbitration second. Finally, negotiations to resolve disputes over non-compliance with safeguards agreements, which are the most likely forms of dispute because they involve the actual monitoring of a state's nuclear facilities

and fissile materials, are encouraged given the ample time built into the IAEA reporting process.

One should be careful not to view negotiation as a panacea, however. Given that the issues are so complex and the stakeholders so numerous, non-proliferation negotiations can fail.[63] Still, the loose structure of the NPT allows negotiations to permeate almost every level of potential disagreement, thereby empowering the parties to arrive at a resolution of their own making.

5. Provide for rights- and power-based backups, arranged in a low-to-high-cost sequence to maximize cost effectiveness.

Rights-based back-ups refer to legal entitlements, or means of ascertaining a decision regarding disputed legal entitlements, that are contemplated by the system. One rights-based back-up of last resort is the ability of a state to withdraw from the NPT. Prior to becoming a party to the NPT, a state is free to proliferate without any legal encumbrance from positive treaty law, assuming they are not party to any other treaty limiting their development of nuclear weapons. In the NPT system, however, non-nuclear-weapon states give up that right, and can only regain it by withdrawing from the treaty. Thus a state has the right to reclaim its sovereign choice to possess nuclear weapons.[64] Rights-based back-ups are clearly present in resolving certain disputes with the IAEA. Any disputed interpretation of the IAEA Statute can be taken to the ICJ or any other mutually-agreed upon dispute resolution system. Also, any disputes over safeguards agreements unrelated to issues of non-compliance can be taken to arbitration.[65] Both of these situations provide for rights-based options for either party where negotiations fail.

As for disputes that involve non-compliance with safeguards agreements, there is no similar rights-based back-up. A party found to be non-compliant by the IAEA has no means of appealing that decision to a non-IAEA-related body.

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63. Compare the 1994 Agreed Framework that was negotiated with North Korea, which ultimately did not work because North Korea later developed clandestine uranium enrichment facilities, with the current six-party talks that are also now facing some difficulties. For a complete analysis of the first round of negotiations with North Korea in 1993-94, see generally WIT ET. AL., *supra* note 43. For an analysis of the recent six-party negotiations, see Carla Anne Robbins, *Wrestling Nuclear Genies Back Into the Bottle, or at Least a Can*, N.Y. TIMES, May 9, 2007, at A24; John S. Park, *Inside Multilateralism: The Six-Party Talks*, 28 WASH. Q. 75 (2005); Eric Yoon-Joong Lee, *The Six-Party Talks and the North Korean Nuclear Dispute Resolution Under the IAEA Safeguards Regime*, 5 ASIAN-PACIFIC L. & POL'Y J. 101 (2004). For a discussion of the North Korea nuclear crisis in general, see MICHAEL O'HANLON & MIKE M. MOCHIZUKI, CRISIS ON THE KOREAN PENINSULA: HOW TO DEAL WITH A NUCLEAR NORTH KOREA (2003); VICTOR D. CHA & DAVID C. KANG, NUCLEAR NORTH KOREA: A DEBATE ON ENGAGEMENT STRATEGIES (2003).

64. This right will not necessarily end or resolve the dispute, however. The only effect of withdrawal is to release the state from the legal requirements and obligations of the NPT. States can still be subject to punishment via unilateral state actions or via actions authorized by the UNSC.

65. For a discussion of the benefits of arbitration in the NPT context, see Edwin J. Nazario, Note & Comment, *The Potential Role of Arbitration in the Nuclear Non-Proliferation Treaty Regime*, 10 AM. REV. INT'L ARB. 139 (1999).

While the IAEA may choose not to forward the report to the UNSC or the UNSC may choose not to act, there is no intermediate step that gives the accused party resort to a court or a third-party alternative dispute resolution mechanism. While this lack of rights-based back-up reinforces the reliance on the IAEA as discussed below in principle six, it also results in a missed opportunity to capitalize on potentially effective means of dispute resolution procedures.

Power-based options are those in which a party takes actions that involve elements of coercion against the other party, even if those actions are contemplated by the system. For instance, if a state has breached its safeguards commitments with the IAEA, the IAEA could submit a noncompliance report, which eventually would get forwarded to the UNSC at the discretion of the IAEA Board of Governors. Before the report is submitted, the state can try to negotiate a solution with the IAEA, and after the report is submitted, the state being reported can try to persuade the Director General, Board of Governors, or the UNSC not to take action against it. Where such negotiation efforts fail, however, the IAEA and the UNSC both have power-based options that they can exercise. The IAEA can terminate its assistance to the state and report the noncompliance to the UNSC. The UNSC has the power-backup of being able to authorize sanctions, the use of force, or other coercive measures.[66]

Other states may have a preferred outcome in various situations, and they may seek to engage in a power play to achieve such goals. First, states can legally institute unilateral economic sanctions and other means of non-military coercion based on levers of influence at the bilateral level. Similarly, for a state seeking to develop certain questionable technologies, it could potentially coerce parties that are trying to prevent such developments by utilizing economic or military levers of influence. Examples of such influence include controlling the price of commodities such as oil, and the ability to play a destabilizing role in a region or conflict in which the other party is involved. Second, there is little that the international system can do to prevent a state from invading or attacking another state, aside from having established a legal norm and a mechanism to encourage other forms of opposition, for example, negotiation through the NPT system. Despite this norm and the NPT system, such attacks have taken place in the context of nuclear proliferation, for example, Israel's attack of Iraq's Osiraq nuclear reactor in 1981.[67] Israel is not an NPT member and was therefore outside of the system when it attacked Iraq's reactor; thus, one might argue that the NPT reduces the need to resort to such preventive strikes.[68] However, an NPT

66. U.N. Charter arts. 41, 42.

67. Federation of American Scientists, Osiraq—Iraq Special Weapons Facilities, *available at* http://www.fas.org/nuke/guide/iraq/facility/osiraq.htm.

68. The United States invasion of Iraq is another potential example, but that invasion was most probably not about nuclear proliferation—if it was ever about weapons proliferation, it was probably about chemical and biological stockpiles. The nuclear link was so far removed that it was not a credible justification, but it can still be used as an example of a power play by a third-party interested in enforcing a non-proliferation norm.

member could have also unilaterally used military means to force a desired outcome on the parties to the dispute, even though that action would be outside of the NPT system.

Thus, within the NPT system, states have certain rights that they can rely on to help resolve disputes in their favor, for example, the withdrawal provision. The NPT also provides recourse to the ICJ and arbitrators in cases of disputes with the IAEA over questions of statutory interpretation or disagreements regarding safeguards agreements not related to non-compliance issues. Unfortunately, the NPT system lacks rights-based back-ups within the non-compliance dispute resolution track. Power-backups recognized by the NPT include the ability of the IAEA to cease cooperation and report the party in breach to the UNSC, and the UNSC's power to authorize punishment against the party in breach of its commitments. These back-ups are generally arranged in order from the lowest to highest level of force. Power-backups outside of the NPT system also exist and include both economic and military options for coercion.

6. Use an independent and neutral body with specialized knowledge and capacity to monitor and police the system and to function in a consultative role.

The NPT succeeds in this aspect of DSD principles because of its use and reliance on the IAEA. As an independent body made up of member states, the IAEA has specialized knowledge in the realm of nuclear technology, can facilitate research and development of civilian nuclear power, and has the credibility and expertise to function as the monitoring and inspecting agency for the NPT system. The IAEA's reports are authoritative and its findings are generally relied upon by the international community when assessing a state's compliance with its NPT obligations.

7. Allow broad and deep coverage of the issues related to the regime's purpose.

The NPT can be improved in providing breadth and depth of coverage of nuclear technology challenges. Most facets of potential use of nuclear technology are generally covered—peaceful uses are promoted and facilitated, while military uses are discouraged and monitored. Any violation or action that might indicate a move towards military application should trigger alarm within the system. The key concern in making the move from civilian to military applications hinges on the ability of a state to enrich its own uranium, or reprocess its spent fuel to extract weapons-grade plutonium. Thus, any state seeking either of these material production mechanisms will subject itself to intense IAEA and international scrutiny, for example, Iran.[69] The NPT could help to alleviate this problem

69. For a discussion of Iranian negotiations under the NPT regime, see Amir Azaran, Development, *NPT, Where Art Thou? The Nonproliferation Treaty and Bargaining: Iran as a Case Study*,

by sponsoring an international fuel bank, along the lines of Director General Mohamed ElBaradei's proposal, that might reduce the need for states to build their own enrichment or reprocessing facilities.[70]

Another aspect that deserves increased resources and attention is the ability of the IAEA to conduct comprehensive inspections. The IAEA Additional Protocol would greatly enhance the IAEA's inspection capabilities, but only a limited number of states have agreed to the protocol.[71] If more states were to agree to the Protocol, and if greater resources were given to the IAEA, the most difficult task of verification and monitoring might become easier for the IAEA.[72] Furthermore, the NPT must do more in working towards disarmament. The longer the nuclear-weapon states maintain their nuclear weapons, the greater the chance that other states will revisit the logic of possessing the same.

8. Connect the goals of the regime to oversight, monitoring, and implementation mechanisms.

The NPT fails to effectively connect its goals with oversight, monitoring, and implementation devices. Of the NPT's three major goals—non-proliferation, cooperative development of peaceful nuclear technology, and disarmament—only the first two goals have well-established implementation mechanisms. The IAEA serves to monitor, oversee, and foster the development of peaceful civilian nuclear technology so that states can share in the benefits of such technology, and in order to ensure that such technology is not diverted for military purposes. There is, however, no institution or implementation mechanism that is tasked with ensuring that the NPT's disarmament goal is pursued. This task is left to NGOs and the NPT parties themselves, resulting in collective action problems that stand in the way of agreement on the means and methods of achieving disarmament. While the NPT has survived this long without any specific disarmament agreements having been negotiated, the long-term viability of the regime remains in doubt so long as this essential goal, a fundamental component of the baseline NPT bargain, continues to be ignored.

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6 CHI. J. INT'L L. 415 (2005).

70. *See* Mohamed ElBaradei, Director General, IAEA, Speech during the 50th Session of the IAEA General Conference: A New Framework for the Nuclear Fuel Cycle (Sept. 19, 2006), *available at* http://www.iaea.org/NewsCenter/Statements/2006/ebsp2006n015.html.

71. A total of 81 countries have Additional Protocol agreements in force, and 112 countries have formally signed onto the Additional Protocol. IAEA, Strengthened Safeguards System: Status of Additional Protocols, *supra* note 44; IAEA, Safeguards Current Status, *supra* note 45.

72. *See* Mohamed ElBaradei, Director General, IAEA, Speech at the Symposium on International Safeguards in Vienna, Austria: Addressing Verification Challenges (Oct. 16, 2006), *available at* http://www.iaea.org/NewsCenter/Statements/2006/ebsp2006n018.html.

9. Vest control over decisions with the most interested and affected parties, except in the case of power back-ups, where control should lay with a recognized representative body of the international community.

The first half of this principle is provided for in that the states subject to IAEA monitoring will be the ones making the most important decisions, and rightfully so since they have the most to gain or lose depending on the situation. The negotiation-friendly structure also ensures that interested third-parties will be able to exert influence on the final outcome by involving themselves in the negotiation process.

The second part of this principle seeks to prevent the resort to military actions unauthorized by the UNSC. First, if conflict can be avoided via peaceful means, those means should be exercised to the fullest extent possible. Second, to allow for such actions would be to grant certain states greater say over the outcome of an issue than other states, even though other states may be just as concerned, if not more so. For example, Iran's neighbors may be very concerned about Iran's potential desire to proliferate, but if the United States were to attack, the outcome may be even worse for those neighboring states. If the United States were to engage in preventive strikes against Iran, this would privilege America's perceived security interests over those of Iran's neighbors, without any clear justification for why that should be. On the other hand, if the decision were to be vested completely within the control of an international representative body, the security interests of the collective would take precedence over the concerns of individual states. Thus, such authority should either be vested with the UNSC or with another similar body as per Richard Butler's suggestion for a Counsel on Weapons of Mass Destruction.[73] In this sense, the NPT partially achieves the second objective of the principle because non-compliance reports from the IAEA may eventually be sent to the UNSC, which can decide to act if it so chooses. The NPT fails to fully meet the second objective, however, in that it does not seek to prevent or discourage the possibility of unauthorized or unilateral actions. Such non-UNSC-sponsored threats or actions are quite salient in influencing non-proliferation negotiations, as demonstrated in the case studies below.

10. Provide for meaningful periodic review mechanisms of the system based on measurable criteria.

Article VIII ¶ 3 of the NPT provides for review of the treaty every five years if a majority of the members so desire. The regular five-year review process has had mixed results. The 2005 Review Conference was largely seen as a failure, with the President of the conference, Mr. Duarte of Brazil, stating that "substantively—in terms of results and agreements—very little had been ac-

73. Butler, *supra* note 22.

complished."[74] Furthermore, under Article X ¶ 2, the treaty is reviewed on its twenty-fifth anniversary to determine whether it should be permanently extended. In 1995, the NPT member states voted to indefinitely extend the NPT.[75] The stipulated review process, while noting a desire to review the NPT's implementation in light of the perambulatory purposes, is not explicitly linked to any measurable criteria. For example, problems in progress towards disarmament would be more readily addressed in review sessions that focused on the relative increase or decline in overall numbers of nuclear warheads, especially if target goals were set by the parties, because that progress can be tracked over time and pressure can be brought to bear by the other member-states to encourage results that move in the direction of disarmament. Additionally, the review conferences should focus on means of involving those parties that have thus far chosen to remain outside of the system, perhaps by inviting them to participate in discussions regarding the challenges of obtaining universal membership. Overall, the NPT should have more meaningful review mechanisms than currently in operation.

C. Summary of NPT DSD Analysis

The NPT and its associated IAEA safeguards regime constitute a dispute system which can be vastly improved by the application of DSD principles. In analyzing the NPT from the DSD perspective, various weaknesses become apparent. The lack of universal membership, particularly with regard to the four of nine states that possess nuclear weapons, and the system's lack of symmetry between its goals and its oversight, monitoring, and implementation mechanisms are two serious shortfalls in need of significant attention. Gaps in the regime's coverage of important areas of nuclear policy, for example, reactor fuel production and disarmament, as well as meaningful review mechanisms based on measurable criteria, are areas that need much improvement. The availability of rights- and power-based backups, particularly rights-based back-ups in the realm of safeguards non-compliance disputes and issues of control over decisions regarding certain power-based actions, are also areas that could be enhanced. The NPT system is fairly effective, on the other hand, with respect to balancing the legal endowment, maintaining the focus on both individual and collective interests, providing multiple entry and exit points into negotiations, and the presence of a strong and specialized institution to monitor the system. Despite having success in these areas, the system can certainly improve.

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74. 2005 Review Conference of the Parties to the Treaty on the Nonproliferation of Nuclear Weapons (NPT), Press Conference on Non-Proliferation Treaty, May 27, 2005, *available at* http://www.un.org/News/briefings/docs/2005/NPTpc050527.doc.htm.

75. Extension of the Treaty on the Non-Proliferation of Nuclear Weapons, NPT/CONF.1995/32/DEC.3, May 1, 1995, *available at* http://www.fas.org/nuke/control/npt/text/extensio.htm. For a comprehensive discussion and analysis of the 1995 Review Conference, see JAYANTHA DHANAPALA & RANDY RYDELL, MULTILATERAL DIPLOMACY AND THE NPT: AN INSIDER'S ACCOUNT (2005).

III.
CASE STUDIES—NORTH KOREA, IRAN, AND PAKISTAN

Having analyzed the NPT as a dispute system in light of relevant DSD principles, this part of the article will examine three case studies of recent non-proliferation negotiations in order to compare and contrast the competing influences of the shadow of the law and the shadow of violence. These case studies are meant to test the question of whether international law, as embodied by the NPT, matters in the context of serious national security threats to states. More specifically, the case studies help to examine whether the NPT makes a substantive difference in non-proliferation negotiations that would otherwise not be in the interests of more powerful states as regards structuring the terms of negotiations, allocating rights through legal endowments, affecting expectations and potential courses of action, and iterating disputes. In addition to analyzing the role of the dispute system within each particular negotiation, each case study will include a background to the dispute, the relevant legal issues at play, and the coercive means relevant to the dispute. The independent variable between these case studies is the country's NPT status: North Korea having left the NPT, Iran still being within the NPT, and Pakistan always having been outside of the NPT.

A. North Korea

1. Background to the Dispute

While the history of the North Korean nuclear dispute has its roots in the Korean War,[76] the two most important phases of the crisis occurred more recently—in 1994 and 2006. The Soviet Union supplied North Korea with a research reactor in 1965, which was built in Yongbyon and was later upgraded and supplemented by North Korean scientists with another nuclear reactor.[77] In 1985, the United States discovered a third reactor, and North Korea, under pressure from the Soviet Union, agreed to sign the NPT.[78] A reprocessing facility was discovered by U.S. intelligence in 1990, and under international pressure North Korea finally negotiated a safeguards agreement with the IAEA in 1992.[79] Once inspections by the IAEA began, disputes quickly arose over access to facilities, and evidence of unaccounted plutonium reprocessing was discovered. In March 1993, North Korea threatened to withdraw from the NPT, but suspended

76. Walter Pincus, *N. Korean Nuclear Conflict Has Deep Roots*, WASH. POST, Oct. 15, 2006, at A16.

77. *Id.*

78. *Id. See also* WIT ET AL., *supra* note 43, at 1-3.

79. The failure to quickly negotiate a safeguards agreement with the IAEA was in part the IAEA's fault for providing improper forms to North Korea and for failing to follow up quickly with the right information for them to submit. WIT ET. AL., *supra* note 43, at 4.

its proposed withdrawal pending negotiations with the United States.[80] These negotiations and the events leading up to them make up the first phase of the nuclear dispute. The U.S.-led negotiations produced the Agreed Framework in 1994, wherein North Korea was to freeze and give up its nuclear program in exchange for fuel oil supplies and two light-water nuclear reactors.[81] The Agreed Framework provided short-term stability to the crisis, but North Korea was still found to have clandestinely extracted enough plutonium for a nuclear device.[82]

The second phase of the crisis spans from late 2001 to the present. In late 2001, U.S. intelligence sources discovered that North Korea had begun secret construction of a uranium enrichment plant.[83] The discovery of the covert uranium enrichment program effectively ended the already-troubled Agreed Framework. Just prior to its statement of withdrawal from the NPT in January 2003, North Korea expelled IAEA inspectors from its nuclear reactors and resumed reprocessing operations.[84] North Korea is the first and only country ever to withdraw from the NPT.[85] The reasons given for withdrawal include IAEA resolutions against North Korea, America's "vicious hostile policy" towards North Korea, America's listing of North Korea as part of an axis of evil, and U.S. failure to abide by the Agreed Framework.[86]

The Six-Party talks[87] began in 2003 but did not show much immediate progress. A joint-statement from the Six-Party talks in September 2005, in which North Korea agreed to end its nuclear program and rejoin the NPT in exchange for energy and humanitarian assistance, the building of two light-water nuclear reactors, and the normalization of relations with the United States and Japan,[88] provided a moment of hope in an otherwise disappointing series of diplomatic

80. *Id.* at 26-28, 37, 59.

81. The full text of the 1994 Agreed Framework is available at Arms Control Association, Agreed Framework between the United States of America and the Democratic People's Republic of Korea, *available at* http://www.armscontrol.org/documents/af.asp.

82. Pincus, *supra* note 76.

83. Joby Warrick, *U.S. Followed the Aluminum*, WASH. POST, Oct. 18, 2002, at A1.

84. Paul Kerr, *North Korea Restarts Reactor; IAEA Sends Resolution to U.N.*, ARMS CONTROL TODAY, Mar. 2003, *available at* http://www.armscontrol.org/act/2003_03/nkorea_mar03.asp.

85. On January 10, 2003 North Korea announced its intention to withdraw from the treaty immediately, but given the three month notice provision of Article X of the NPT, most observers mark April 10, 2003 as the date of North Korea's withdrawal. Devon Chaffee, *North Korea's Withdrawal from Nonproliferation Treaty Official*, WAGING PEACE, April 10, 2003, *available at* http://www.wagingpeace.org/articles/2003/04/10_chaffee_korea-npt.htm. North Korea argued that because it gave notice of intent to withdraw from the treaty in 1993, it had already complied with the three month notice period. However, it declared a unilateral moratorium on that withdrawal effort, so the period should probably toll again. *Id.*

86. Center for Nonproliferation Studies, Text of North Korea's Statement on NPT Withdrawal, *available at* http://www.cns.miis.edu/research/korea/nptstate.htm.

87. The Six-Party talks include the United States, North Korea, South Korea, Japan, China, and Russia.

88. Joint Statement of the Fourth Round of the Six-Party Talks, Beijing, Sept. 19, 2005, *available at* http://www.state.gov/r/pa/prs/ps/2005/53490.htm.

exchanges. Enthusiasm over the joint-statement soon faltered, however, when North Korea tested a nuclear device on October 9, 2006.[89] Thus far, including UNSC Resolution 1718 sanctions,[90] North Korea has received only relatively mild punishment for its withdrawal from the system and its subsequent nuclear testing.

Despite the nuclear test and UNSC sanctions, an agreement over a timetable for implementing the joint-statement was eventually made, resulting in the February 13, 2007 Agreement.[91] In July 2007, the IAEA confirmed that North Korea had shut down its five declared nuclear facilities in delayed compliance with the February Agreement.[92] Efforts continue to try to implement the negotiated solution to the crisis, with attention now focused on obtaining a North Korean declaration of its nuclear facilities and material.[93]

2. Law and Coercion

The legal requirements and rights of the NPT play an important role in the North Korean dispute. First, while North Korea was an NPT member, it was held up to non-proliferation standards that shaped the overall dispute. Given that North Korea's reprocessing and enrichment activities were in violation of its NPT obligations, the international community had leverage to demand that it cease those activities or risk that the matter be referred to the UNSC. Second, the first stage of the crisis would not have been discovered so early were it not for the IAEA inspections. Because the NPT system provided for IAEA inspection of North Korea's facilities, and imbalances in declared and actual plutonium amounts were discovered, North Korea was forced to either negotiate a resolution to the dispute, or face the consequences of its breach of legal obligations. Third, North Korea was able to use the NPT withdrawal clause to its advantage. Since withdrawing from the treaty would relinquish North Korea of its NPT obligations, there was a strong incentive for the other NPT member states to try to negotiate a deal to keep North Korea in the NPT. Preserving North Korea's NPT

89. For evidence indicating the possible failure of North Korea's nuclear test, see Garwin and Hippel, *supra* note 3.

90. On October 14, 2006, the UNSC passed UNSC Resolution 1718, condemning North Korea's nuclear test as a "clear threat to international peace and security" and taking action under Article 41 to prohibit trade in large-scale arms, luxury goods, and nuclear or ballistic missile technology and related training to North Korea, as well as an asset freeze on North Koreans involved in the nuclear or missile programs and authorization to inspect cargo to enforce the sanctions. UNSC Resolution 1718, S/RES/1718 (2006).

91. U.S. Dep't of State, *North Korea - Denuclearization Action Plan*, Feb. 13, 2007, *available at* http://www.state.gov/r/pa/prs/ps/2007/february/80479.htm.

92. Choe Sang-Hun, *North Korea Offers Nuclear Concessions*, N.Y. TIMES, July 18, 2007, *available at* http://www.nytimes.com/2007/07/18/world/asia/18cnd-koreanuke.html.

93. *Id.* While changes and new developments in the negotiations with North Korea will be continuous, the lessons to be drawn from the experience thus far are important in assessing and improving the NPT system, and understanding the effectiveness of the NPT and similar multilateral treaties.

membership was highly advantageous as it ensured that the system would not have to bear the shock of having a party withdraw, and it allowed for continued IAEA monitoring of North Korea's nuclear program. Moreover, the use of the withdrawal provision was a clear catalyst in forcing the parties to make progress in the talks, or else face having to deal with the situation outside the legal framework of the NPT.[94]

Perhaps more so than the influence of the shadow of the law, the shadow of violence played a defining role in the North Korean nuclear crises. The historical roots of the conflict were born in the Korean War. The presence of U.S. nuclear weapons on the Korean peninsula began in 1958[95] and did not end until 1991.[96] Furthermore, Presidents Truman and Eisenhower both made veiled threats that they would be willing to use nuclear weapons against the North to end the war.[97] Years later, in 1975, Secretary of Defense James Schlesinger warned North Korea that the United States would consider using tactical nuclear weapons in response to North Korean aggression.[98] More recently, Christopher Hill, Assistant Secretary of State for East Asian and Pacific Affairs and Chief U.S. Negotiator with North Korea, said that "We are not going to live with a nuclear North Korea, we are not going to accept it."[99] In its statement regarding withdrawal from the NPT, North Korea cited discriminatory IAEA resolutions, America's "vicious hostile policy" towards North Korea, America's listing of North Korea as part of an axis of evil, and U.S. failure to abide by the Agreed Framework.[100] One high-level North Korean official warned South Korea that if war were to break out, Seoul would be a "sea of fire."[101] Known for using passionate rhetoric, it is not surprising that in response to UNSC Resolution 1718, North Korea stated that it would "'deal merciless blows' against anyone who violates its sovereignty" and that the U.N. sanctions were tantamount to a "declaration of war."[102]

There is little doubt that North Korea feels that its security and perhaps survival as a state are threatened by the United States, a feeling influenced by statements and actions by the United States interpreted as threats of military

94. WIT ET AL., *supra* note 43, at 26-28, 37.

95. The Nuclear Information Project, A History of U.S. Nuclear Weapons in South Korea, *available at* http://www.nukestrat.com/korea/koreahistory.htm.

96. The Nuclear Information Project, The Withdrawal of U.S. Nuclear Weapons from South Korea, *available at* http://www.nukestrat.com/korea/withdrawal.htm.

97. Pincus, *supra* note 76; WIT ET AL., *supra* note 43, at 1-2.

98. WIT ET AL., *supra* note 43, at 2.

99. David E. Sanger & Jim Yardley, *U.S. Warns North Koreans about Nuclear-Weapon Test*, N.Y. TIMES, Oct. 5, 2006, at A8.

100. Center for Nonproliferation Studies, Text of North Korea's Statement on NPT Withdrawal, *available at* http://www.cns.miis.edu/research/korea/nptstate.htm.

101. WIT ET AL., *supra* note 43, at 149.

102. Bo Mi-Lim, *North Korea: Sanctions are Declaration of War*, WASH. POST, Oct. 17, 2006, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/10/17/AR2006101700135.html.

force. North Korea's demands for bilateral negotiations with the United States may be evidence that the true interest it seeks to gain in negotiations is security assurances from the United States. The use of military strikes against North Korea during the first stage of the crisis was a very real option discussed by White House planners,[103] and President Bush's rhetoric of "axis of evil," combined with the administration's unilateral preemption policy as demonstrated in Iraq, surely give North Korean leaders reason for concern. Also, as seen in its reaction to the UNSC sanctions, North Korea views the lesser coercive tool of sanctions as severely provocative.

On the other side of this issue, North Korea's neighbors, particularly South Korea and Japan, feel very threatened by North Korea's behavior and rhetoric.[104] North Korea has repeatedly tested missiles, sometimes flying them directly over Japan.[105] Furthermore, North Korea has considerable conventional forces and armaments amassed on its side of the DMZ border with South Korea, giving it the capability to inflict massive damage on South Korea's population and the U.S. troops that are stationed there.[106]

Undoubtedly, threats of violence and lesser means of coercion have influenced non-proliferation negotiations with North Korea. Although North Korea's decision to test may have reflected its desire to maintain nuclear weapons permanently, the February 2007 Agreement seems to indicate that North Korea is concerned with receiving both a large compensation package for giving up its nuclear weapons and energy program, as well as explicit and trustworthy security assurances from the United States that it will not attack. While the security concerns are manifest in the demand for no-attack guarantees, North Korea's repeated violations of previous agreements may also be driven by security considerations. If North Korea truly feels that the only way to protect its sovereignty and deter attacks from other nuclear powers is through the possession of nuclear weapons, then one logical conclusion might be that North Korea's perception of its security threats is so great that only an independent nuclear deterrent will suffice. If this were true, then fear of attack would have completely determined the outcome of the negotiations. On the other hand, North Korea could be using its nuclear weapons and energy program as a tool for nuclear blackmail, a means to demand an exorbitant price from other states in exchange for assurance that that

103. WIT ET AL., *supra* note 43, at 179-81, 210.

104. *South Korea, Japan Condemn North Korean Nuclear Test*, VOICE OF AMERICA NEWS, Oct. 9, 2006, *available at* http://voanews.com/english/archive/2006-10/2006-10-09-voa15.cfm.

105. *North Korea Test-Fires Several Missiles*, N.Y. TIMES, July 4, 2006, *available at* http://www.nytimes.com/2006/07/04/world/asia/04cnd-korea.html.

106. Military casualty estimates alone of another Korean war range in the hundreds of thousands, while civilian casualties would approach one million. WIT ET AL., *supra* note 43, at 101-102, 180-81. Former President Bill Clinton called the Korean DMZ, which has nearly two million troops facing off against each other every day, the "scariest place on Earth." Joe Havely, *Korea's DMZ: 'Scariest Place on Earth'*, CNN.COM, Aug. 28, 2003, *available at* http://edition.cnn.com/2003/WORLD/asiapcf/east/04/22/koreas.dmz/.

North Korea will relinquish its programs.[107]

3. Role of the Dispute System

In the case of North Korea, the NPT dispute system played a few roles. First, as mentioned above, it set standards of compliance by which to judge North Korea's behavior, and it provided the institutional capacity to actually inspect North Korea's facilities and discover covert proliferation activities. Second, the NPT process provided a means of pacing negotiations. Because of the withdrawal clause, North Korea could not shed its NPT obligations for three months after announcing its intention to withdraw. In 1993, this delay allowed the United States to convince North Korea not to withdraw from the NPT, and to negotiate instead. Thus, this iteration and pacing mechanism added a stabilizing element to a situation that could have very quickly ended in violence. North Korea's use of the withdrawal clause also served as a bargaining chip in its subsequent negotiations with the United States, as the United States was keen on keeping North Korea in the NPT.[108] Third, in creating this extra opportunity for negotiation, the system helped to minimize the possibility of military action. The system's emphasis on negotiations ensured that coercive means of dispute resolution were never the first option.

One interesting aspect of the North Korean case is that North Korea did not stress that it had a substantive right under the NPT to develop reprocessing or enrichment technologies. Rather than working within the system in that manner, North Korea instead relied upon claims of sovereign right, and a desire to protect its security and sovereignty to justify its actions. This might indicate that North Korea's negotiation strategies were not influenced much by the NPT system as North Korea made little attempt to leverage potential substantive legal endowments in its favor. On the other hand, North Korea was able to leverage *procedural* legal endowments, namely the withdrawal provision of the NPT, to engage in negotiation brinkmanship in an effort to extract concessions from the United States. Thus, while the United States and other interested parties were able to leverage North Korea's non-compliance in order to threaten UNSC action, North Korea was able to use the NPT's withdrawal provision to create a new bargaining chip—its reentry into the NPT. In the end, both sides to the dispute were able to leverage different aspects of the NPT system and its legal endowments to try to frame and influence the negotiations. While the shadow of violence was very salient in this dispute, the shadow of the law still played a significant role in shaping the outcome of the negotiations.

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107. Mohamed ElBaradei, *No Nuclear Blackmail*, WALL ST. J., May 22, 2003, *available at* http://www.iaea.org/NewsCenter/Statements/2003/ebWSJ20030522.shtml.

108. WIT ET AL., *supra* note 43, at 45 ("North Korea might withdraw from the treaty as a bargaining ploy while taking whatever steps were necessary to keep the situation from spiraling out of control. Modulating its cooperation with IAEA inspectors could be a valuable spigot for Pyongyang to shape the political environment.").

B. Iran

1. Background to the Dispute

The direction of Iran's nuclear program has shifted considerably over the years in response to major domestic political changes and movements. Under Shah Pahlavi's regime, Iran was a major ally of the United States, and the United States assisted Iran in its plans to develop nuclear energy facilities with a civil nuclear cooperation agreement in 1957 and the building of a highly-enriched-uranium-fueled research reactor, which became operational in 1967.[109] Iran ratified the NPT in 1970 and has remained a party ever since.[110] Cooperation over the development of various nuclear projects continued through the 1970's until the Islamic Revolution in 1979.

The Revolution ended the period of cooperation with the United States and European countries, and leaders of the Revolution sought to significantly curtail the Shah's nuclear plans.[111] However, smaller scale work continued on Iran's incomplete Bushehr reactor. In August 2002, the Iranian dissident group National Council of Resistance of Iran exposed the existence of two unreported and previously unknown nuclear facilities—a uranium enrichment facility in Natanz, and a heavy water production facility in Arak.[112] Iran possesses natural uranium deposits,[113] so these facilities could either be in line with a program to create a closed domestic nuclear fuel cycle, or they could be part of a nuclear weapons program.[114] In the wake of this revelation and via subsequent meetings and inspections by the IAEA, further evidence regarding Iran's violations of its agreements with the IAEA and obligations under the NPT materialized.[115]

In 2003, soon after the revelations, negotiations began to encourage Iran to fully comply and cooperate with IAEA inspectors and its safeguards agree-

109. Nuclear Threat Initiative, Iran Profile, Nuclear Chronology, *available at* http://www.nti.org/e_research/profiles/1825_1826.html.

110. *Id.*

111. Nuclear Threat Initiative, Iran Profile, Nuclear Overview, *available at* http://www.nti.org/e_research/profiles/Iran/1819.html.

112. Nuclear Control Institute, List of Revelations on Iran's Nuclear & WMD Activities by the Iranian Opposition since 2002, *available at* http://www.nci.org/06nci/01-31/Revelations.htm.

113. GlobalSecurity.org, Iran Special Weapons Facilities, Uranium Mines, *available at* http://www.globalsecurity.org/wmd/world/iran/mines.htm.

114. The uranium enrichment facility would produce enriched uranium for Iran's nuclear reactors. *See infra* note 150. Natural uranium can be used directly as fuel in a heavy-water reactor, eliminating the need to enrich uranium. However, such reactors produce significant amounts of highly fissile P-239. Thus, if a natural uranium heavy-water reactor were combined with a reprocessing facility, the proliferation risk would be high. GARDNER, *supra* note 4, at 20, 32-35. At the moment, Iran does not possess a reprocessing facility nor is one apparently under construction. For a full list of Iran's nuclear facilities, see IAEA, *List of Locations Relevant to the Implementation of Safeguards in Iran*, IAEA Doc. GOV/2004/83 annex 1, *available at* http://www.iaea.org/Publications/Documents/Board/2004/gov2004-83_annex1.pdf.

115. *See infra* notes 118-120.

ments. In December 2003 Iran signed the IAEA Additional Protocol, giving the IAEA rights to conduct more robust inspections of declared and undeclared facilities once the Protocol enters into force.[116] These negotiations led Iran to declare a temporary, voluntary cessation of its enrichment activities on November 14, 2004.[117] Although the IAEA has not characterized any of Iran's activities as constituting a nuclear weapons program, on November 15, 2004, the IAEA released a report listing activities that were in breach of Iran's safeguards agreement with the IAEA.[118] It was not until September 2005, however, one month after Iran had restarted its uranium enrichment activities, that the IAEA Board of Governors officially concluded that Iran's violations of its safeguards agreements constituted non-compliance with its NPT obligations.[119] Five months later, on February 4, 2006, the Board of Governors referred the matter to the UNSC.[120] The UNSC in turn issued UNSC Resolution 1696 on July 31, 2006, which called on Iran to suspend uranium enrichment and warned of future sanctions should Iran fail to comply.[121] The UNSC followed through on its threat on December 23, 2006, when it acted under Article 41 of the U.N. Charter to impose sanctions on Iran via UNSC Resolution 1737, banning the supply of particular nuclear material and technology, and freezing the assets of persons and entities connected with Iran's nuclear program.[122] On March 24, 2007, again acting under Article 41, the UNSC extended the sanctions via UNSC Resolution 1747 to include military equipment broadly, and reiterated its demand that Iran cease enriching uranium.[123]

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116. Although Iran has signed the Additional Protocol, the Iranian parliament has yet to approve it, so it has not entered into force. Safa Haeri, *Iran Confirms Stopping Additional Protocol of the NPT*, IRAN PRESS SERVICE, OCT. 9, 2005, *available at* http://www.iran-press-service.com/ips/articles-2005/october-2005/Iran_nuclear_91005.shtml; *see also supra* note 44, 45. Iran had voluntarily complied with the Additional Protocol since its signing, but has since suspended that voluntary compliance after the IAEA referred the issue to the UNSC in February 2007. Paul Kerr, *IAEA Reports Iran to U.N. Security Council*, ARMS CONTROL TODAY, Mar. 2006, *available at* http://www.armscontrol.org/act/2006_03/MARCH-IAEAIran.asp; *see also infra* note 120.

117. Paul Kerr, *Iran Agrees to Temporary Suspend Uranium-Enrichment Program*, ARMS CONTROL TODAY, Dec. 2004, *available at* http://www.armscontrol.org/act/2004_12/Iran.asp.

118. IAEA, *Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran*, IAEA Doc. GOV/2004/83 (Nov. 15, 2004), *available at* http://www.iaea.org/Publications/Documents/Board/2004/gov2004-83.pdf.

119. IAEA, *Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran*, IAEA Doc. GOV/2005/77 (Sept. 24, 2005), *available at* http://www.iaea.org/Publications/Documents/Board/2005/gov2005-77.pdf.

120. IAEA, *Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran*, IAEA Doc. GOV/2006/14 (Feb. 4, 2006), *available at* http://www.iaea.org/Publications/Documents/Board/2006/gov2006-14.pdf. This action by the IAEA to refer Iran's case to the UNSC has been criticized as being politicized by those opposed to Iran's nuclear program because the IAEA has not found Iran's activities to be part of a nuclear weapons program. Daniel Joyner, *The Iran Nuclear Standoff: Legal Issues*, JURIST FORUM, Mar. 1, 2006, *available at* http://jurist.law.pitt.edu/forumy/2006/03/iran-nuclear-standoff-legal-issues.php.

121. S.C. Res. 1696, U.N. Doc S/RES/1696 (July 31, 2006).

122. S.C. Res. 1737, U.N. Doc S/RES/1737 (Dec. 23, 2006).

123. S.C. Res. 1747, U.N. Doc S/RES/1747 (Mar. 24, 2007).

Although the effectiveness of these sanctions is questionable,[124] in August 2007 the IAEA and Iran negotiated a significant agreement that could resolve Iran's safeguards compliance issues. The August 21 agreement brings Iran's Natanz enrichment plant into its safeguards agreement with the IAEA, subjecting it to IAEA inspections.[125] While certain questions about Iran's past activities remain, the August 21 agreement sets out a timeline for resolving those issues. Most significantly, the IAEA has conducted inspections, including unannounced inspections, in line with the August 21 agreement and has verified "the non-diversion of declared nuclear material in Iran."[126] However, as Iran continues to press its NPT right to enrich uranium and cooperates with the IAEA, it remains in non-compliance with the UNSC resolutions calling for a halt to its enrichment activities.[127]

2. Law and Coercion

The Iran case study has been influenced to a large degree by the NPT legal endowment. First, Iran has consistently defended its nuclear program and enrichment activities via reference to the Article IV ¶ 1 right to peaceful development of nuclear technology.[128] This right has given Iran means to justify its ac-

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124. Steven R. Weisman, *Lack of ID Data Impedes U.N. Sanctions Against Iran*, N.Y. TIMES, Sept. 17, 2007, *available at* http://www.nytimes.com/2007/09/17/world/middleeast/17sanctions.html.

125. IAEA, Information Circular, *Communication dated 27 August 2007 from the Permanent Mission of the Islamic Republic of Iran to the Agency concerning the text of the "Understanding of the Islamic Republic of Iran and the IAEA on the Modalities of Resolution of the Outstanding Issues"*, INFCIRC/711 (Aug. 27, 2007), *available at* http://www.iaea.org/Publications/Documents/Infcircs/2007/infcirc711.pdf.

126. IAEA, *Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran*, IAEA Doc. GOV/2007/48 ¶ 22 (Aug. 30, 2007), *available at* http://www.iaea.org/Publications/Documents/Board/2007/gov2007-48.pdf; IAEA, *Implementation of the NPT Safeguards Agreement and relevant provisions of Security Council resolutions 1737 (2006) and 1747 (2007) in the Islamic Republic of Iran*, IAEA Doc. GOV/2007/58 ¶¶ 31, 39 (Nov. 15, 2007), *available at* http://graphics8.nytimes.com/packages/pdf/world/20071115IAEA-report.pdf. Although the November 2007 report declares Iran to be in compliance with its IAEA obligations, it notes that, because Iran has not implemented the Additional Protocol, "the Agency's knowledge about Iran's current nuclear programme is diminishing," and that "the Agency is not in a position to provide credible assurances about the absence of undeclared nuclear material and activities in Iran without full implementation of the Additional Protocol." *Id.* at ¶¶ 39, 43. This latest report also includes the interesting history of Iran's black market acquisition of uranium enrichment technology. *Id.* at ¶¶ 4-23.

127. IAEA, IAEA Doc. GOV/2007/58, *supra* note 126, at ¶ 40. The successful negotiations between the IAEA and Iran in bringing its enrichment facility within its safeguards agreement has created friction between the IAEA and certain Western powers, including the United States, France, Germany, and the U.K. Elaine Sciolino and William J. Broad, *An Indispensable Irritant to Iran and its Foes*, N.Y. TIMES, Sept. 17, 2007, *available at* http://www.nytimes.com/2007/09/17/world/middleeast/17elbaradei.html; *Iran Expanding Its Nuclear Program, Agency Reports*, N.Y. TIMES, Aug. 30, 2007, *available at* http://www.nytimes.com/2007/08/30/world/asia/31cnd-nuke.html.

128. *See, e.g.*, Press Release, United Nations, Foreign Minister of Iran Defends Country's Inal-

tivities in the negotiations as being within the bounds of the NPT. Second, the IAEA safeguards agreement was critically important in establishing criteria by which the IAEA could declare Iran to be in breach of its commitments. That legal standard helped to authorize subsequent actions to punish Iran for violations, even when Iran's current enrichment activities are legal under the treaty. In other words, past noncompliance is legally punishable, and the UNSC used Iran's past violations to pressure it to cease its current enrichment activities. Given the past violations, the UNSC had grounds to declare the current enrichment activity a threat to international peace and security, thereby providing legal recourse to impose sanctions.[129] Thus, a line has been drawn between substantive legal actions—uranium enrichment deemed by the IAEA to be for civilian purposes—and procedural mistakes—various reporting failures and mistakes that have so colored Iran's present activities that they are considered by the UNSC to be a threat to international peace and security. While the substantive actions could have been protected by the NPT, the procedures Iran followed violated protocol, justifying resort to coercion to punish past mistakes and provide negative incentives for behavioral modification.

Coercion has certainly also played a role in the negotiations, particularly the recent use of economic sanctions. The IAEA's delays in reporting Iran's breaches and referring the matter to the UNSC maximized the impact that the threat of economic sanctions might have had on the negotiations. While the long-term impact is unclear, the UNSC economic sanctions may have led to a defiant action by Iran to continue enrichment activities, and it also may have encouraged Iran to negotiate the positive August 21 agreement with the IAEA.[130] Subsequent to the imposition of sanctions, the IAEA's successful negotiations with Iran to come into full compliance with its safeguards agreement undercut to some extent the UNSC push for Iran to cease its enrichment activities, since those sanctions were initially prompted by the IAEA's report of Iranian noncompliance with its NPT obligations. Nonetheless, the UNSC sanctions currently remain in force, and further actions by the UNSC and other states in their individual or collective capacities cannot be ruled out.

It is worth noting that Iran is surrounded by often hostile neighbors, some of which possess nuclear weapons, for example, Israel, Pakistan, Russia, and the United States (via its presence in Iraq and other regional military deployments). Threats of military actions have been highly salient in the Iran nuclear crisis. Israel has indicated on numerous occasions that it might preemptively attack Iran,

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ienable Right to Nuclear Technology for Peaceful Purposes (Jan. 29, 2004), *available at* http://www.un.org/News/Press/docs/2004/dcf433.doc.htm.

129. The UNSC Resolutions cited in *supra* notes 121-123 express concern as to "the proliferation risks presented by the Iranian nuclear programme" while remaining "*mindful* of [the UNSC's] primary responsibility under the Charter of the United Nations for the maintenance of international peace and security."

130. Kim Murphy, *Iran Warns World Against U.N. Sanctions*, L.A. TIMES, Nov. 11, 2006, *available at* http://www.latimes.com/news/nationworld/world/la-fg-iran11nov11,1,3193191.story?coll=la-headlines-world.

with or without help from the United States, in order to stymie Iran's nuclear program even if Iran is many years away from actually being able to build a nuclear bomb.[131] Given Israel's actions against Iraq's Osiraq reactor,[132] such a threat is probably viewed as credible by Iran. President Bush has warned that a nuclear Iran would risk World War III, and Vice President Cheney has warned that the United States would use its naval power to prevent Iran from developing nuclear weapons and from disrupting oil supplies.[133] In response, Iran has warned that it would respond and retaliate to any attack.[134] With the U.S. military positioned next door in Iraq, Iran is likely to perceive the threat of a U.S. attack as very serious. Thus, quite clearly, the use of force is a prevalent element hanging over the Iranian non-proliferation negotiations.

3. Role of the Dispute System

The NPT dispute system as a whole has played a significant role in shaping the conflict over Iran's nuclear program. First, the IAEA and official inspections have played an important part in defining the official status of Iran's compliance with its non-proliferation obligations. There has been no finding of a nuclear weapons program, and UNSC sanctions were only imposed after the IAEA referred the issue of non-compliance to the UNSC, in line with the NPT dispute system framework. Moreover, in prolonging the time in which it both issued its report of Iranian non-compliance and referred the matter to the UNSC, the IAEA managed to maximize the window for a negotiated solution to take hold. Thus, the system was able to frame the issues in the dispute and also provide for delay and iterations to give the parties time to craft a solution before the use of sanctions or force was officially contemplated.

Second, the legal endowment regarding the development of peaceful nuclear technology, including enrichment and reprocessing technology, has allowed Iran to defend its actions under the cloak of its NPT rights. The IAEA's inability to identify a nuclear weapons program has bolstered this defense, providing Iran with a defendable negotiating position in terms of its future actions, so long as they comply with IAEA agreements. Third, the NPT system has thus far successfully managed and mitigated the unauthorized use of force. While threats of military force abound, negotiations are still the preferred course of

131. Anne Penketh, *Israel Raises Nuclear Stakes with Iran*, THE INDEPENDENT, Jan. 25, 2007, *available at* http://news.independent.co.uk/world/middle_east/article2183872.ece.

132. *See* Federation of American Scientists, *supra* note 67.

133. Sheryl Gay Stolberg, *Nuclear Armed-Iran Risks World War, Bush Says*, N.Y. TIMES, Oct. 18, 2007, *available at* http://www.nytimes.com/2007/10/18/washington/18prexy.html; David E. Sanger, *On Carrier in Gulf, Cheney Warns Iran*, N.Y. TIMES, May 11, 2007, *available at* http://www.nytimes.com/2007/05/11/world/middleeast/11cnd-cheney.html. For a discussion of U.S. war planning against Iran, see Seymour M. Hersh, *The Iran Plans*, THE NEW YORKER, Apr. 17, 2006, *available at* http://www.newyorker.com/archive/2006/04/17/060417fa_fact.

134. CNN.com, *Iran Warns U.S. Over Strike Threat*, *available at* http://www.cnn.com/2007/WORLD/meast/05/14/iran.ahmadinejad.ap/index.html.

dispute resolution, and the UNSC actions were only taken after the IAEA referred the issue for action. Again, the system's emphasis on negotiations at all levels of the dispute has allowed maximum opportunity for a negotiated settlement.

C. Pakistan

1. Background to the Dispute

The origins of Pakistan's nuclear program date back to 1972, when it was founded by General Zulfiqar Ali Bhutto.[135] India's first nuclear test in 1974 spurred Pakistan to redouble its efforts to obtain a nuclear deterrent.[136] Subsequently, in 1975, Dr. Abdul Qadeer Khan joined the effort, bringing with him expertise in sensitive uranium enrichment technology, as well as stolen designs and other technology gained from his previous employment in the Netherlands.[137] Through Khan's efforts, Pakistan developed uranium enrichment capabilities, and was likely capable of producing a highly-enriched-uranium nuclear weapon by the late 1980's.

In 1985, the U.S. Congress passed the Pressler Amendment, which requires a total cut-off of U.S. aid to Pakistan unless the President can certify that Pakistan does not possess nuclear weapons.[138] In October 1990, President Bush stated that he could no longer certify that Pakistan did not possess a nuclear weapon.[139] In 1996, the Brown Amendment was passed to ease the restrictions of the Pressler Amendment and allow certain U.S. military sales to Pakistan.[140] These two amendments still managed to block a deal for Pakistan to purchase a number of F-16 aircraft.

Between May 11th and 13th, 2006, India conducted five nuclear tests.[141] Pakistan was under considerable domestic pressure to reciprocate in order to fully demonstrate its deterrent. However, the international community, led by the United States, tried to persuade Pakistan not to test. Although those talks were focused on forgoing nuclear testing and not on forgoing nuclear weapons

135. Federation of American Scientists, Pakistan Nuclear Weapons, *available at* http://www.fas.org/nuke/guide/pakistan/nuke/index.html.

136. U.S. State Department Briefing Paper, *The Pakistani Nuclear Program*, June 23, 1983, at 5, *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB6/ipn22_5.htm.

137. William J. Broad et al., *A Tale of Nuclear Proliferation: How Pakistani Built His Network*, N.Y. TIMES, Feb. 12, 2004, *available at* http://www.nytimes.com/2004/02/12/international/asia/12NUKE.html.

138. Federation of American Scientists, Pakistan Nuclear Weapons—A Chronology, *available at* http://www.fas.org/nuke/guide/pakistan/nuke/chron.htm.

139. *Id.*

140. *Id.*

141. Federation of American Scientists, Nuclear Forces, *available at* http://www.fas.org/nuke/guide/india/nuke/.

wholesale, this case study focuses on those discussions in order to compare and contrast a case of non-NPT nuclear negotiations with the previous two cases of states that are or were NPT parties. Ultimately, Pakistan conducted six nuclear tests on May 28th and 30th, 2006.[142]

2. Law and Coercion

Pakistan has never signed the NPT. It also does not have a comprehensive safeguards agreement with the IAEA like those relevant in the Iran and North Korea cases. Thus, it operates in the world of sovereign right in terms of its domestic nuclear energy and defense choices. The primary legal constraints here relate not to international law, but to U.S. law restricting foreign aid, and other forms of leverage and foreign relations. Those laws also represent part of the coercion dynamic at play. Forging a multilateral consensus on sanctions was much more difficult in the aftermath of Pakistan's nuclear tests, so the United States instead chose to impose unilateral sanctions.[143]

In deciding whether or not to test nuclear weapons, Pakistan had to balance the security interest of demonstrating its nuclear deterrent against the positive incentives offered by the United States to refrain from testing. The security pressure to test was not absolute—it was known that Pakistan possessed a nuclear capability sufficient to produce a number of nuclear devices, and such knowledge alone may have been enough to effectively deter India, which was probably motivated to test its weapons not solely because of Pakistan, but primarily because of concerns over China's rising military and economic power.[144] Still, a security dimension was obviously at play, in addition to considerable domestic pressure to respond to India's perceived provocation.[145]

The Clinton administration sought to balance positive and negative incentives in order to persuade Pakistan not to test. First, it threatened to impose sanctions under the Glenn amendment if Pakistan tested.[146] Those sanctions would include a tightening of the U.S. sanctions on Pakistan that were eased by the

142. Federation of American Scientists, Pakistan Nuclear Weapons, *available at* http://www.fas.org/nuke/guide/pakistan/nuke/index.html.

143. Alan Friedman, *Clinton Seeks Condemnation of India and a Plea for Pakistani Restraint*, INT'L HERALD TRIB., May 16, 1998, *available at* http://www.iht.com/articles/1998/05/16/summit.t.php.

144. Ministry of External Affairs, Disarmament & International Security Affairs Division, Embassy of India, Washington, D.C., Brief on India's Nuclear Tests, *available at* http://www.indianembassy.org/pic/nuclear/briefonnucleartests.htm.

145. Farah Zahra, *Will Pakistan Test? The View from Islamabad*, GLOBAL BEAT ISSUE BRIEF NO. 35, May 19, 1998.

146. Glenn amendment sanctions include the following: termination of economic development assistance, suspension of foreign military sales, suspension of U.S. government credits and credit guarantees, freezing of U.S. banks loans, suspension of loans from the IMF and World Bank, and prohibition of exports of dual-use nuclear or missile items. Howard Diamond, *India Conducts Nuclear Tests; Pakistan Follows Suit*, ARMS CONTROL TODAY, May 1998, *available at* http://www.armscontrol.org/act/1998_05/hdlmy98.asp.

Brown amendment, as well as actions by the United States to limit, delay, or prevent World Bank and IMF loans from being given to the country.[147] In terms of positive incentives, the United States offered increased assistance and a completion of the F-16 arms sales deal.[148] Ultimately, Pakistan rejected the offer and chose to face the consequences of sanctions. Those sanctions were eventually waived in 2001 in order to reward Pakistan for its cooperation in the War on Terror.[149]

3. Role of the Dispute System

In this negotiation, the lack of the NPT dispute system, or any dispute system for that matter, clearly affected the nature of the negotiations. First, there was no particular framework or timeline that influenced the talks. Pakistan could have tested its weapons at any point with or without holding talks with the United States. There was no procedure and no third party involved in any way to influence the nature or character of the talks. Second, in terms of legal endowment, Pakistan had the right to test nuclear weapons. There was no NPT obligation that tempered its right of action—it was free to act in its sovereign capacity. Therefore, persuading Pakistan not to test was difficult because the United States had to do so purely on the use of positive and negative incentives based in bilateral levers of influence, not on any international legal framework.

Third, a collective action problem surfaced in terms of attempts to get the international community to put pressure on Pakistan not to test its weapons. While parties to the NPT are already within a system that has procedures for both oversight and punishment, Pakistan did not face a similar regime, so it had the benefit of being free from a system of normative constraints. Because it was not in that system, other states were less inclined to apply those same norms to Pakistan when considering means of punishment for the nuclear tests. This disjunction in norms, in combination with a lack of framework for action, made collective international action difficult and ensured that Pakistan only had to fear bilateral forms of censure.

Finally, the nature of the negotiations was less principled than in the other two case studies. In the case of North Korea and Iran, the NPT framework supplied standards, procedures, and norms of behavior that guided the discussions.

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147. *Id.*; Rick Marshall, *Spokesman Notes "Profound Disappointment" at Pakistani Test*, USIS, May 28, 1998, *available at* http://www.fas.org/news/pakistan/1998/05/98052807_npo.html; CNN.com, *Pakistan: Nuclear Test Is Not Imminent*, May 26, 1998, *available at* http://www.cnn.com/WORLD/asiapcf/9805/26/pakistan.nuke.two/.

148. CNN.com, *U.S. Offers Pakistan Arms Sales in Return for Nuclear Restraint*, May 15, 1998, *available at* http://www.cnn.com/WORLD/asiapcf/9805/15/india.pakistan/index.html; CNN.com, *Pakistan Remains Elusive on Nuclear Testing Plans*, May 16, 1998, *available at* http://www.cnn.com/WORLD/asiapcf/9805/16/pakistan.nuke.update/index.html.

149. Alex Wagner, *Bush Waives Nuclear-Related Sanctions on India, Pakistan*, ARMS CONTROL TODAY, Oct. 2001, *available at* http://www.armscontrol.org/act/2001_10/sanctionsoct01.asp.

In the case of Pakistan, however, negotiations around shared treaty-based principles were lacking, and the discussion instead turned primarily into an ad hoc bargaining game. If Pakistan were an NPT member, the positive and negative incentives used by the United States may still have been a factor in the negotiations, but the framework that the NPT provides would have placed the focus of the talks on the party's status of compliance with the treaty and its procedures for dispute resolution.

IV.
LESSONS LEARNED

This final section of the article discusses various lessons that can be drawn from the use of DSD principles for the NPT. Table 2 below offers a diagram of the dispute resolution process that was followed in the three case studies.

A. Procedural Lessons

The cases of North Korea, Iran, and Pakistan help to illustrate the impact that the NPT has, or could have, in terms of influencing negotiations through its legal regime—both procedurally and substantively. First, Iran is the clearest case in which the NPT significantly structures the negotiation by providing iterations for the dispute. The Iran dispute is controlled in large part by the IAEA, which documented the areas of misreporting and breach of safeguards agreements, declared that Iran was not in compliance with its NPT obligations, and then referred the dispute to the UNSC. The IAEA was able to maximize opportunities for negotiation by following those steps deliberately and in taking time before, during, and after each of those stages. This strategy eventually led to the August 21 agreement between Iran and the IAEA. Similarly, in the North Korea case, the IAEA discovered North Korea's breach of its safeguards agreements, which sparked negotiations in which North Korea's threat to withdraw from the NPT helped to create time for negotiations and also added extra impetus to the talks. Though this effort ultimately failed to resolve the dispute, which is still ongoing, it did create procedural opportunities for negotiations to succeed. In the case of Pakistan, on the other hand, the complete lack of a framework was evident in Pakistan's absolute control over the timing of its decision regarding the nuclear testing. Even if Pakistan were in the NPT and was trying to break out, at least the NPT withdrawal provision would have established a concrete time frame in which other countries could have tried to persuade Pakistan to remain within the system. Thus, procedurally in terms of providing iterations in disputes, the NPT system helps to expand the time available for negotiations.

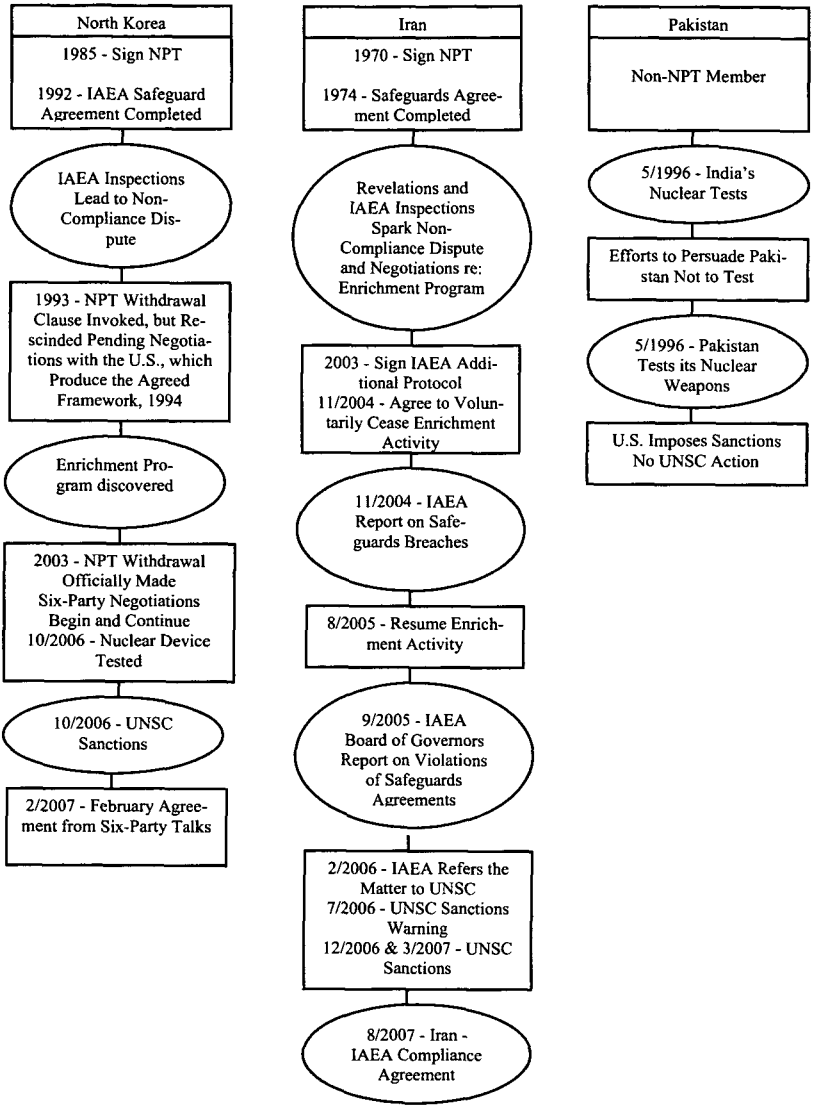
Second, the NPT structure also influences the actual terms of the negotiations. With North Korea, the issue continues to be abandonment of its nuclear weapons and energy program and reentry into the NPT. On the other hand, with Pakistan, the terms of the negotiations were never controlled by an independent

standard. Even if Pakistan chose not to test its weapons, the issue was not having to give up its nuclear program. With Iran, the issue is more complicated because both sides in the negotiations frame the dispute in different terms using the same standard. Iran claims that it is engaged in a lawful pursuit of enrichment technology, whereas the UNSC frames the dispute as preventing Iran from gaining the means of eventually creating fissile material for nuclear weapons. The IAEA has established that Iran is not pursuing the latter course at this point in time, but rather that it breached its safeguards agreement in the past and that it is not being as open about its current nuclear program as it could and should be. This provided justification for the UNSC to characterize Iran's enrichment activities as a threat to international peace and security and to impose sanctions upon Iran.

Third, the NPT legal endowments can make a difference if the parties to the dispute choose to make use of them for their own benefit. Iran has taken advantage of Article IV ¶ 1 of the NPT to justify its development of an enrichment capability. On the other hand, the IAEA and the UNSC made use of Iran's past breaches of its safeguards agreements to impose pressure, and ultimately sanctions on Iran for its decision to pursue its enrichment capability. North Korea made use of the legal right to withdraw in order to leverage negotiations and ultimately, to actually withdraw from the treaty. Pakistan also benefited from the default legal endowment of the international system, which grants them the right to develop nuclear technology without encumbrance. The international community, on the other hand, had no contrary legal endowment to leverage against Pakistan in its decision to test its nuclear devices.

Finally, the NPT can also help shape expectations and create predictability within the system. The Iran case study is a clear example where the parties to the dispute were aware of and followed the established dispute procedures. On the other hand, with the North Korea case, even though the conflict arose in the typical fashion with IAEA inspections, North Korea's quick recourse to the withdrawal procedure expedited the negotiation process. Also, after enrichment facilities were discovered and noncompliance with the Agreed Framework was clear, negotiations again were quickly complicated by North Korea's second attempt to withdraw from the treaty, which this time was successful. As for Pakistan, there were no expectations, nor was there predictability in terms of the negotiation process or procedures involved.

TABLE 2
CASE STUDIES COMPARED



B. Substantive Lessons

While the procedural aspects of the NPT seem to be helpful, the substantive deficiencies noted in Part II play a prominent role in the crises that make up the Part III case studies. First, regarding both North Korea and Pakistan, it is clear that the NPT was not able to provide either state with enough security guarantees to influence them to forgo nuclear weapons. For Pakistan, the threat of invasion and of a neighboring rival with nuclear weapons was too great for it not to reciprocate with nuclear tests of its own. For North Korea, the perceived threat from the United States, in the context of a long history of war and provocation, has thus far proven to outweigh the benefits of remaining within the NPT system. However, many states do not face significant security challenges, or if they do, they are able to provide for their security through conventional means. Such states would benefit from the NPT because of the potential for gain via peaceful nuclear technology transfers and cooperation, as well as the limitation on the number of other states possessing nuclear weapons. Some states view the proliferation of nuclear weapons as threatening to their security, so they would prefer the NPT system because it may normatively constrain other states from considering proliferation. But other states, like North Korea and Pakistan, face significant security threats, and the NPT's short- to medium-term incentive of atomic energy and long-term incentive of eventual disarmament may not be enough to convince these states to either join or remain in the NPT. This is especially the case if these states doubt the potential for long-term disarmament.

Part of the challenge for the NPT system in this realm is the fact that security concerns relating to nuclear weapons are of such a high order that it may be very difficult to develop an incentive structure that would meet the security interests of some states. Perhaps the NPT could have elicited clear security guarantees from the nuclear-weapon states for the non-nuclear-weapon states, for example, clear and binding statements of the nonuse of nuclear weapons against non-nuclear-weapon states that are members of the NPT. Or perhaps the NPT could have offered more attractive energy incentives, such as free or heavily discounted access to reactor fuel. These incentives still may not be enough for some, but it could help in other cases.

Pakistan is a very clear example of the NPT's failure to achieve universal membership. Nuclear-weapon states outside of the system significantly weaken the regime's chances of long-term success, as the risks and calculations that might drive other states to acquire nuclear weapons would be allowed to develop unchecked. Thus, with India outside of the system due to its desire to deter China and maintain its ability to independently defend itself, Pakistan too is faced with a choice: either acquire its own deterrent to counter India's nuclear power, or enter the NPT system that has little chance of getting India to give up its nuclear weapons absent substantial progress towards global disarmament.

The North Korea example also demonstrates the NPT's substantive deficiency in achieving disarmament. If there was progress being made by the NPT

nuclear-weapon states to reduce their arsenals and work towards disarmament, then perhaps North Korea's perceived security threat from the United States would diminish, thus alleviating the need for it to proliferate. Absent such progress, however, there is little to counter such perceived security threats.

Iran is a classic example of the NPT's challenge in terms of both guarding against proliferation and allowing states to build civilian nuclear programs. Enrichment and reprocessing technologies are inherently dual use—to produce reactor fuel, states typically use either enriched uranium or reprocessed spent fuel.[150] If the state possesses the capacity to enrich or reprocess on its own for nuclear energy purposes, that same process can also be used to produce or access fissile material for use in a nuclear weapon. Thus, while the NPT technically allows states to build such facilities for peaceful purposes, there is no escaping the potential that those facilities could be used for military purposes as well, or that material could be diverted from those facilities for military use. The NPT could have dealt with this problem initially by including specific provisions regarding particularly tight international oversight or control over the production and reprocessing of nuclear fuel. The system could also have developed international fuel banks or other such programs to ensure that all states have guaranteed access to nuclear fuel without having to rely on the nuclear-weapon states or other suppliers. Regardless, the substantive deficiencies quite clearly underlie most of the problematic cases of nuclear proliferation concerns.

C. Reflections on Reform

Given the manner in which the NPT has developed from an implementation perspective, namely the lack of progress and the lack of any mechanism to enforce progress towards disarmament, there is a strong argument to be made that the NPT reflects the security interests of the nuclear-weapon states. In other words, the NPT reflects the interests of the more powerful states in the system, as non-nuclear-weapon states party to the NPT have forgone the right to develop nuclear weapons, essentially entrenching the nuclear status quo.[151] So long as

150. The most popular nuclear reactor is a light-water reactor, which uses low-enriched uranium fuel (1.8-3% U-235). Natural uranium, however, can be used directly as fuel in a heavy-water reactor (which would also require the use of heavy water, or water enriched with deuterium oxide) or in a gas-cooled graphite-moderated reactor. A heavy-water reactor eliminates the need to enrich uranium, and when combined with a reprocessing facility, would produce significant amounts of P-239. A gas-cooled graphite-moderated reactor operates similarly to a heavy-water reactor, but uses graphite instead of heavy water to moderate the reaction, thereby eliminating the need to produce heavy water. Fast breeder reactors, which produce more fissile material than they consume, require P-239 and U-238 for fuel. GARDNER, *supra* note 4, at 20, 32-35.

151. This bias may have originated in the original creation of the NPT. The United States and the U.S.S.R. monopolized the early treaty drafting, perhaps slanting the NPT in favor of preventing horizontal proliferation (that is, nuclear weapons spreading to more countries), rather than limiting vertical proliferation (that is, an increase in the number of nuclear weapons possessed by status quo nuclear powers). This preoccupation with horizontal proliferation may account for the NPT's weakness in making progress towards nuclear disarmament. Dimitris Bourantonis, *Negotiating the Non-Proliferation Treaty 1965-68: Patterns of Compromise*, 28 DIPLOMATIC STUDIES PROGRAMME

those powers retain their nuclear weapons, they have a military advantage over non-nuclear powers. Thus, the total lack of enforceable legal commitments regarding disarmament, in addition to the highly capable IAEA inspections regime, serve to benefit the powerful states in the system to the detriment of the weaker states.

In response to this position, one could argue that the NPT's legal endowment and its procedural impact on non-proliferation negotiations, especially opportunities for states to defend their development of nuclear technologies within the system or withdraw from the system when security concerns demand it, help to mitigate the ability of powerful states to exercise power bluntly over the weaker states. In other words, the NPT legal system mitigates and manages the use of power, placing the law in between conflicting security concerns. While this argument may be true in terms of assessing the NPT's procedural impact on negotiations, the substantive deficiencies in the system seem to point in the other direction, in favor of the argument that the NPT system is imbalanced in favor of the powerful states. The fact that, aside from the five NPT nuclear-weapon states, the four other states that possess nuclear weapons are not NPT members provides support for the notion that the NPT is primarily intended for the security of the powerful states in the international system, particularly the five NPT nuclear-weapon states and their allies.

While the substantive challenges are daunting, they are not reasons to abandon the system or condemn it to inevitable failure. Sustaining the regime will be difficult, especially as the impact of the North Korean nuclear test runs its full course through the system. But the NPT can be strengthened and improved, so long as the parties to the treaty retain the political will to have the treaty succeed. Some potential reforms for particularly important challenges faced by the NPT are listed below.

1. Universal Membership

Achieving universal membership is critically important for the regime. While states cannot be forced to join the system, they can be isolated or punished for being outside of the system. The UNSC could pass a resolution authorizing certain political, economic, and military sanctions against those countries not in the NPT system. While the political will may be lacking for such an action, it would be one of the best and most direct ways to isolate those regimes that are in possession of nuclear weapons outside of the NPT.[152] An alternative to this route would be to engage in concentrated efforts to negotiate agreements

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DISCUSSION PAPERS 1-11 (1997). Where particular states monopolize or dominate treaty drafting, the resulting treaty may be skewed in favor of those states' interests over the interests of other states.

152. In this regard, it is unfortunate that the United States recently approved plans to cooperate with India's nuclear energy industry, as it reverses a long-standing policy not to cooperate with non-NPT counties on nuclear energy. Dafna Linzer, *Lawmakers Concerned About U.S.-India Nuclear Trade Deal*, WASH. POST, Nov 15, 2006, at A14. Indeed, this policy may weaken the NPT non-proliferation norm. CIRINCIONE, *supra* note 7, at 120-21.

with each of the states outside of the system in order to persuade them to join. This can be achieved by addressing the specific interests of each state that have thus far prevented them from joining the system. This might entail providing negative and positive security assurances, creating regional nuclear weapons-free zones, or negotiating a separate treaty on disarmament among the nine states currently possessing nuclear weapons.

2. Legal Rules Applicable to States Outside the System

While the states outside of the NPT/IAEA system may never join the NPT, it could be of great benefit to develop rules or procedures that would incorporate these states into the system as much as possible. Non-NPT parties can and do cooperate with the IAEA as member-states. For example, India, Pakistan, and Israel are IAEA member-states and have entered into limited project-specific safeguards agreements with the IAEA.[153] The IAEA could build on these existing relationships and establish special non-NPT-party safeguards relationships with these nuclear-weapon states so that there is a more robust body of information available to the IAEA regarding their nuclear programs and stockpiles of nuclear material. In light of these states' national security interests, the information regarding nuclear material could remain confidential between the non-NPT-party nuclear-weapon state and the IAEA, unless and until there is a security breach that warrants alerting the international community. Since such an event would rise to the level of a threat to international peace and security, the UNSC would have authority to act on it anyway. The only difference would be that there would be early warning of the problem from an independent source. Such a relationship would benefit the international community, because of the enhanced monitoring of the nuclear material, and the non-NPT-party nuclear-weapon states, because they would benefit from IAEA assistance in securing and accounting for their nuclear material. One of the gravest concerns today involves the transfer of nuclear devices or material to non-state actors and terrorist groups.[154] If the IAEA were to further monitor and account for such material, it could help alert the international community of potential threats from illicit transfers or from the leakage of material.

3. Implementation Mechanisms for Disarmament

One of the key deficits of the NPT is the lack of implementation mechanisms for the call to disarm. This deficiency affects other states when consider-

153. IAEA, IAEA Member States, *available at* http://www.iaea.org/About/Policy/MemberStates/; IAEA, *Safeguards Statement for 2006*, *supra* note 42, at 7 (noting that only India, Pakistan, and Israel have safeguards agreements with the IAEA solely on a project-specific basis under INFCIRC/66/Rev.2). The NPT nuclear-weapon states have entered into "voluntary offer" safeguards agreements with the IAEA. *Id.* at 8; *see supra* note 42.

154. *See, e.g.*, GRAHAM ALLISON, NUCLEAR TERRORISM: THE ULTIMATE PREVENTABLE CATASTROPHE (2005); CIRINCIONE, *supra* note 7, at 89-95.

ing their choices to remain outside of the NPT and also to proliferate, even if they are currently in or once were in the NPT.[155] There are a number of ways in which such mechanisms could be developed. One way is for there to be an absolute cap preventing the development of any new nuclear devices, and prohibiting the modification, refurbishment, repair, or retooling of any nuclear devices. Thus, if a device is nearing its shelf-life, it cannot be replaced and must be allowed to expire. Such a policy would ensure that eventually, by the natural process of decay and obsolescence, disarmament would be achieved. This type of system is being advocated in the UK because its submarine-based Trident nuclear missiles are reaching the end of their shelf-life, and some have argued that replacing them would be contrary to the spirit, if not the letter, of the NPT's disarmament provisions.[156] The IAEA could be in charge of monitoring nuclear weapons stockpiles to ensure that replacements are not being made.

Another way to achieve this would be to negotiate a disarmament treaty with the nine nuclear-weapon states. Such a treaty between those nine states could involve setting certain goals and benchmarks for the gradual elimination of nuclear weapons. A first step could involve de-mating warheads from delivery systems. A second step would be dismantling the actual devices and separating out the fissile material, creating a "virtual deterrence" system.[157] A third step could involve establishing proportional reductions in the number of devices. Again, the IAEA could be called upon to monitor this system.

4. Legal Rules Regulating Withdrawal

As states are allowed to withdraw from the NPT, it is uncertain what legal obligations remain with regard to their behavior. For example, if a state violated its safeguards agreement prior to withdrawal, can it be punished for that noncompliance even once it has completely withdrawn from the treaty?[158] The answer to this question is not certain, but a provision specifying the legal obligations could have easily been included in the treaty, and can still be included by amendment, or perhaps by a UNSC resolution. It is clear that in order to discourage states like North Korea from withdrawing from the treaty, there should be some clarity regarding the persistence of particular legal obligations that attach due to a state having previously signed or ratified the NPT.

5. Enhancing Procedural Iterations in Negotiations

As seen in the Part III case studies, procedural iterations in the NPT system help to prolong the amount of time available for negotiations where appropriate.

155. This deficiency may be linked to a possible pro-nuclear-weapon-state bias among the major powers when the NPT was being drafted. *See supra* note 151.

156. *See supra* note 58.

157. *See supra* note 5.

158. At the very least, the UNSC could act under its authority outside of the NPT framework.

Enhancing such provisions can help to maximize the potential for a negotiated solution. In particular, the UNSC should consider an iteration between passing a resolution, and the resolution having authoritative effect. In other words, if a state is doubtful that the UNSC will actually pass particular sanctions or authorize the use of force against it, the state may discount the threat of that action. However, if the UNSC passes such a resolution with the caveat that it will not be enforced until one week from the day it was passed, an extra week is created in which negotiations could take place. Because UNSC action would be ensured absent a compromise, states may be more willing to make concessions in the face of certain consequences. Similarly, the UNSC resolutions could list multiple punishments, each of which is to take effect at a different time in order to create an automatic ratchet-up effect that the target country can halt in the case of negotiation or compromise.

6. Provide Robust Security Assurances

As many states either leave or do not enter the NPT due to security concerns, the NPT could benefit from certain provisions that would mandate particular security guarantees. For example, all nuclear-weapon states could be required to issue no-first-use pledges to all non-nuclear-weapon states. Such pledges would oblige the nuclear-weapon state to not be the first party to use nuclear weapons in a conflict with the non-nuclear-weapon state. This measure would ensure that nuclear weapons would never be used in any such conflict. The nuclear-weapon states could also sign such agreements with each other, ensuring that nuclear weapons again would not be used, since neither party would initiate the use. While such negative security assurances may be very beneficial, positive security assurances can also play an important role in bolstering the NPT system, and should be encouraged.[159]

7. Legal Rules Regulating Enrichment and Reprocessing Facilities

As the case of Iran demonstrates, the development of enrichment and reprocessing capabilities poses a long-term proliferation risk because those facilities could be used to produce fissile material. The IAEA could develop a special inspection and monitoring protocol that would be applicable to such facilities to ensure that they are very closely monitored. Alternatively, the NPT could be amended to grant non-nuclear-weapon states specific rights of access to low-cost nuclear fuel in order to ease their incentives to develop their own production capabilities. Another option to deal with the problem of enrichment and reprocessing facilities is the creation of an international nuclear fuel supply administered by the IAEA.[160] Such an international nuclear fuel bank would assure countries

159. A positive security assurance would be a guarantee that Country A would protect Country B, perhaps even with Country A's nuclear weapons, in case anyone attacked Country B.

160. For a detailed discussion of the possible ways to create and implement a multilateral nu-

that they would not be denied access to nuclear fuel because of political impediments, a concern that may currently limit certain states' access to nuclear fuel supplies. This unencumbered access to fuel may also ease the desire and economic incentive to build enrichment and reprocessing facilities. In fact, if the IAEA or the international fuel bank were to undercut other sellers, it would create a negative economic incentive for states to construct such facilities.

8. Enhance Punishment Options

A final option is to enhance the range and scope of punishment options available for noncompliance. Options here include political sanctions, such as the removal of ambassadors from the country or travel limitations, or automatic rescission of various forms of international assistance.

CONCLUSION

Like many other multilateral treaty regimes, the NPT is a dispute system that moderates the competing rights and claims of its members. The system allocates legal endowments, empowers institutional actors, provides a framework for dispute resolution, and incorporates coercive means of enforcing its non-proliferation norm. By harnessing the shadow of the law and the shadow of violence, the NPT system is able to influence the process and outcome of non-proliferation negotiations. Analyzing the NPT as a dispute system highlights its strengths and weaknesses, both of which continue to be exposed by ongoing developments in the case studies. While the future of non-proliferation efforts remain uncertain, the ten DSD principles discussed in this article should help focus NPT reform efforts on the issues that are most important in strengthening the non-proliferation regime. And though the experience of the NPT may be idiosyncratic, the lessons that can be gleaned from its thirty-seven-year history should also be considered when analyzing, reforming, or drafting other multilateral treaty regimes.

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clear fuel cycle, see IAEA, *Multilateral Approaches to the Nuclear Fuel Cycle*, INFCIRC/640 (Feb. 22, 2005), *available at* http://www.iaea.org/Publications/Documents/Infcircs/2005/infcirc640.pdf.

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Getting Paid: Processing the Labor Disputes of China's Migrant Workers

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INTRODUCTION**

Two profound developments are reshaping the landscape of modern Chinese society. One is the remarkably rapid construction of a formal legal system. Not only is the number of laws and institutions growing, but Chinese citizens are becoming increasingly aware of their legal rights and more willing to ensure them through formal legal processes. The second development is the explosion of China's migrant worker population, presently totaling about 150 million, who leave their rural homes each year to knit the world's clothes and assemble the world's computers in China's bustling cities and factories.[1] Despite their large numbers, members of this societal "subclass," who lack education, money and knowledge of the law, are "easy to exploit" and are routinely denied basic rights and cheated by their employers.[2] They are the Chinese citizens most in need of the protection of a strong legal regime. But are migrant workers able to use this developing legal system to guarantee their rights? If not, it could have significant implications for China's stability as these workers turn to more politicized and extreme measures to express their discontent. This important question thus serves as the starting point of this Article.

** This article follows the Chinese convention for proper names, putting the family name first, except in citations to certain works published in English. Monetary values are generally stated in Chinese currency ("*yuan*"). When most of the research for this article was conducted, the exchange rate from yuan to US dollars was roughly 8:1.

1. Ministry of Labor and Social Security (MOLSS) statistics actually state there were 190 million migrant workers employed in cities and towns in 1995 and over 200 million in 2005. *Laws Needed to Ensure Migrant Workers' Wages*, CHINA DAILY, Mar. 9, 2006, http://www.china.org.cn/english/null/160892.htm. The more popularly reported number is 150 million. Beijing, a city of roughly fifteen million permanent residents, has over four million such migrants, eighty percent of whom work in the wholesale, retail, manufacturing, catering, construction and service sectors. *Beijing Population to Top 15.5 mln*, CHINAFEEDONLINE.COM, Aug. 2, 2005, http://www.chinafeedonline.com/china/info/news/show_news_detail.jsp?id=177303. The largest population of migrants is in Shenzhen: 6-7 million migrant workers in a city of 10 million people. Chen Hong, *Government Helps Migrant Workers get Unpaid Wages*, CHINA DAILY, Jan. 27, 2006, http://www.chinadaily.com.cn/english/doc/2006-01/27/content_515955.htm.

2. *See* AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, U.S. REPRESENTATIVE BENJAMIN L. CARDIN AND U.S. REPRESENTATIVE CHRISTOPHER H. SMITH, SECTION 301 PETITION at 9, 12 (June 8, 2006), http://www.aflcio.org/issues/jobseconomy/globaleconomy/upload/china_petition.pdf [hereinafter AFL-CIO, PETITION]. *See also* Dorothy Solinger, *The Creation of a New Underclass in China and its Implications* (July 22, 2005), CENTER FOR THE STUDY OF DEMOCRACY, PAPER 05-10, http://repositories.cdlib.org/cgi/viewcontent.cgi?article=1065&context=csd. For a more complete listing of sources on the status of migrants in the cities, see footnote 100 of AFL-CIO, PETITION at 47. One migrant summarized the work conditions of such workers: "Compared to full time employees who hold the same positions and do the same work, we work twice as much. We have no holidays, Sundays, sick days, or New Year's days off, paid annual leave, nor do we have days off for weddings or funerals. We have no benefits. Our salaries are one-third to one-fifth of theirs." Zhou Shengwen, *One Migrant Worker Raises Six Points Regarding the Amendment of Labor Contract Law*, BEIJING NEWS, Apr. 12 2004, (China Law Digest trans.), http://www.chinalawdigest.com/article.php?aid=668.

This Article argues that China's legal construction project has largely failed migrant workers. The formal system of administrative organs, arbitration tribunals and courts created to process labor disputes remains an inefficient and ineffective means for migrant workers to settle conflicts with employers. Alternatively, informal mediation is far more accessible to migrants, more time efficient, and more likely to yield a positive outcome. This Article identifies four elements of an "effective" mediator and compares the relative effectiveness of three types of mediators: arbitrators and judges within the formal labor dispute resolution system, other officials outside of this system, and non-officials.[3] Mediators within the formal system are less effective than those outside of it because of the difficulties that migrant workers face in accessing the formal system and the fact that those parties who do make it into the formal system then become less willing to compromise. Non-officials are often more effective mediators than are officials. This is because non-officials generally have a greater personal commitment to helping migrants and are not beholden to the interests of the state, thus enabling them to more vociferously advocate on behalf of workers. However, all mediators, even if they are not officials, must invoke the authority of the government in order to persuade employers and achieve a successful outcome.

In making the above argument, this Article focuses principally on migrant workers involved in disputes about unpaid wages.[4] Workers' wages can be withheld in a number of ways and for a number of reasons. For example, employers may state that they lack the money to pay employees at the time wages are due, but will pay them as soon as the money is available. Alternatively, despite the 1994 Labor Law's requirement that wages be paid each month, employers may, when first hiring workers, only promise to pay wages once per season or even year. In the construction industry, which is notorious for both employing migrant workers and deferring payment of their wages, employers often promise to distribute wages only after the project is completed. While many migrant workers seem willing to accept a deferment of their wages, problems arise when migrant workers are planning to return to their rural homes for Spring Festival (Chinese New Year) or when employers disappear before wages have been paid. In many other cases, employers only pay a portion of the wages earned, citing either a lack of money or a need to deduct money for living expenses, training reimbursement or the poor quality of the work performed.

3. In this context, it is argued, that an "effective" mediation provider is (1) accessible to workers, (2) able to convince employers to participate in the mediation, (3) able to pressure employers to reach an agreement, and, to a lesser extent, (4) able to convince the worker to make reasonable demands.

4. The term "deferred wages" is often used in discussing this issue because it is a more direct translation of the Chinese term used to describe this problem (*tuoqian gongzi*). "Deferred wages" is an accurate description for situations in which the employer has promised to pay the owed money at a later date. However, there are times where this term is also used to describe cases where the employer has no intention of paying the wages or does not acknowledge that any money is owed. Therefore, this article uses the term "unpaid wages" to capture all variations of this phenomenon.

These types of disputes, where the employer withholds all or part of the wages owed to migrant workers, are extremely common. Some reports claim that nearly half of all migrant workers have experienced payment default, while others suggest that the figure is as high as seventy percent.[5] China's official trade union, the All-China Federation of Trade Unions (ACFTU), calculated that as of November 2004, the wages owed to migrant workers exceeded 100 billion yuan (US$12.5 billion).[6] An investigation by China's Labor Supervision Bureau revealed that only 7.8% of workers had experienced deferred wages, but that each was owed three months of salary or 2184 yuan on average.[7] Similarly, in a recent crackdown on thirty firms in Guangdong Province, over 20 million yuan was owed to over 8000 workers—an average of 2500 yuan per worker.[8] While this Article focuses primarily on these unpaid wages cases, which constitute the vast majority of disputes that migrant workers experience, many of the problems faced by migrants in seeking redress for these conflicts are common to all types of labor disputes.

This Article is somewhat geographically focused because most of the field research for the Article was conducted in and around Beijing. However, because many aspects of migrants' situation in Beijing are shared by the millions of migrant workers in cities throughout China, the findings and conclusions presented here are largely applicable to migrants nationwide.

This Article proceeds in four parts. Part I argues that China's formal labor dispute resolution system does not provide an effective means of redress for migrant workers and that its failure to do so threatens social stability. This part is divided into three Sections. The first introduces the primary components of the formal labor dispute resolution system and their relationship to one another. The second identifies and analyzes aspects of the system that make it unfriendly toward migrant workers. Finally, the third Section addresses some of the stability-threatening means of "dispute resolution" to which migrants turn as alternatives to the formal system, including protests, crime, suicide, and petitioning the government.

Part II consists of four Sections and argues that informal mediation is the most effective means of dispute resolution for migrant workers engaged in disputes about unpaid wages. The first Section analyzes why mediation is more suitable than arbitration or litigation. The next Section argues that mediation conducted within the formal system is preferable to arbitration and litigation, but

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5. Zhang Lei, *Fayuan fachu sifa jianyi huyu zeng "tuoqian laodong baochou zui"* [Court Calls for Establishing the "Crime of Deferring Labor Wages"], BEIJING WANBAO [BEIJING EVENING NEWS], Apr. 29, 2006, http://news.xinhuanet.com/legal/2006-04/29/content_4490996.htm.

6. Tina Qian, *Fund Gives Migrant Workers Access to Legal Aid*, CHINA DEVELOPMENT BRIEF, Jan. 26, 2006, http://www.chinadevelopmentbrief.com/node/430.

7. *Quanguo Renda: Woguo "laodong fa" shishi cunzai wuda wenti* [NPC: Five Big Problems in Implementing Our Country's "Labor Law"], ZHONGGUO QINGNIAN BAO [CHINA YOUTH DAILY], Dec. 29, 2005, http://www.southcn.com/law/flrs/200512310301.htm.

8. *Laws Needed*, *supra* note 1.

still limited in its efficacy. The third Section introduces several government organs outside the formal system that are engaged in mediating labor disputes between migrants and employers. It argues that a mediator's status as an official and authority to impose fines are important factors influencing the effectiveness of these mediators. However, this Section also argues that this same official status simultaneously limits the effectiveness of these mediators by both restricting the cases in which they can participate and forcing them to always satisfy the state's interests in each case. The fourth and final Section is a case study of a Beijing NGO that successfully employs mediation to aid migrant workers. It argues that this organization derives certain benefits from not being controlled directly by the government while also finding ways to compensate for their lack of government authority or power to impose fines.

Part III considers the experience of some new legal aid providers in Beijing and revisits the question of whether "settling" through mediation is really preferable to "winning" in the courts. It argues that mediation remains a preferable option for many migrant workers and that the limited supply of high-quality legal aid falls far short of migrant workers' enormous demand.

Part IV, the conclusion, is divided into five Sections which analyze the factors that make for a successful mediation of migrants' disputes, potential models for improving China's labor dispute mediation system, developments that could improve the situation of workers generally, the effect of mediation on the development of the formal legal system and the rule of law, and finally, the implications that the mistreatment of migrant workers and ineffectiveness of the formal labor dispute resolution system have for China's social stability.[9]

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9. This article draws heavily on the fieldwork conducted by the author from 2004 to 2006 and in August 2007. Most of this work was done in Beijing, but the author also performed research in Shenzhen, Shanghai and other cities. In this time, a variety of research methods were employed. First, interviews were conducted by the author with NGO staff, migrant workers, employers, lawyers, scholars and officials at all levels and in all positions relevant to migrant workers and labor dispute resolution. Notes from these meetings are on file with the author. While most interviews were three to four hours in length, several lasted an entire day. Many people were interviewed more than once. The interviews also varied in formality. Most were conducted at the workplace of the interviewee, however, several were held at their home or at a restaurant. In most cases, only one person was interviewed at a time, but there were also occasions where multiple people were interviewed simultaneously.

Second, the author observed two labor arbitrations and six full mediations. Both arbitrations were in Beijing and neither involved migrant workers. Five of the mediations were in Beijing and one in Shenzhen and all involved migrants. The author was mindful of trying to have as minimal an impact on the proceedings as possible. Whenever possible, he positioned himself in the corner of the room, remaining outside of the parties' and mediators' line of vision. The author was always invited to observe the mediation by the mediator and he would remove himself if the parties ever objected to his watching—but this situation never arose. The author did not speak to any of the parties during the actual mediation unless a question was specifically addressed to him—and even then, the author usually allowed the mediator to respond. Several parties did inquire as to the identity of the author, to which the mediator replied by saying that he was either a researcher or journalist.

Third, the author consulted a large number of written materials, including laws, regulations, newspaper and magazine articles, and scholarly articles. Fourth, the author spent eight days

I.
THE FORMAL LABOR DISPUTE RESOLUTION SYSTEM[10]

A. Structure of the Formal System

At present, a system of "one mediation, one arbitration, two trials" exists for the processing of labor disputes. The 1993 Regulations for the Handling of Enterprise Labor Disputes (HELDR) and 1994 Labor Law instruct that, when a labor dispute arises, the parties may first bring the case before the enterprise mediation committee (EMC).[11] This committee is comprised of representatives of the enterprise, workers, and the labor union. The representatives from the union chair the committee. Enterprise mediation was widely used under the planned economy but has become increasingly obsolete as only a small percentage of enterprises now have EMCs.[12] Even where EMCs do exist, workers generally view these bodies as biased in favor of the enterprise (management) and, therefore, choose to bypass them.[13]

Although EMC mediation is optional, workers are required to go through labor arbitration before filing a claim in court. In 2005, 18,000 labor arbitration cases were filed in Beijing, an increase from 15,928 cases in 2004 and 14,911 in 2003.[14] Labor bureaus at the municipal and district levels are required to estab-

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attending formal conferences for both academics and practitioners on topics relating to labor law and dispute resolution. Finally, the author participated in many informal discussions with friends, neighbors, migrant workers, businessmen, employers and others, which played an important role in shaping the author's understanding of the situation of migrant workers in Chinese society.

10. The statistics in this section should be assumed to apply to all cases, not just those involving migrant workers, unless otherwise stated.

11. St. Council, *Qiye laodong zhengyi chuli tiaoli* [Regulations for the Handling of Enterprise Labor Disputes, hereinafter HELDR], No. 117, art. 6-11 (1993); Nat'l People's Cong., *Laodong fa* [Labor Law], No. 28, art. 79 (1994).

12. Only 11.2% of Chinese enterprises had EMCs in 2003, as compared with 56% in 1997. The absolute number has also been declining. INTERNAL REPORT, LABOR SCIENCE RESEARCH OFFICE, MOLSS, *WOGUO LAODONG ZHENGYI CHULI ZHIDU GAIGE WENTI YANJIU* [RESEARCH ON THE QUESTION OF REFORMING CHINA'S LABOR DISPUTE PROCESSING SYSTEM] (2005) [hereinafter MOLSS Internal Report].

13. Labor union representatives, who chair the EMCs, not unlike the staff of a human resources department, are generally employees of the enterprise, and thus, answer to the same managers that are a party to the mediation. Feng Chen, *Between the State and Labour: The Conflict of Chinese Trade Unions' Double Identity in Market Reform*, 176 CHINA QUARTERLY 1017 (2003). For fuller analyses of the problems with EMCs and the reasons for their decline, see Chen Bulei, *Laodong zhengyi tiaojie jizhi de gouzao fenxi yu gaijin gouxiang* [Analysis of the System of Mechanisms for Mediating Labor Disputes and Thoughts on Potential Improvements], ZHONGGUO LAODONG GUANXI XUEYUAN XUEBAO [JOURNAL OF CHINA INSTITUTE OF INDUSTRIAL RELATIONS], Vol. 20, No. 4, Aug. 2006, at 7-17; Fu Hualing & D.W. Choy, *From Mediation to Adjudication: Settling Labor Disputes in China*, CHINA RIGHTS FORUM, No. 3 (2004), at 17-18.

14. Tang Yang, *Beijing yancha zhongxiao siqi laodong hetong* [Beijing sternly investigates labor contracts of middle- and small-sized private enterprises], XINJING BAO [BEIJING NEWS], Feb. 19, 2006, http://news.thebeijingnews.com/0189/2006/0219/015@161572.htm (reporting the 2005

lish labor arbitration committees (LACs),[15] of which there are now over 3100 nationwide.[16] Each LAC is to be comprised of labor bureau officials, one of whom will serve as the director of the committee, as well as enterprise representatives and labor union representatives.

The LAC will often attempt to solve a dispute through conciliation before it is filed. If no settlement is reached, there are two possible outcomes. First, the LAC is mandated to attempt mediation before it adjudicates the case and can issue a mediation agreement if successful.[17] If mediation fails, then a decision will be issued by the arbitrator. If a party is unsatisfied with the decision, he may apply to the people's court within fifteen days for a trial of the original dispute. Such appeals are becoming increasingly common. The MOLSS reports that roughly 40% of all cases in which arbitral awards are issued are appealed to the court.[18] In 2003, labor officials in Beijing and Shanghai reported that this number was as high as 70% in their jurisdictions.[19]

Regardless of whether a labor dispute has been previously arbitrated, the court is required to try the case *de novo*. As with most civil cases, judges generally first attempt to mediate the conflict. If a verdict is issued instead, either party may appeal to a higher court. The number of labor cases filed in Chinese courts has exploded since 2000. In 2001, Chinese courts heard just over 100,000 labor cases; by 2004, this number rose to nearly 165,000.[20] There is also evidence that the rate at which labor dispute cases are appealed is higher than for other civil trials. In Fujian Province, labor cases were appealed at rates of 37% and 47% in 2003 and 2004 respectively, whereas about 12% of ordinary civil cases were appealed.[21] In Guangzhou, 80% of ordinary civil cases were concluded after the first trial in 2003, but 70% of labor cases were appealed.[22]

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data); *ZHONGGUO LAODONG TONGJI NIANJIAN* [CHINA LABOUR STATISTICAL YEARBOOK] [hereinafter Labor Y.B. China] 523 (Beijing: China Labour & Soc. Sec. Publ'g House 2004) (reporting the 2003 data); Labor Y.B. China, 2005, at 611 (reporting the 2004 data).

15. HELDR, *supra* note 11, art. 6, 31; Labor Law, *supra* note 11, art. 79.

16. MOLSS Internal Report, *supra* note 12.

17. HELDR, *supra* note 11, art. 27-28.

18. MOLSS Internal Report, *supra* note 12.

19. Mary E. Gallagher, "Use the Law as Your Weapon!": Institutional Change and Legal Mobilization in China, *in* ENGAGING THE LAW IN CHINA: STATE, SOCIETY, AND POSSIBILITIES FOR JUSTICE 73 (Neil J. Diamant et al. eds., 2005). Another scholar reports that in some localities, 90% of arbitrated labor cases are appealed to the courts. Theodore J. St. Antoine, *Teaching ADR in the Labor Field in China*, 25 COMPARATIVE LABOR LAW AND POLICY JOURNAL 110 (2003).

20. Gallagher, *supra* note 19, at 58; *ZHONGGUO FALÜ NIANJIAN* [LAW YEARBOOK OF CHINA] [hereinafter Law Y.B. China] 153 (Beijing: Press of Law Yearbook of China 2005). The rise was even more dramatic in areas of high economic growth: the number of labor dispute cases filed in the courts of Dongwan City, Guangdong in 2004 was 50 times the 1995 number; in Shenzhen, the 2004 number was 10 times that in 1998. Zhong Angang, *Laozi maodun chengwei shenpan nandian* [Labor Disputes are Difficult to Adjudicate], FAZHI RIBAO [LEGAL DAILY], Nov. 22, 2005, http://www.legaldaily.com.cn/bm/2005-11/22/content_222831.htm.

21. MOLSS Internal Report, *supra* note 12.

22. Ying Zhu, *Laodong zhengyi an cheng wu da tedian* [Five Major Characteristics of Labor

The labor supervision agency of the local labor bureau is another important player in processing disputes. This agency is responsible for supervising compliance with labor laws and regulations, such as those requiring employers to sign labor contracts and pay minimum wage.[23] Although the agency does routine investigations, most are initiated by worker complaints. The Regulations on Labor Security Supervision issued by the State Council in 2004 both standardized this agency's work and increased its enforcement power.[24] If a violation is discovered, agency officials can issue an "administrative decision" ordering the employer to correct the problem by a certain date. If the employer fails to comply and has not filed an administrative lawsuit to challenge the decision, the agency can seek compulsory enforcement of the decision by the courts.[25] Under this Regulation, cases are to be concluded within 60 days of being filed, or 90 days if they are complicated.[26]

Labor supervision agencies also have the authority to fine employers and penalties vary according to the type of violation. For instance, violating the labor rights of women and children yields a fine of 1000-5000 yuan per worker.[27] If an employer required employees to work hours that exceed official limits, the agent may impose a fine of 100-500 yuan per worker.[28] For other violations, however, such as failure to sign a labor contract, the Regulation simply instructs agents to order the employer to correct the situation without mention of a fine.[29] Labor supervision agencies will not always impose these fines, but will usually threaten to do so in order to encourage employers to comply with an administrative decision or an order to rectify a violation.[30] These agencies may also fine employers between 2000 and 20,000 yuan for failing to comply with agency decisions and requests or otherwise obstructing its work.[31] In addition, the Regulation entitles workers to receive compensation from employers for select violations.[32]

Disputes], RENMIN RIBAO [PEOPLE'S DAILY], Dec. 21, 2005, http://npc.people.com.cn/GB/28320/41246/41337/3960872.html.

23. The officials doing this work are sometimes separate from those doing labor arbitration, but if resources are limited, the same labor bureau officials may do both.

24. St. Council, *Laodong baozhang jiancha tiaoli* [Regulations on Labor Security Supervision], No. 423 (2004).

25. *Id.* art. 44.

26. *Id.* art. 17.

27. *Id.* art. 23.

28. *Id.* art. 25.

29. *Id.* art. 24.

30. Interview with Director, Chongwen District Labor Supervision Agency, in Beijing (July 6, 2006).

31. Regulations on Labor Security Supervision, *supra* note 24, art. 30.

32. In cases where employers have withheld workers' wages, paid them below the minimum wage or not paid severance to terminated workers, and have not complied with the agency's order to correct the situation, the employer should pay 50-100% of the owed amount in compensation. *Id.* art. 26.

Nonetheless, these agencies still face difficulties in ensuring compliance. For instance, the Director of Chongwen District's Labor Supervision Agency in Beijing estimates that her office is unable to contact employers in 10% of cases.[33] Employers may also be uncooperative: by not attending meetings, preventing agents from entering the work site, refusing to provide evidence, or failing to implement agency decisions.[34] Agents also complain that the penalties they are authorized to impose are too small to seriously threaten or deter noncompliant employers.[35]

Often, the first step for migrant workers involved in labor disputes is to seek out the labor supervision agency, which is free and can sometimes resolve the problem quickly.[36] In the first ten months of 2005, labor supervision agencies throughout Beijing handled 4450 cases of unpaid wages involving 157,900 migrant workers and 250 million yuan.[37] Often, however, if the case involves not only a violation but also a "labor dispute," as do most unpaid wages cases, then the worker is directed to the LAC.[38] Thus, the agency and LAC may simultaneously work on the same case. Similarly, it is possible for a labor arbitration or civil trial to be occurring at the same time as an administrative trial where the employer is appealing an agency decision or fine. In such cases, the civil court judge will usually wait for the administrative dispute to be resolved before issuing a decision on the labor dispute.

B. Problems in Working through the Formal Legal System

This section identifies nine obstacles faced by migrant workers in accessing and achieving satisfactory results through the formal labor dispute resolution system. Some of these problems confront all workers, not just migrants. Other

33. Interview, Chongwen District, *supra* note 30.

34. *Id.*

35. *Id.*

36. The Director of the Chongwen District Labor Supervision Agency in Beijing estimates that nearly 70% of the nearly 600 labor violations reported in 2005 were brought by migrant workers. *Id.* A 2006 study by the Beijing Migrant Workers Legal Aid Station revealed that 80% of migrant workers that brought their case to the center had previously sought help from at least one government bureau. Beijing Migrant Workers Legal Aid Station, *Nongmingong qianxin anjian yanjiu baogao* [Report on Cases Involving Migrant Workers' Unpaid Wages], § 2(3), Oct. 2006, http://www.zgnmg.org/zhi/dybg/bg002_1.htm.

37. *Taoxin rexian meitian jie shu shi qiuzhu dianhua* [Wage Recovery Hotline Receives Dozens of Calls for Aid Each Day], XINJINGBAO [BEIJING NEWS], Dec. 26, 2005 at A11. The Chongwen District labor bureau reported that from January to November of 2005, 535 complaints had been filed and half of them concerned unpaid wages. *Beijing: Siqu laodong bumen huiying nongmingong taoxin* [Beijing: Labor Bureaus in Four Districts Recover Wages for Migrant Workers], XINJINGBAO [BEIJING NEWS], Dec. 27, 2005, http://life.people.com.cn/GB/1089/3976690.html.

38. MOLSS, *Guanyu shishi "Laodong baozhang jiancha tiaoli" ruogan guiding* [Several Provisions Regarding the Implementation of the "Regulation on Labor Security Supervision"], No. 25, arts. 15-16 (2004) *in LAODONG FA PEITAO GUIDING* [THE LABOR LAW AND ACCOMPANYING REGULATIONS] (Beijing: Chinese Legal System Press 2005).

problems, such as the difficulty of enforcing court judgments, are faced by all citizens who engage the system. However, these difficulties, while experienced by all users of the formal system, are often felt more poignantly by migrant workers.

1. Motivation and Discrimination in the Local Labor Bureau

In recent years, higher levels of the Chinese government have begun taking steps to aid migrants. In October 2003, Chinese Premier Wen Jiabao helped the husband of Xiong Deming, a peasant from outside Chongqing, to recover the 2240 yuan he was owed for construction work.[39] This incident sent a message to government organs to pay attention to the problem of migrant workers' unpaid wages. Since then, the State Council, China's highest executive organ, has called for this problem to be addressed.[40] The media's freedom to report on the issue of unpaid wages has also increased, and the subsequent coverage has heightened public awareness regarding this phenomenon. Several cities to which migrant workers flock each year have passed their own regulations and orders concerning unpaid wages. Other cities have more actively helped workers to recover their wages or have even punished employers by exposing them in the media, imposing fines, or restricting their ability to do business in that city.[41]

Yet, such zealous pursuit of non-compliant employers does not appear to be the norm amongst local government officials. Instead, local labor bureaus, which house both labor supervisory agencies and the LACs, often fail or refuse to perform the duties required of them. Merely performing their routine investigations and other daily tasks leaves inspection officials with little time for much else. In all of China, there are only 19,000 full-time and 24,000 part-time labor inspection officials—less than 3% the number of migrant workers alone.[42] However, the number of claimed violations has risen dramatically in recent years.[43] These labor officials, who are paid a fixed salary regardless of how

39. Verna Yu, *Pay Day at last After Premier Aids a Peasant; Wen Jiabao is Quick to End Impoverished Worker's Plight*, SOUTH CHINA MORNING POST, Oct. 29, 2003, at 6.

40. *See, e.g.*, St. Council, *Guanyu jiejue nongmingong wenti de ruogan yijian* [Some Opinions on Solving the Problems of Migrant Workers] (2006), http://www.gov.cn/jrzg/2006-03/27/content_237644.htm.

41. *See 30 Firms Blacklisted for Defaulting Wages*, CHINA DAILY, June 26, 2006, http://news.xinhuanet.com/english/2006-06/26/content_4749173.htm (on actions taken in Guangdong Province and Guangzhou City); Chen Hong, *supra* note 1 (on Shenzhen's imposition of 47 million yuan in fines on 1300 companies and helping migrants to recover 70 million yuan in wages).

42. Tong Lihua & Xiao Weidong, Beijing Youth Legal Aid and Research Center, *Zhongguo nongmingong weiquan chengben diaocha baogao* [Investigative Report on the Rights Protection Costs of Chinese Migrant Workers], Sept. 2005, § 4(2), http://www.chineselawyer.com.cn/pages/2005-9-29/s31553.html; Labor Y.B. China, 2004, *supra* note 14, at 527; Labor Y.B. China, 2005, *supra* note 14, at 615.

43. Official statistics reveal that Beijing had 10,000 labor violation cases in the first half of 2005 alone, 25.66% more cases than the same period in 2004. Xie Yanjun, *Beijing 135 wan ren ke qian jiti hetong yueding gongzi* [1.35 million People in Beijing will be Eligible to Sign Collective

many cases they process, prefer to work on as few cases as possible and focus on convincing any worker that comes into the office not to file a complaint. The situation at the LACs is similar. The number of cases accepted by all LACs nationwide increased by double-digits each year from 2000 until doubling in 2004 to 260,471 cases.[44] However, China only has 7424 full-time and 12,906 part-time arbitrators, forcing arbitrators in some districts to handle over 200 cases each year.[45]

One obstacle faced by workers more fundamental than the understaffing concern is that the local labor bureaus are often biased in favor employers. This bias may be a result of pressure from the local government, which has effective authority over the labor bureau, and often seeks to support enterprises that provide jobs and pay taxes or whose officials have a personal relationship with employers.[46] For example, officials from a city in Hebei Province explain that many local officials are not concerned with conducting business in accordance with law, but focus merely on economic development and advancing their personal interests.[47] Economic development is a key criterion by which the performance of local officials is evaluated, and thus, by which salaries and promotions are determined.[48] These factors, Ching Kwan Lee writes, "have fostered a permissive regime of labor regulation."[49] Employers may also build relationships with labor bureau officials by treating them to meals, providing gifts or through other means.[50] These factors make labor officials less likely to act on workers' complaints or accept the cases they file for arbitration and more likely to favor employers in those cases that are accepted.[51]

Contracts], XINJINGBAO [BEIJING NEWS], Nov. 2, 2005, http://www.bjrd.gov.cn/27925/2005/11/02/4@378.htm.

44. Labor Y.B. China, 2005, *supra* note 14, at 609.

45. MOLSS Internal Report, *supra* note 12.

46. For a discussion of the relationship between foreign-invested enterprises and local authorities and the precarious situation it creates for migrant workers, see Yuchao Zhu, *Migrant Workers in China's Labour-Intensive Foreign Enterprises*, 35(5) DEVELOPMENT AND CHANGE 1011, 1026 (2004). Peng Guanghua, a professor of labor relations at People's University in Beijing and an expert on labor law, notes that other administrative organs often interfere in the arbitration process of the LACs and can "directly influence the fairness of the arbitration." Peng Guanghua, *Laodong guanxi jiqi chuli* [Labor Disputes and Processing] in Chang Kai, ed., LAODONG GUANXI XUE [LABOUR RELATIONS SCIENCE] 395 (Beijing: Labour and Social Insurance Publishing House 2005).

47. Li Qinghua, Xu Zekuan and Li Junlian, *Tansuo baozhang nongmingong hefa quanyi de fangfa* [Exploring Methods of Ensuring the Legitimate Rights and Interests of Migrant Workers], RENMIN TIAOJIE [PEOPLE'S MEDIATION] 21, Mar. 2006.

48. Susan Whiting, "The Cadre Evaluation System at the Grassroots: The Paradox of Party Rule," *in* HOLDING CHINA TOGETHER: DIVERSITY AND INTEGRATION IN THE POST-DENG ERA 106-112 (Barry J. Naughton and Dali L. Yang, eds., 2004); Yang Zhong, LOCAL GOVERNMENT AND POLITICS IN CHINA: CHALLENGES FROM BELOW 139-41 (M.E. Sharpe 2003).

49. Ching Kwan Lee, *From the Specter of Mao to the Spirit of the Law: Labor Insurgency in China*, THEORY AND SOCIETY, Vol. 31, No. 2. (Apr., 2002), at 200.

50. *See* AFL-CIO PETITION, *supra* note 2, at 30, 78, 98.

51. Official statistics reveal that workers "won" 48.7% of cases in which arbitral awards were issued in 2004 and that both parties won in 37.2% of cases. However, it must be noted that 95% of

The disregard that labor officials often display toward migrant workers is far more intense than that shown toward local workers. Because migrants are often neither permanent nor even long-term residents in the locales where they work, and are likely to return home after a year or so, they are not a constituency that garners much attention from the local government.[52] One migrant worker from Hunan recalls reporting his unpaid wages to the labor bureau and simply being dismissed by an official who said that "[the worker] had no rights as [he was] working illegally."[53] Another migrant worker who went to a labor bureau in Beijing to report his employer's refusal to sign a labor contract was slapped by an official at the office.[54] As one observer writes, "[f]or the minority of migrant workers who have experience interacting with local labor bureau officials or public security officers, the state is predatory and discriminatory against their sort."[55]

2. Dominance of the Arbitration Process by Labor Bureau Officials

LACs are intended to have a degree of independence from the labor bureau, but this rarely exists in reality. While professors, union employees, lawyers and officials from other bureaus are allowed to serve as "part-time" arbitrators on panels that hear cases, only labor bureau officials can serve as "full-time arbitrators."[56] Many cases are deemed as "simple cases" and heard by a single arbitrator from this latter category. Even where a panel of three arbitrators is assembled, the labor bureau's influence over the process is rarely reduced. First, it is not uncommon to have a panel comprised of three labor official arbitrators. Second, when non-official arbitrators are used, a labor bureau official still usually serves as the "lead arbitrator" on the panel. Moreover, if local unions and employers do send an employee to sit on these panels, these representatives are often uninterested in the work and willing to defer to the more knowledgeable and

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claims filed at the LACs are brought by workers. Labor Y.B. China, 2005, *supra* note 14, at 523-4, http://www.molss.gov.cn/images/2006-11/16/27110316153762520791.pdf. Further, the aforementioned statistics do not consider the large number of workers' claims that were not accepted for arbitration, the amount awarded in each "win," or whether that amount was ever paid.

52. Xin Frank He notes that when internal migration began, "local host governments' initial response was to try to block the influx of migrants into their jurisdiction. Most urban governments regarded migrants as subjects of their original native places, so they did not think that it was the local host government's duty to regulate these outsiders even if they were residing in cities." It was only after these blocking efforts proved unsuccessful that local governments adopted an approach of strictly regulating the migrant populations. Xin Frank He, *Regulating Rural-Urban Migrants in Beijing: Institutional Conflict and Ineffective Campaigns*, 39 STAN. J INT'L L. 177, 183-184 (2003).

53. *No New Year Cheer for Chinese Migrant Workers*, REUTERS, Jan. 2, 2006, http://www.chinadaily.com.cn/english/doc/2006-01/02/content_508706.htm.

54. Interview with Shi Fumao, Director, and Xu Yuling, Attorney, Beijing Migrant Worker Legal Aid Station, in Beijing (June 13, 2006).

55. Ching Kwan Lee, *supra* note 49, at 217.

56. MOLSS, *Laodong zhengyi zhongcai weiyuanhui zuzhi guize* [Regulation on the Organization of Labor Dispute Arbitration Committees] (1993), art. 15.

experienced lead arbitrator. Further, even in those rare cases where the lead arbitrator is outvoted on which party should prevail, lead arbitrators still write the final decision consistent with their own viewpoint. As one official at an LAC in Beijing frankly stated, the sole purpose of having a panel of three arbitrators is to "give the appearance of justice."[57] Finally, the labor bureau is also able to influence outcomes because it requires that all decisions receive its approval. Two part-time arbitrators, one a law professor and one a private lawyer, each recall instances when she was serving as the lead arbitrator and the labor bureau asked her to change the decision that she had written—usually to favor the employer.[58]

3. Labor Arbitration's 60 Day Statute of Limitations

Article 82 of the Labor Law states that parties must file for labor arbitration within 60 days of when the labor dispute arises. This leaves a very brief window of time in which workers can file a claim. By comparison, parties generally have two years to file a lawsuit in court for other civil cases.[59] Commentators note that the statute of limitations for labor arbitration filings has become employers' "strongest weapon" when labor disputes arise.[60] In cases involving unpaid wages, this provision is particularly problematic. Workers rarely take action after just one or two months of wages have been withheld, choosing instead to maintain faith in employers who promise to pay them as soon as they have the money. The worker will generally not bring a case for arbitration until several months or even a whole year of wages have been withheld. In some industries, workers do not even expect to get paid on a monthly basis. For instance, in the construction industry, which employs 30% of all migrant workers, it is quite common for workers to be paid once a year (just before Spring Festival) or at the completion of the project.[61] However, when workers apply for arbitration after not having been paid for several months or a whole year, the LAC often cites the 60-day time limit as a reason not to accept the case or to only award wages for the most recent two months.[62]

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57. Interview with Arbitrator, Beijing Municipality LAC, in Beijing (Mar. 21, 2006).

58. Interview, Labor Arbitrator, Chengdu, Sichuan, in Beijing (Apr. 1, 2006); Interview, Former Labor Arbitrator, Beijing Municipal Labor Arbitration Committee, in Beijing (Feb. 25, 2006).

59. Nat'l People's Cong., *Minfa tongze* [General Principles of Civil Law] (1986), art. 135.

60. Zhong Angang, *supra* note 20. In Shenyang City in northeastern China, 1055 (86%) of the cases that the LAC refused to accept were because the 60-day statute of limitations had expired. Mao Lei & Shi Guosheng, *Laodong zhengyi tiaojie zhongcai fa cao'an chushen; san da liangdian yinren guanzhu* [Draft of Labor Dispute Mediation and Arbitration Law Undergoes First Reading; Three Bright Points Attract Attention], RENMIN RIBAO [PEOPLE'S DAILY], Aug. 28, 2007, http://npc.people.com.cn/GB/14957/6176267.html.

61. Tong & Xiao, *supra* note 42, at § 3(7). A report by the Beijing Migrant Workers Legal Aid Station reveals that the claims of 81.1% of the workers it represented were determined by the LAC to have exceeded this 60 day limit. Beijing Migrant Workers Legal Aid Station, *Report on Unpaid Wages*, *supra* note 36, at § 2(2)(1).

62. To support such actions, arbitrators combine a 1995 MOLSS Opinion that defines "the date on which the labor dispute arose" as when the "party knew or should have known" his rights

4. The Limited Meaningfulness of the Right to Appeal

For migrant workers who were unsuccessful in labor arbitration, the courts often fail to provide an effective means of recourse. To begin, if the court deems a case to be a "labor dispute," it will only be accepted if the local LAC issues a letter confirming its refusal to consider the case. Some labor officials have refused to provide such a letter; others have demanded that they be paid to issue one.[63] Sometimes, the LAC refuses to accept a case because it is not a "labor" dispute but an "economic" dispute; however, the court will disagree and remand the case to the LAC.[64] If the LAC refuses to accept a case because the 60-day statute of limitations has been exceeded, courts are instructed to accept the case; but, if the court verifies that the time period has in fact expired and there was no legitimate reason for the delay, the case is to be dismissed.[65]

This problem can be avoided by characterizing the lawsuit as a "services" or "economic" dispute instead of a "labor" dispute.[66] However, it is often only sophisticated lawyers who are able to successfully execute this task. In addition, trying the case as a non-labor dispute requires forfeiting some of the beneficial provisions that the Labor Law provides to workers in trying labor disputes. For instance, the evidentiary burden of production will not shift to the defendant (employer) and the worker is not eligible to receive 25% compensation of any unpaid wages that are recovered.[67] A final problem faced by workers in getting relief from the courts is that, despite the requirement that cases that have been arbitrated and appealed are to be tried *de novo*, the courts often ignore this requirement. Overburdened judges, especially in cases where there is no new evi-

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were infringed along with Article 50 of the Labor Law, which states that wages are to be paid monthly. MOLSS, *Guanyu guanche zhixing "Zhonghua Renmin Gongheguo Laodong fa" ruogan wenti de yijian* [Opinion on Some Problems Relating to Implementing the "PRC Labor Law"], art. 85 (1995), *in LAODONG FA PEITAO GUIDING* [THE LABOR LAW AND ACCOMPANYING REGULATIONS] (Beijing: Chinese Legal System Press 2005). While this is the predominant interpretation, at least one labor arbitrator says that the entire period in which wages were not paid can be viewed as a single violation and thus the worker can be awarded the full amount of unpaid wages. However, this arbitrator is not an official in the local labor bureau but a very pro-worker law professor that occasionally arbitrates cases at a local LAC. Interview with Li Kungang, Labor Arbitrator, Anhui Province, in Beijing (Feb. 18, 2006).

63. Virginia Harper Ho, LABOR DISPUTE RESOLUTION IN CHINA: IMPLICATIONS FOR LABOR RIGHTS AND LEGAL REFORM 153 (Regents of the University of California 2003); Interview with Shi and Xu, *supra* note 54 (recalling that one labor arbitrator demanded 20 yuan to write such a letter).

64. Liu Weifeng, *One Man's Mission to Claim what is due*, CHINA DAILY, July 1, 2005, http://english.sohu.com/20050701/n226149507.shtml. Strictly speaking though, courts are supposed to accept and try such cases so long as they are within the jurisdiction of the court. Sup. People's Ct., *Guanyu shenli laodong zhengyi anjian shiyong falü ruogan wenti de jieshi* [Judicial Interpretation on Some Legal Issues Relating to Trying Labor Dispute Cases], § 2(2) (2001).

65. Sup. People's Ct., Trying Labor Disputes (2001), *supra* note 64, at § 3.

66. *See infra* Section I(B)(7).

67. The Beijing Migrant Worker Legal Aid Station reports that, of the 1068 migrant workers that it represented, the cases were filed as services (*laowu guanxi*) disputes for 83.2% of those workers, and only 10 workers received 25% compensation. Beijing Migrant Workers Legal Aid Station, Report on Unpaid Wages, *supra* note 36, at § 2(5).

dence presented by the worker or glaring error in the LAC's award, will often simply uphold the arbitral award.[68] The Dongcheng District and Chongwen District LACs, both in Beijing, proudly reported that, of the arbitral awards appealed to the court in 2005, 90% and 95% of them respectively were upheld.[69] By comparison, in 2005, only 48% of court verdicts that were appealed nationwide were upheld without further action.[70]

5. The Difficulty of Enforcing Arbitral Awards and Court Judgments

Even if the arbitral award orders that the worker be compensated, payment is far from guaranteed. The labor bureau lacks the legal power or authority and, often, the time, motivation or interest to compel the losing party to comply with the award. In such cases workers can apply to the court for compulsory enforcement of the award.[71]

Chinese courts, however, are notorious for their poor ability to enforce judgments.[72] According to a Supreme People's Court (SPC) report, causes of non-enforcement include difficulties in finding the relevant person or property or that ownership of the property in question had been transferred to another party.[73] Parochialism also provides a serious obstacle to the enforcement of court orders. Local officials may obstruct enforcement by directly contacting enforcement judges or giving orders to organs whose cooperation is needed to enforce a judgment. Some officials have even "been known to incite riots to resist

68. In 1989, the SPC clarified that when arbitrated cases are appealed to the court, the case is between the two original parties, not the appealing party and the LAC; therefore, the LAC should not be listed as the defendant and the judgment should not contain language about nullifying or supporting the arbitral award. Sup. People' Ct., *Zuigao renmin fayuan dui Laodong bu "Guanyu renmin fayuan shenli laodong zhengyi anjian jige wenti de han" de dafu* [SPC's Reply to the Ministry of Labor's "Letter Regarding Some Issues Relating to Trying Labor Dispute Cases in People's Courts"], No. 53, ¶ 2 (1989). In 2005, the SPC was still reminding judges of this fact. *See* Han Yanbin, Sup. People's Ct., *"Zuigao renmin fayuan guanyu shenli laodong zhengyi anjian shiyong falü ruogan wenti de jieshi" de lijie yu shiyong* [Understanding and Implementing the "SPC Judicial Interpretation on Some Legal Issues Relating to Trying Labor Dispute Cases"], ¶ 6 (2005), http://www.ldzc.com/law/yljd/104647.htm.

69. Interview with Director, Dongcheng District LAC, in Beijing (June 28, 2006); Interview, Chongwen District, *supra* note 30.

70. Law Y.B. China, 2006, at 990.

71. Such cases actually comprise a significant portion of the labor disputes referred to the courts. Gallagher, *supra* note 19, at 74.

72. In 2004, the President of the SPC said, "The difficulty of executing civil and commercial judgments has become a 'chronic ailment,' often leading to chaos in the enforcement process; there are few solutions to the problem." *Quoted in* Stanley Lubman, *Law of the Jungle*, CHINA ECONOMIC REVIEW, Sept. 2004, at 24. For a comprehensive discussion on the enforcement of court decisions, see Donald C. Clarke, *Power and Politics in the Chinese Court System: The Enforcement of Civil Judgments*, 10 COLUM. J. ASIAN L. 52 (1996).

73. Qiu Li, *Zhongjiwei deng lianhe tongzhi jian zhi "zhixingnan" si xue youlai* [CPC Central Committee for Discipline Inspection and Other Organs Issue Notice on "Difficult Enforcement"], FAZHI RIBAO [LEGAL DAILY], June 23, 2006, http://news.xinhuanet.com/legal/2006-06/23/content_4737072.htm.

the enforcement" of court orders.[74] This problem has become so severe that, in June 2006, top government and Party organs issued a notice instructing officials to stop abusing their power in this way.[75]

Thus, all too often, even after prevailing in arbitration and two court trials, workers are left with just a slip of paper and no actual money. For instance, after a construction company failed to implement a court judgment to pay wages owed to a group of migrant workers for six months, in an act of desperation, the workers stood on the street attempting to sell their court award of 6.53 million yuan for 5.5 million yuan.[76] In another case, a migrant worker who was awarded 958.18 yuan in a default judgment was later charged 390 yuan by the Beijing High Court to publish the verdict in order to render it legally effective.[77]

6. Prohibitively High Costs

Persevering through the series of dispute resolution processes of the formal system involves bearing significant financial and time costs. These costs affect migrant workers more significantly than other employees. With regard to time, a 2005 report by the Migrant Workers Legal Aid Station in Beijing offered a *very* conservative calculation that the whole procedure from labor inspection, to arbitration, to two trials, to enforcement by the court would take at least four months and ten days.[78] However, Shenzhen's labor bureau reported that, in 2001, the "average" case took between eleven and twenty months just to go through labor arbitration and two trials.[79] These extensive lengths may result from the need to collect evidence or foot-dragging by employers. Moreover, many cases far ex-

74. *China moves against local meddling in court cases*, XINHUA, June 21, 2006, http://news.xinhuanet.com/english/2006-06/21/content_4728730.htm.

75. *Zhongjiwei deng lianhe fa tongzhi yaoqiu jiejue fayuan zhixing nan wenti* [CPC Central Committee for Discipline Inspection and Other Organs Issue Notice Demanding Courts' Problem of Difficult Enforcement be Solved], XINHUAWANG [XINHUA NET], June 21, 2006, http://news.sina.com.cn/c/2006-06-21/11219260747s.shtml.

76. Feng Xiang, *Unable to Collect, Migrant Workers Sell the Judgment on the Street*, CHINA BUSINESS MORNING VIEW, Oct. 11, 2005, (China Law Digest trans.), http://www.chinalawdigest.com/article.php?aid=473.

77. Zhang Zhiqiang, *Yi ming jiazheng fuwuyuan de weiquan zhi lu* [The Rights Protection Road of One Domestic Worker], DAGONGMEI ZHI JIA SHI ZHOU NIAN TEKAN [MIGRANT WOMAN'S CLUB TENTH ANNIVERSARY SPECIAL ISSUE] (2006), at 6-7.

78. The breakdown is as follows: labor inspection processing, 10 days; labor arbitration, 1 month; trial of first instance, 1 month; appeal trial, 1 month; enforcement by the court, 1 month. Tong & Xiao, *supra* note 42, at § 2(1). A later report produced by the Beijing Migrant Workers Legal Aid Station, where Tong and Xiao are both attorneys, revealed that, for the 446 migrant workers that have actually received money with the help of the Station, the process took an average of 11 months: only 25.1% received money in 6 months or less; 32.7% took six to 12 months; 32.5% took one to two years; and 9.6% took over two years. Beijing Migrant Workers Legal Aid Station, *Report on Unpaid Wages*, *supra* note 36, at § 2(7).

79. Ho, *supra* note 63, at 158. She cites the Shenzhen Labor Yearbook (2000-2001), which reports that an average case takes two months to be processed by the LAC, six to twelve months at court, and an additional three to six months for an appeal.

ceed these averages. In one deferred wages case in Beijing, labor arbitration, which is required to be completed in ninety days, lasted for five months.[80] One work injury case underwent two labor arbitrations, five trials and countless administrative procedures before the migrant worker received a court award thirty-seven months later, by which time the liable company had re-registered under a different name, thus making enforcement virtually impossible.[81]

During the lengthy process of pursuing a legal claim, migrant workers face significant financial obstacles as well. The first of the financial costs is the application fees. Labor arbitration costs at least 300 yuan in several major cities, such as Beijing and Shanghai, and 400 yuan in Xinjiang.[82] In many locations, LACs charge additional fees when multiple workers are parties to the case.[83] A review of 60 cases processed by a Shenzhen LAC revealed that the average cost for filing an arbitration case, not including attorney fees, was 2361 yuan.[84] Courts are much cheaper, and, since April 2007, charge only 10 yuan for cases involving labor disputes.[85] In addition, transportation fees make collecting evidence, filing claims, and appearing at hearings financially burdensome. Moreover, if the worker has quit his original job and not found new work, he must also pay room and board each day.

Another financial burden is the cost of hiring an attorney, which is often necessary to prevail in arbitration or litigation. Xiao Weidong, a legal aid lawyer in Beijing, found that there are 962 national-level laws and regulations relating to labor, in addition to countless local laws, regulations, and guidelines, all riddled with contradictions and inconsistencies between them. As Xiao explained,

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80. Zhang Zhiqiang, *Weiquan jinxing shi* [Doing Rights Protection Work], DAGONGMEI ZHI JIA SHI ZHOU NIAN TEKAN [MIGRANT WOMAN'S CLUB TENTH ANNIVERSARY SPECIAL ISSUE] (2006), at 27.

81. Zhang Zhiqiang, *Qiye "tuoqiao jingying," gongshang peichang shei zhifu?* [Enterprise "Casts Off" its Management, Who will Compensate the Worker?], DAGONGMEI ZHI JIA SHI ZHOU NIAN TEKAN [MIGRANT WOMAN'S CLUB TENTH ANNIVERSARY SPECIAL ISSUE] (2006), at 25-26.

82. *See* Gallagher, *supra* note 19, at 59 (on the cost in Shanghai). Cao Zhiheng, *Xinjiang renda daibiao huyu quxiao laodong zhongcai qianzhi de falü chengxu* [A Delegate to Xinjiang's People's Congress Calls for Eliminating Labor Arbitration as a Mandatory Legal Procedure], XINHUAWANG [XINHUA NET], Jan. 20, 2006, http://news.xinhuanet.com/legal/2006-01/20/content_4076746.htm (reporting that LACs in Xinjiang charge at least a 400 yuan "processing fee" and a 20 yuan "acceptance fee" for each case). This issue of fees may soon become irrelevant, however, because the most recent draft of a new law that will change the labor dispute resolution system bars LACs from charging fees to workers that file for arbitration. *See infra* note 287.

83. One legal aid lawyer recalls that when filing a case on behalf of 66 migrant workers at an LAC in Beijing, officials demanded a fee of 19,800 yuan (300 yuan/person). Interview with Shi Fumao, Director, Beijing Migrant Worker Legal Aid Station, in Beijing (June 13, 2006).

84. Isabelle Thireau & Hua Linshan, One Law, Two Interpretations: Mobilizing the Labor Law in Arbitration Committees and in Letters and Visits Offices, *in* ENGAGING THE LAW IN CHINA: STATE, SOCIETY, AND POSSIBILITIES FOR JUSTICE 90 (Neil J. Diamant, et al. eds., 2005). While the arbitration tribunal may order that the employer repay this money to the worker in its decision, if the employer does not comply, the worker will have to go through the courts to retrieve the money.

85. St. Council, *Susong feiyong jiaona banfa* [Measures on the Payment of Litigation Fees], No. 481, art. 13(4) (2007), http://www.law-lib.com/law/law_view.asp?id=184005.

"[a] lawyer would need quite a considerable amount of time to become clear on all these rules, let alone a migrant worker."[86] Moreover, as discussed below, disputes involving migrant workers often touch on some of the thorniest legal issues.

For many workers, it simply does not pay to begin this legal battle. The aforementioned Station report calculated, *very* conservatively, that a minimum of 920 yuan must be spent to go through the steps from labor inspection to court enforcement.[87] However, a survey of 1000 migrant workers in Guangzhou revealed that, amongst those whose wages had been withheld, the average amount was only 827.70 yuan.[88] Moreover, given that the average construction worker makes 50 yuan per day, even if all the legal procedures are concluded in the *absolute* minimum of 11-21 days, the migrant worker will lose an additional 550-1050 yuan in wages for that time period.[89] One migrant worker who sued three different employers for unpaid wages reported that each case took so long that he lost money despite winning the judgments.[90]

Both the MOLSS and the SPC have sought to address these cost issues. In 2005, MOLSS issued a Notice calling on LACs to waive the fees for migrant workers who are "economically troubled."[91] Nonetheless, over a year later, there are still reports that LACs are denying such waivers to migrant workers.[92] Many LACs require a letter from either the local labor union or from the residents/villagers committee in the worker's hometown certifying that the worker is "economically troubled" before waiving the fee, both of which can be very difficult or costly to obtain.[93] It is reported that some courts, such as those in

86. Zhang Yan and Shi Yi, *Mingong weiquan chengben diaocha baogao chulu taoxin chengben sanbei yu shouyi* [An Investigation of the Costs of Protecting Migrant Workers' Rights Reveals that the Cost of Recovering Wages is Three Times the Amount Recovered], JINGHUA SHIBAO [BEIJING TIMES], Jan. 23, 2006, http://www.gsflyz.com/www/ContentsDisp.asp?id=85&ClassId=5.

87. The breakdown is as follows: 120 yuan for the labor inspection process; 400 yuan for labor arbitration; 150 yuan for the first trial; 150 yuan for the appeal trial; 100 yuan for enforcement by the court. These amounts include both the mandatory fees (for example, to file for arbitration and file a lawsuit) as well as estimates for photocopies, transportation, housing and eating costs. Tong & Xiao, *supra* note 42, at § 1(1).

88. *Id.*

89. The breakdown is as follows: labor inspection process, 1-3 days; labor arbitration, 3-5 days; trial of first instance, 3-5 days; appeal trial, 3-5 days; enforcement by the court, 1-3 days. *Id.* at § 1(2).

90. Philip P.Pan, *Getting Paid in China: Matter of Life and Death; Suicide Threats Rise as Employers Deny Wages*, WASH. POST, Feb. 13, 2003.

91. MOLSS, *Guanyu jiaqiang jianshe deng hangye nongmingong laodong hetong guanli de tongzhi* [Notice on Strengthening Supervision of Labor Contracts for Migrant Workers in the Construction and Other Industries], No. 9, § 5 (2005), http://www.chinalabor.cc/Article/flfg/ldxzgz/200507/2188.html.

92. Interview with Shi Fumao, *supra* note 83. Gao Daozhi, a lawyer who frequently represents migrant workers, also notes that the fee waiver is rarely granted to non-locals (*waidi ren*). Interview with Gao Daozhi, Lawyer, in Beijing (June 17, 2006). It is very possible, however, that the situation varies in different districts of Beijing and in different cities.

93. Tong & Xiao, *supra* note 42, at § 3(10).

Beijing, are more willing to waive fees.[94] However, while the filing fees might be lowered or eliminated, compensation for the migrant workers' other litigation costs (transportation, room and board, etc.) is hardly ever awarded by either LACs or courts.[95]

In order to speed up the process, in 2005, LACs were instructed to use a summary procedure in cases involving migrant workers' unpaid wages and to accept, try and conclude these cases quickly.[96] Shenzhen had already been giving parties the option of using a "simplified procedure," which reportedly reduces the length of arbitration cases by two-thirds.[97] Beijing's Dongcheng District LAC claims to use a "special procedure" for such cases, concluding them just fifteen to thirty days after accepting them.[98] Similarly, in 2003, the SPC called for the "speedy" processing of construction-related contract disputes involving migrant workers' wages, and the Beijing High Court made a similar call in 2005.[99] Some evidence exists that these measures have been effective in encouraging judges to process migrant workers' cases more quickly.[100]

7. Labor Contracts and Labor Relationships

During the reform era, China's employment for life arrangement was replaced by a "labor contract system."[101] The Labor Law requires all enterprises to sign contracts with their employees and allows workers to be compensated for

94. Beijing's highest court has called for the reduction or elimination of court and enforcement fees for migrant workers throughout the city's judicial system. Beijing High People's Ct., *Guanyu yifa kuaisu chuli jianshe lingyu tuoqian nongmingong gongzi xiangguan anjian de yijian* [Opinion on Quickly Processing Unpaid Wages Cases of Migrant Workers in the Construction Industry in Accordance with the Law], No. 189, ¶ 5 (2005). Further, in June 2006, SPC President, Xiao Yang, reiterated that courts should waive litigation fees for migrant workers. *More legal aid to protect disadvantaged groups*, XINHUA, June 29, 2006, http://news.xinhuanet.com/english/2006-06/29/content_4768227.htm. The Station's chief lawyer estimates that while there are often problems in getting LACs to waive fees, courts will waive them 90% of the time. Interview with Shi Fumao, *supra* note 83.

95. Beijing Migrant Workers Legal Aid Station, Report on Unpaid Wages, *supra* note 236, at § 2(8) (reporting that transportation costs, for instance, were only awarded one time out of all the cases tried by the Station).

96. MOLSS, Notice on Labor Contracts, *supra* note 91, at § 5.

97. Labor Y.B. China, 2005, *supra* note 14, at 432.

98. Interview, Dongcheng District LAC, *supra* note 69. While the short time-frame may sound impressive, it should be noted that this particular LAC has only tried a handful of cases involving migrant workers in the past few years.

99. Chen Yonghui, *Zuigao fayuan jiang zhendui laodong anjian redian wenti chutai sifa jieshi* [The SPC Will Issue a Judicial Interpretation Addressing Hot Issues in Labor Cases], RENMIN FAYUAN BAO [COURT NEWS], Mar. 9, 2006, http://news.xinhuanet.com/legal/2006-03/09/content_4278701.htm (describing the 2003 SPC Opinion); Beijing High People's Ct., Opinion on Quickly Processing Unpaid Wages Cases, *supra* note 94, ¶ 5.

100. Interview with Clerk, Chaoyang District Basic-Level Court, Beijing, in Beijing (July 4, 2006).

101. *See* Gallagher, *supra* note 19, at 61-62.

any damages resulting from a failure to do so.[102] Such contracts are still quite rare outside of the state sector though, and virtually nonexistent among migrant workers and their employers.[103] An investigation of 1000 migrant workers in the city of Harbin revealed that only 19.58% had written contracts, over half had oral agreements and 21.11% had never discussed anything with their employer.[104] Others estimate that less than 10% of migrant workers have written employment contracts.[105]

The lack of a written contract is a significant obstacle to seeking redress through the formal labor dispute resolution system. Protections under the Labor Law only apply to employees who have formed a "labor relationship" (*laodong guanxi*) with their employer.[106] Such a relationship is required for labor supervision agencies to process a case and is also what defines a conflict as a "labor dispute," and thus, within the LAC's jurisdiction.[107] As employers of migrant workers often deny having a labor relationship with any worker that brings a legal action, the worker must prove that the relationship does, in fact, exist. A labor contract is the best evidence of this relationship; in fact, many LACs and courts treat it as the only acceptable evidence of such a relationship. In response to this practice, MOLSS has emphasized that the party need not have a written contract for a case to be accepted so long as an "actual labor relationship" (*shishi laodong guanxi*) exists.[108] MOLSS even lists several items that qualify as evidence of such a relationship, including pay slips, a work ID, a list of workers, work attendance records, or the testimony of other workers, and instructs that employers shoulder the burden of production for the pay slips, list of workers and attendance records.[109]

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102. Labor Law, *supra* note 11, art. 16, 98.

103. A 2005 report of the NPC's Standing Committee determined that less than 20% of small- and medium-sized private corporations had signed contracts with their employees. NPC: Five Big Problems in Implementing "Labor Law," *supra* note 7.

104. Tong & Xiao, *supra* note 42, at § 3(8). A later report examining the 1068 migrant workers that actually received assistance with their unpaid wages cases from the Beijing Migrant Workers Legal Aid Station between September 2005 and September 2006 showed that only 9 (0.8%) of these workers had written contracts with their employer. Beijing Migrant Workers Legal Aid Station, Report on Unpaid Wages, *supra* note 36, at § 2(7).

105. Anthony Kuhn, *A High Price to Pay for a Job*, FAR EASTERN ECON. REV., Jan. 22, 2004, at 30-32 (reporting the estimate of Li Jianfei, a law professor at People's University in Beijing and a former MOLSS official).

106. Labor Law, *supra* note 11, art 2.

107. Where a "labor service relationship" (*laowu guanxi*) exists, such as in disputes involving independent contractor agreements or personal service contracts, the cases are governed by the PRC Contract Law and not the Labor Law. Ho, *supra* note 63, at 77. Thus, domestic helpers—a group largely comprised of migrant workers—do not enjoy the protections of the Labor Law. The silver lining is that such workers are not obligated to go through arbitration before filing a case in the people's courts.

108. MOLSS, Opinion on Implementing Labor Law, *supra* note 62, at art. 82(1).

109. MOLSS, *Guanyu queli laodong guanxi youguan shixiang de tongzhi* [Notice on Issues Relating to Establishing Labor Relations], No. 12, § 2 (2005), http://www.chinalabor.cc/Article/flfg/ldxzgz/200506/1832.html. Despite the assignment of the bur-

Obtaining even these types of evidence, however, can be quite challenging for migrants. Pay slips are rarely issued to migrants, especially those who have not been paid. Migrants are often not given a work ID, and if they are, may not be allowed to take it outside of the worksite. Lists of workers and attendance records are held by the employer, not the workers. Some migrant workers, often risking their personal safety, will try to obtain such documents and stealthily leave the worksite to make a photocopy; however, even this difficult task becomes nearly impossible if the worker has already left that job. Finally, other workers, fearing retaliation from the employer, may be unwilling to testify on such a matter. Even gathering such evidence does not guarantee that an LAC will acknowledge the existence of a labor relationship: the case of one worker possessing both a work ID and a pay sheet was still rejected by the Shenzhen City LAC because the company's official seal did not appear on these documents.[110]

The evidentiary difficulties involved in proving a labor relationship is another reason that lawyers encourage migrant workers to avoid pursuing "labor disputes," and instead, file contract or debt claims in the courts. The SPC has come to recognize and affirm such a practice. A 2006 Judicial Interpretation states that, if a worker brings an IOU (*gongzi qiantiao*) issued by the employer, and the case does not involve any other disputes involving a labor relationship, the court is to consider it a "labor remuneration dispute" (*laodong baochou zhengyi*) and accept it as an ordinary civil dispute.[111] While some question whether such a dispute must still go through labor arbitration, the language of the Judicial Interpretation calls on courts to accept such a case as an ordinary civil dispute, and not a labor one. This suggests that the criteria for accepting the case must differ in some way from that of a normal labor dispute—namely, that prior consideration by the LAC is not required.[112]

Judges and clerks from three Beijing courts have suggested, however, that not many cases of this sort have been brought thus far.[113] Obtaining a pay slip is not always easy, as employers generally only verbally promise to pay any owed

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den of production to the employer, many LACs would sooner dismiss a case than push an employer who claims that no labor relationship exists to actually produce these documents. Moreover, it is relatively easy to forge such documents or "conveniently" lose them.

110. Mao Jianguo, *Zhongcaiwei shang le nongmingong de xin; paizi bei zhai suanbusuan yuanwang?* (Labor Arbitration Committee Emotionally Injures Migrant Worker; Is the Taking of its Sign a Loss or Not?), YANGZI WANBAO [YANGTSE EVENING NEWS], Dec. 29, 2006, http://news3.xinhuanet.com/fortune/2006-12/29/content_5547219.htm (the article notes that the back of the work ID clearly did have the company's stamp; angered by this result, this migrant worker went on to steal the sign of the LAC).

111. Sup. People's Ct.,, *Guanyu shenli laodong zhengyi anjian shiyong falü ruogan wenti de jieshi (er)* [Judicial Interpretation on Some Legal Issues Relating to Trying Labor Dispute Cases (2)], No. 6 (2006), § 3.

112. *See e.g.*, Li Guoguang, ed., *ZUIGAO RENMIN FAYUAN LAODONG ZHENGYI ANJIAN SIFA JIESHI: SHIYI YU ANJIE* [SUPREME PEOPLE'S COURT JUDICIAL INTERPRETATIONS ON LABOR DISPUTE CASES] 245-48 (Beijing: Falü Chubanshe [Law Press] 2006).

113. Interview, in Beijing (Aug. 21, 2007).

amount. For this reason, attorneys at a legal aid center in Beijing that services migrant workers will often tape record conversations with their clients' employers in order to have evidence that money is owed.[114] Another obstacle that arises in cases that rely on pay slips is that the IOU must satisfy the court's requirements for the authentication of evidence.[115] Furthermore, as mentioned above, trying unpaid wage cases as general civil disputes has a significant disadvantage for workers: the plaintiff can only be awarded the amount of wages that he is owed and is not eligible for the additional compensation in the amount of 25% of the owed wages that can be granted in labor cases. Thus, frustrating workers' abilities to prove a labor relationship and the possibility of them winning 25% additional compensation are both strong incentives for employers not to sign labor contracts.

Employers also benefit from not signing written contracts in other ways. Not concluding written contracts allows employers to avoid supervision by the labor bureau (with whom labor contracts are to be registered), which also allows employers to escape from paying taxes and buying legally-mandated insurance. The lack of a written contract also enables employers to lie about the terms of the oral employment agreement when a dispute arises. For instance, the employer may tell the arbitrator that the "1000 yuan salary" promised to the worker really meant that 700 yuan was to be paid to the worker and 300 yuan was to be deducted for room and board. In light of these powerful incentives for employers to avoid signing contracts, powerless migrants have little hope of persuading employers to do otherwise.

Migrants simply lack any bargaining power vis-à-vis their employers. Migrant workers often do not even think of requesting a written contract.[116] While NGOs and lawyers working to educate migrants about rights protection techniques often emphasize the need for workers to demand written contracts, this advice is far easier to give than for migrants to implement. If a migrant worker requests a written contract when looking for work, an employer would likely view him as a troublemaker and choose a less demanding worker. For those workers who already have jobs, their only leverage is to threaten to quit, which is unlikely to inspire action from the employer. As one worker was told, "[t]here are many candidates for your position; you can leave any time. Don't mention the contract again!"[117] Even worse than simply denying the request, some employers might retaliate against a worker that requests a written contract. The only support that exists for the workers in this situation is the legal requirement

114. Interview with Shi Fumao, Beijing Migrant Worker Legal Aid Station, in Beijing (Aug. 22, 2007).

115. Nat'l People's Cong., *Minshi susong fa* [Civil Procedure Law], Ch. 7 (1991).

116. Some of the reasons that migrant workers don't request their employers to sign written contracts include: "I was introduced by a friend from my hometown (*laoxiang*), so if I don't have a contract, it is no big deal (*mei shi*)" and a fear that they will be fired or not invited to start working if they make such a request. Tong & Xiao, *supra* note 42, at § 3(8).

117. Liu Weifeng, *supra* note 64.

that employers conclude written agreements. But, one migrant chuckled at the idea that he might actually use this fact to convince his employer: "how could an uneducated person like me start discussing specific legal stipulations with my boss?"[118]

Persuading employers to sign written agreements requires altering the costs and benefits of doing so. Tong Lihua and Xiao Weidong, who head the Migrant Workers Legal Aid Station in Beijing, suggest imposing a fine of 200-500 yuan on an employer for each day that he has not signed a labor contract with an employee.[119] The Beijing government has also recognized the need to add teeth to their many calls for employers to sign contracts.[120] As part of "Labor Contract Awareness Month" in early 2006, the city's labor bureau proclaimed that employers could be fined 500 yuan for each employee who lacks a written contract. In addition, in order to encourage compliance, the labor bureau promised that those companies that signed contracts with all of their employees would be exempted from routine compliance inspections.[121]

8. The Complicating Factor of Labor Brokerage

Some of the greatest practical and legal problems faced by migrants are created by the widespread use of middlemen (*baogongtou* or *zhongjieren*) or dispatch companies (*paiqian gongsi*) who function as labor brokers connecting workers with "user companies" (*yongren danwei*) or employers. Such arrangements are particularly prevalent in the construction industry, where large numbers of workers are needed and turnover is high. The construction company (user company) offers to pay these labor brokers to find workers. The brokers then go either to the countryside or to an urban migrant worker camp to round up laborers.[122] The labor broker does not exit the picture at this point, but often

118. Interview with migrant workers, SOHO Residential Development, Beijing, in Beijing (June 18, 2006).

119. Tong & Xiao, *supra* note 42, at § 4(5).

120. Beijing issued its regulation on fining employers who withhold wages from migrant workers shortly after the State Council called on local governments to take action in this area. St. Council, Opinions on Solving Problems of Migrant Workers, *supra* note 40, art. 8. Guangdong Province has a similar policy as well, in which employers can be fined 100-300 yuan for each worker that does not have a contract. Liu Qian and Lai Liangqing, *Guangdong bu qian laodong hetong chufa yongren danwei* [Guangdong Punishes Employers that do not Sign Labor Contracts], NANFANG RIBAO [SOUTHERN DAILY], Mar. 16, 2006, http://www.southcn.com/job/features/2006jobright/200603160537.htm.

121. Tang Yang, *supra* note 14. It is not clear, however, how many employers were actually fined. One press report released at the conclusion of this month noted the large propaganda effort that was made, but mentioned nothing about employers being fined. *Laodong hetong xuanchuan yue luomu qiye yu zhigong hetong yishi zengqiang* [Labor Contract Awareness Month Strengthens the Awareness of Enterprises and Employees], BEIJING LAODONG JIUYE BAO [BEIJING LABOR EMPLOYMENT NEWS], Apr. 21, 2006, http://www.btophr.com/viewcontent/eachfor.asp?id=13177.

122. Lei Guang identifies three "pathways" through which migrants get to urban areas: (1) formal state channels, such as rural labor bureaus; (2) direct company recruitment or "urban labor market institutions;" and (3) kinship or village-based networks. He suggests that this third pathway is

remains responsible for all contact between the user company and the workers, including recording the hours worked and distributing wages. To further complicate matters, there are usually multiple levels of subcontractors between the enterprise funding the project and the workers.[123] However, migrant workers often only have contact with the broker who brought them to the site, but not with the individuals who are higher up the chain of command.

In such arrangements, there are two common scenarios in which migrant workers do not receive wages. The first occurs when a labor broker is given money to disperse amongst the migrant workers but either passes on only a portion of the money or keeps it all for himself. When the workers confront the labor broker, the broker denies that he received any money. The workers will then seek out the company manager (higher-level), who says that the money was already paid to the labor broker and the workers must take it up with him.[124] By this point, the labor broker has often already disappeared with the money. The second situation occurs when the project actually runs out of money. Such a development may affect people at several levels in the chain, but certainly hits migrant workers the earliest and the hardest.[125] In this case, migrant workers are usually assured that they will receive all their wages at some later date, such as when the project is completed.

The use of labor brokerage also creates difficulties when workers seek redress through the legal system. In addition to the problems that arise with written contracts and evidence, these workers face the added hardship of determining *with whom* they are trying to prove the existence of a labor relationship. The labor broker is often an individual or informal business, not the type of employer to which the Labor Law applies.[126] Even where a labor relationship is determined to exist, LACs and labor supervision agencies often require a copy of the business license of the user company in order to file a case.[127] However, many times the labor broker and even managers and subcontractors higher up the

"by far the most important channel." Lei Guang, *Pathways of Rural-Urban Migration and China's Urban Transformation*, HARV. CHINA REV. 33, 34 (Spring 2005).

123. Interview, Chongwen District, *supra* note 30.

124. *See, e.g.*, Zhan Minghui, *Laoban shiyue 7 mingong chunjie taoxin* [Boss Fails to Keep Appointment to Discuss the Spring Festival Salaries of 7 Migrant Workers], XINJING BAO [BEIJING NEWS], Feb. 1, 2006, http://news.thebeijingnews.com/0190/2006/0201/015@158497.htm.

125. One labor contractor even sought out a Beijing organization known to help migrant workers recover their unpaid salaries. Wu Shan, *Dagong qingnian de gongyi shiye meng* [A Young Migrant Worker's Dream of Making a Public Contribution], ZHONGGUO QINGNIAN BAO [CHINA YOUTH DAILY], Feb. 11, 2006, http://zqb.cyol.com/content/2006-02/11/content_1313593.htm.

126. The Labor Law applies to *yongren danwei* ("user companies"), which is said to include "enterprises" (*qiye*) and "economic organizations" (*jingji zuzhi*). Nat'l People's Cong., *Laodong fa* [Labor Law], No. 28, art. 2 (1994). Labor supervision agencies and LACs would thus characterize a worker and a labor contractor as having an "employment relationship" (*guyong guanxi*) but not a "labor relationship" (*laodong guanxi*) and refuse to accept the case.

127. Interview with Shi Fumao, *supra* note 83; Interview, Chongwen District, *supra* note 30.

chain have not registered with the relevant bureau.[128] A more basic problem, revealed by one survey, is that over 46% of migrant workers do not even know the name and contact information for their "employer," let alone whether they have a proper license.[129]

Government attention to the labor brokerage issue has resulted in both national and local demands that employers sign contracts and pay wages directly to migrant workers as well as legislation making employers liable for workers wages even when subcontracting takes place.[130] Some legal issues, however, such as the difference between a "labor relationship" and an "employment relationship," still remain murky. As a result, LACs are often hesitant to take on such messy, legally complex cases, preferring to let courts handle them.[131] The courts have attempted to clarify some of the legal and procedural issues; for instance, by allowing both contracting and subcontracting companies to be listed together as defendants in a lawsuit.[132] In unpaid wages cases involving informal labor brokers, both the broker and the user company will often be listed as defendants. If the labor broker has also not been paid by the company, he may sometimes join together with the suing workers or at least testify to the fact that they had all worked for the user company and had not been paid.

Enforcement is probably the most difficult aspect of these cases. Often, by the time that arbitration and court proceedings conclude, usually well after the construction project has been completed, the lower-level contractors have long disappeared. Even some of the higher-level companies may no longer exist. The

128. Tong & Xiao, *supra* note 42, at § 3(1).

129. *Id.* at § 3(7).

130. A 2005 MOLSS Notice mandates that the user company itself signs contracts with the migrant workers it employs, forbidding the company's site branch, program manager, project manager, labor broker or other person lacking the necessary legal qualifications to conclude these contracts. MOLSS, Notice on Labor Contracts, *supra* note 91, at § 2. Another MOLSS Notice issued the following month clarified that if a construction or other company subcontracts to an organization or person lacking the credentials to hire laborers, the company is still principally responsible for those laborers. MOLSS, Notice on Establishing Labor Relations, *supra* note 109, at § 4. Several localities have taken action in this area as well. For instance, the Beijing Labor Bureau requires all construction companies to pay wages at least once per month and that they be paid directly to the workers. Beijing Labor and Social Security Bureau and Beijing Construction Comm., *Beijing Shi jianzhu shigong qiye laodong yonggong he gongzi zhifu guanli zanxing guiding* [Beijing's Temporary Regulation on Managing Employment and the Distribution of Wages by Construction Companies], No. 155, art. 10, 11 (2004), http://www.law-lib.com/lawhtm/2004/87379.htm. Finally, the 2007 Labor Contract Law dedicates an entire sub-chapter to workers employed through labor brokers and spells out the obligations of both the broker and the user company in such a relationship. *See* Nat'l People's Cong., *Laodong hetong fa* [Labor Contract Law], art. 5(2) (2007).

131. Workers' lawyers sometimes welcome this practice, as it allows them to forego the timely, costly arbitration process and go directly to court. Interview with Shi Fumao, *supra* note 83.

132. Sup. People's Ct.,, Trying Labor Disputes (2001), *supra* note 64, at § 12 (instructing that both the subcontracting and contracting companies should be listed as defendants); *but see* Sup. People's Ct., Trying Labor Disputes (2) (2006), *supra* note 111, at § 10 (instructing that, for disputes arising from labor brokerage contracts, the broker should be listed as the defendant, but, for disputes involving the user company, the company ought to be listed as the defendant).

companies that do remain are often in debt and have no money to pay the workers.[133]

To complicate matters further, in some cases, the company at the top of the chain is a government bureau or agency, which means that workers cannot sue them in the civil courts, but must instead bring an administrative litigation suit.[134] If a worker is unsuccessful in one part of his two-track effort, he is unlikely to receive anything. In response to these problems, some local governments have begun requiring certain employers to set aside money in a government-monitored bank account to ensure that they do not default on wage payments.[135] The Beijing government has also forbidden construction companies that defaulted on paying workers' wages from performing future construction projects in the city.[136]

9. Legal Education and Representation

Migrant workers' lack of legal knowledge makes it difficult for them to use the legal system to recover their unpaid wages. Several organizations have sought to educate and empower migrant workers by providing rights protection handbooks that communicate the content of the law.[137] While at least one such handbook merely reprints some of the more fundamental laws and regulations, others employ far more user-friendly formats that answer commonly asked questions, explain relevant legal provisions in plain language or provide useful information, such as the types of content that a labor contract should contain. Nonetheless, it is difficult for uneducated migrant workers with no bargaining power or experience to make use of these legal regulations to protect their rights.

Some sections of these manuals are more straightforward in their instruc-

133. For instance, one Beijing company that contracted to build a metro line subcontracted part of the work to a Shandong company, which owed 900,000 yuan in wages to 260 workers. The Shandong company admits that it owes the money and a court has ordered it to pay, but the company says it has no money because it has not been paid by the Beijing company. Liu Li, *Court Orders Migrant Workers be Paid*, CHINA DAILY, June 22, 2006, http://www.chinadaily.com.cn/china/2006-06/22/content_623649.htm.

134. *Default on Migrant Workers Pay Comes to End*, CHINA DAILY, Jan. 17, 2004, http://www.chinadaily.com.cn/en/doc/2004-01/17/content_299779.htm (noting that it is often a government entity that defaults on its payments).

135. *See* Beijing People's Gov't, *Beijing Shi gongzi zhifu guiding* [Beijing's Provision on Wage Payment], No. 142, art. 30, (2003). The Labor Contract Law passed by the NPC in 2007 also contains a provision requiring labor brokerage companies to have 500,000 yuan in registered capital. Labor Contract Law, *supra* note 130, at art. 57. Although many had criticized this provision and questioned its feasibility during the legislative process, its inclusion in the final law, albeit in modified form, suggests the severity of the problem it addresses.

136. *See, e.g., Highlights of major Beijing-based newspapers -- Dec. 3*, XINHUA (LEXIS), Dec. 3, 2003 (reporting that a Hubei construction company was expelled from the Beijing construction market after failing to pay migrant workers' salaries).

137. This analysis is based on the handbooks of three Beijing organizations: the Migrant Women's Club, the Migrant Workers Legal Aid Station and Little Bird.

tion. For instance, migrant workers are told never to pay a security deposit to the employer (which is illegal), to demand a written contract and to refrain from working for employers that lack a valid business license. The manuals also provide specific steps to take after a dispute arises, such as asking the boss about one's unpaid wages and tape-recording the conversation.

Perhaps the most useful content contained in these books, however, is the information provided about how to find a lawyer and how to apply for legal aid. Even armed with a handbook, navigating the unfriendly legal dispute resolution system and web of complex legal issues described above is a daunting task for migrant workers to take on alone.

While legal consulting increases the probability that a worker will be paid, a real chance at success usually requires access tc a lawyer who will take an interest in the case, fill out legal documents and applications and be present during mediation, arbitration and litigation proceedings. Finding such a lawyer is generally very difficult for migrant workers. China has nearly 150 million migrant workers but just over 120,000 lawyers.[138] Furthermore, it is often impossible for migrant workers to pay lawyers their standard fee: in Guangdong, for instance, a lawyer's rate per case is at least 1000 yuan and the average migrant worker's monthly salary is no more than 1200 yuan.[139] Moreover, many lawyers are unwilling to attempt litigation even on a contingency fee basis because these cases require so many procedures, winning is very difficult (especially if the workers lack sufficient evidence) and the awards are hard to enforce.[140]

In response, both the Ministry of Justice and All-China Lawyers Association (ACLA) have called upon lawyers to provide legal aid to migrant workers, especially in cases of unpaid wages.[141] Yet, Tong Lihua and Xiao Weidong of the Beijing Migrant Worker Legal Aid Station, which receives a stipend of 800 yuan for each stage of a case (arbitration; trial of first instance; appeal) in which it represents a migrant worker, note that lawyers will usually spend at least three days on migrant labor disputes and often spend more than five days.[142] Therefore, lawyers that do take these cases can only take a limited number of them.

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138. *China's Lawyers Failing to Provide Nationwide Service*, XINHUA, July 10, 2006, http://english.people.com.cn/200607/10/eng20060710_281725.html.

139. *Laodong weiquan lüshi shiwusuo neng zou duo yuan?* [How Long Can a Labor Rights Protection Law Firm Last?], GONGREN RIBAO [WORKER'S DAILY], Nov. 13, 2005, http://www.xiaoxiaoniao.org/Article_Show.asp?ArticleID=3362.

140. One Shenzhen law firm that hoped to focus exclusively on representing laborers has since realized that they may only be able to continue funding such work by using money earned from trying other types of cases. *Id.*

141. ACLA, *Guanyu tuidong nongmingong falü yuanzhu gongzuo de yijian* [Opinion on Promoting Legal Aid Work for Migrant Workers] (2006), http://www.chineselawyer.com.cn/pages/2006-5-15/s34851.html; Ministry of Justice, *Guanyu wei jiejue nongmingong gongzi wenti tigong falü fuwu he falü yuanzhu de tongzhi* [Notice on Providing Legal Services and Legal Aid towards Solving Migrant Workers' Wage Problems] (2004), http://www.chineselawyer.com.cn/pages/2004-12-10/s25659.html.

142. Tong & Xiao, *supra* note 42, at § 1(4).

As one Beijing lawyer who routinely represents migrant workers states, "we wish we could do more, but we're not the Red Cross, we have to eat too."[143]

Barriers sometimes exist even for lawyers willing to provide free or greatly discounted services to migrant workers. Individual lawyers can only perform pro bono work or "legal aid" through their law firm, which must obtain approval from the municipal justice bureau to do such work. One scholar noted that, in Beijing at least, this "approval . . . can be extremely difficult to obtain."[144] Migrants also experience obstacles in accessing the official legal aid system. Some localities, such as Guangdong Province, require that one either be a permanent resident of the city or have a temporary residence permit in order to apply for legal aid.[145] Although such permits are becoming easier to obtain, not all migrants have them.

In order to increase migrants' access to legal representation, there have been several proposals as to how their legal costs might be defrayed. Some have proposed that labor unions help pay migrant workers' legal fees. At present, migrant workers account for more than half of the nation's work force in manual and service industries, but only 13.8% of them are members of unions.[146] However, the ACFTU and its local branches have recently become very interested in migrant workers and announced a plan to recruit 6 million new members from this group in 2006.[147] In March 2006, a top ACFTU official announced that the organization would put ten programs in place to help protect the rights of migrant workers, one of which is to help them "with the expense of a lawsuit even if they are penniless, [so] they can win it as long as they have justice on their side."[148] In the months preceding that statement, trade unions had raised over 2

143. Interview with Gao Daozhi, *supra* note 92. It should be noted, however, that funds are increasingly becoming available for such work. For instance, following the State Council's January 2006 call for action in this area, ACLA and the Chinese Legal Aid Foundation earmarked 1 million yuan for providing legal aid to migrant workers. *Nongmingong falü yuanzhu zhuanxiang jijin qudong* [Funds Earmarked for Legal Aid for Migrant Workers], NANJING RIBAO [NANJING DAILY], Jan. 24, 2006, http://www.jsxnw.gov.cn/newsfiles/4/2006-01/21954.shtml.

144. Benjamin L. Liebman, *Legal Aid and Public Interest Law in China*, 34 TEX. INT'L L.J. 211, 264 (1999).

145. Guangdong People's Cong., *Falü yuanzhu tiaoli* [Regulations on Legal Aid], art. 10 (1999), http://www.legalaid.net.cn/program/html/news_content.php?ItemID=1496999006&ID=939. However, it is not clear how many municipalities have such regulations or how strictly they are enforced in those that do have them. For instance, Liebman found that, at the Guangzhou Legal Aid Center, lawyers often helped migrant workers who lacked residency documentation. Liebman, *supra* note 144, at 285.

146. Feng Chen, *Between the State and Labour*, *supra* note 13, at 1023-1024. By contrast, based on the numbers of urban workers and union members in China reported by MOLSS, it seems that nearly 52% of China's urban workers are union members. Labor Y.B. China, 2005, *supra* note 14, at 3, 603.

147. *Migrants Receive Help from Trade Unionists*, CHINA DAILY, Feb. 11, 2006, http://news.xinhuanet.com/english/2006-02/11/content_4164985.htm; Fu Jing, *Unions to help Female Migrant Workers*, CHINA DAILY, Feb. 22, 2006, http://www.chinadaily.com.cn/english/doc/2006-02/22/content_522656.htm.

148. *Projects to Further Protect Migrant Workers*, CHINA DAILY, Mar. 10 2006,

billion yuan to help migrant workers as the Spring Festival approached.[149] To date, ACFTU branches in several cities have established or funded legal aid centers to help counsel and represent migrant workers.[150]

C. The Other, Stability-Threatening Means of "Dispute Resolution"

If a migrant worker's rights or interests have been infringed upon and negotiations with the employer are unsuccessful, engaging the formal dispute resolution system is certainly one option. In fact, many employers will not only welcome but encourage workers to start down this path because the long and complicated process is most hurtful to those with the least amount of money. The length of this process also benefits employers by providing an opportunity to transfer their assets and take other measures to evade enforcement of a court judgment, should the migrant worker be able to win.

Faced with such difficulties, many migrant workers are unwilling to engage the legal process. To begin, one survey reveals that over 50% of migrant workers do not know where to go or what to do should a labor dispute arise.[151] A sample of migrant workers who stated that they were unwilling to go to the labor bureau, LAC or court if engaged in a dispute, provided a variety of reasons for this: a belief that the process takes too long (20.97%); a belief that labor bureau officials would not take any action (17.98%); a lack of money to start the process (16.94%); the amount of wages in dispute is not worth it (15.28%); a lack of evidence (12.92%); fear of reprisal by the employer (9.72%).[152]

Because they do not view engaging the legal process as a realistic possibility, many migrant workers will simply forfeit their right to the money they were promised. Discussions with migrant workers revealed that, from the day they start working, many never even expect to get the full amount of wages they are promised but are quite satisfied if they can actually collect 60% of that amount.[153] Others might start the legal process but then become willing to settle for less (sometimes far less) than they are owed or just give up altogether. One

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http://news.xinhuanet.com/english/2006-03/10/content_4284466.htm.

149. *Migrants Receive Help*, *supra* note 147.

150. *See e.g.*, Gao Zhu, *Chengdu gonghui quanli zhu nongmingong rongru chengshi* [Chengdu's Trade Union Assists Migrant Workers to Assimilate into the City], GONGREN RIBAO [WORKER'S DAILY], Dec. 7, 2006, http://www.nmpx.gov.cn/gedidongtai/zonghe/t20061206_48620.htm (describing how such legal aid centers have been established in all 19 districts/counties of Chengdu and answered over 2000 calls for legal advice and processed nearly 200 cases of migrant workers).

151. Tong & Xiao, *supra* note 42, at § 3(12.3).

152. *Id.* § 1(2). A 1996 survey of 2789 migrant workers conducted by the Shenzhen Labor Bureau revealed that 1,537 had some labor-related problem in the previous year. Of these, only 4% turned to LACs, courts or letters and visits offices, whereas 39% tried talking directly with their employer, 26% simply gave up, 23% went through some form of mediation process in the enterprise, 5% quit the job and 2% appealed to the media. Thireau & Hua, *supra* note 84, at 85.

153. Interview with migrant workers, *supra* note 118.

scholar reports that 20% of labor arbitration cases are "abandoned by workers due to the time and money required to pursue the suit through the arbitration process."[154]

On the other hand, there are other migrants who refuse to simply forfeit their wages. For many, it is too embarrassing to have labored for a whole year in the city only to return home to their families with just a fraction of the money that they earned, let alone to return penniless. Since one worker often leads a group of people from his home village to a factory or construction site, promising a certain salary, that worker might be held responsible, or at least feel responsible, for the misfortune of the entire group and their families if the wages are not paid. One such person, who had led nearly 30 villagers from Gansu to a textile factory in Beijing, dejectedly noted that not only was he under pressure from the other workers in Beijing to get the money, but his wife was being harassed by the workers' families back in their village.[155] There are also those workers who refuse to give up out of principle. But if they are unwilling to go to the labor bureau or courts, or such efforts have already proved fruitless, what options are available to these workers?

A considerable number of migrant workers have become so depressed by the dim prospects of redress that they have resorted to very extreme measures. Some have jumped from the very buildings that they helped to construct and one man attempted self-immolation in Tiananmen Square.[156] A woman in Shenyang who was owed 8000 yuan protested nearly naked for three hours outside the furniture factory at which she worked.[157] Others have brutally attacked or murdered civilians, labor brokers, employers and even the family members of employers.[158] One migrant worker from Sichuan sympathized, "I understand the frustration of migrant workers who steal and do other bad things . . . We just want to be paid for our work, like everybody else."[159]

Increasingly, migrants engage in riots and protests when they are treated unfairly. In Beijing, 100 migrant workers protested outside a hotel that they had built, cutting off its power and water, after not being paid for their work.[160]

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154. Gallagher, *supra* note 19, at 71 (based on her interview with MOLSS officials).

155. Interview with Mr. Zhao, migrant worker, in Beijing (Apr. 3, 2006).

156. *No New Year Cheer*, *supra* note 53. *Man Hospitalized after Setting Himself on Fire at Tiananmen Square*, XINHUA (LEXIS), July 20, 2006. An even greater number of desperate workers have threatened to throw themselves from buildings. *See* Pan, *supra* note 90.

157. Echo Shan, *Migrant Woman Tries Naked Appeal Getting Back Pay*, CHINA DAILY, June 27, 2006, http://www.chinadaily.com.cn/china/2006-06/27/content_627038.htm.

158. For instance, one laborer whose request to be paid his wages was met with insults went on a rampage that left four people dead. In September 2005, a gang of migrant workers that had not been paid their wages was so desperate and angered that it attacked the workers' boss and his wife, breaking their limbs with iron bars and attempting to hack them off with cleavers. *No New Year Cheer*, *supra* note 53.

159. *Id.*

160. Xiao Panpan, *Gen Lao Wei qu taoxin* [Demanding Payment with Old Wei], RENMIN RIBAO [PEOPLE'S DAILY], Jan. 23, 2006,

Such activities have become increasingly common in factories in southern China.[161] One report suggests that, at a toy factory in Dongguan City in 2006, over 1000 workers protested their poor working conditions, clashing with police and security guards.[162] A similar incident occurred at a Taiwanese-owned shoe factory in the same city in 2004.[163] While these protests and walkouts sometimes produce changes in working conditions or help migrants get back their wages, they also frequently result in migrant workers being injured, detained, or imprisoned.[164] It is important to note that such detentions are not limited to protestors; in fact, sometimes workers are detained for "hooliganism" simply for requesting that they be paid.[165]

Workers who chose not to engage in protest and similar tactics may choose to petition the government's letter and visits office.[166] In theory, petitioning these offices is far simpler than bringing a case at the LAC, as rules about the content of a complaint and who may file it are looser. Filing a petition is also free. In a comparison of 123 filings by workers at a letters and visits office and 60 cases handled by an LAC in Shenzhen, two researchers, Isabelle Thireau and Hua Linshan, discovered that those workers who are employed by SOEs, earn higher salaries and have worked for a longer time at the company involved were more likely use LACs, while manual and migrant workers were more likely to file at the letters and visits office.[167] While only one-fourth of the LAC cases surveyed were disputes regarding unpaid wages, such cases accounted for 65% of petitions to the letters and visits office.[168] Thireau and Hua note that while many petitions result in mediation by the office, many are never acted upon, let alone successfully resolved.[169] Moreover, petitioning is not always without

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http://www.people.com.cn/GB/paper464/16713/1470893.html.

161. For an updated list of reports on such incidents, see the China Labour Bulletin website (http://www.china-labour.org.hk).

162. Donald Greenlees & David Lague, *An Unhappy Toy Story: Unrest in China*, INT. HERALD TRIB., July 29, 2006, http://www.iht.com/articles/2006/07/28/business/factory.php.

163. Edward Cody, *In China, Workers Turn Tough; Spate of Walkouts May Signal New Era*, WASH. POST, Nov. 27, 2004, at A1.

164. For instance, after two strikes in Dongguan in 2004, police arrested ten workers. *Id.*

165. Xu Ke, *Xiao Xiao Niao: Dagongzhe de "Weiquange"* [Little Bird: Workers' "Rights Protection Bird"], GONGYI SHIBAO [CHINA PHILANTHROPY TIMES], June 27, 2006, http://www.gongyishibao.com/shownews.asp?newsid=4565.

166. These offices may exist within administrative bureaus or agencies (for example, the labor bureau or court) or more general government organs (the people's government or people's congress at various levels). For the most comprehensive and recent examination of the petitioning system in China, *see* Carl F. Minzner, *Xinfang: An Alternative to Formal Chinese Legal Institutions*, 42 STAN. J. INT'L L. 103 (2006).

167. Thireau & Hua, *supra* note 84, at 90 (finding that for the workers that pursued arbitration, the average time spent working for the involved employer is three years and their average monthly salary is 1,444 yuan; the average monthly salary for the workers that petitioned the letters and visits office is 578 yuan).

168. *Id.* at 91.

169. Thireau and Hua suggest that complaints are "usually dealt with and not ignored" in this

costs: many petitioners have been detained or beaten while attempting to file petitions.[170]

The violent acts and protests in which migrants are increasingly participating are a threat to China's social stability and understandably, worrisome to government officials at all levels. Moreover, these acts exist in a context of growing social unrest throughout the country: officials reported that, in 2004, there were 74,000 "mass incidents" (protests), a 30% increase from 2003, which involved 3.8 million participants.[171] Even petitioning can be troublesome to government officials, as it not only embarrasses the local officials who are the subject of the complaint, but can escalate into larger, more active protests.[172] Beijing is keenly aware of this fact, which probably explains why it has demonstrated a concern for improving the situation of migrant workers, such as by pushing employers to sign labor contracts and trying to close the labor brokerage loophole. However, ensuring stability will require not only taking steps to prevent abuses against workers, but also providing an accessible and effective means of resolving disputes once they do arise.

II.
MEDIATION: THE BEST ALTERNATIVE

A. Mediation as the Best Solution

In response to the various problems with the current arbitration and litigation processes for resolving labor disputes, many workers have begun to turn to mediation as an alternative. Mediation is a voluntary process in which a third party helps the two parties reach a mutually-agreeable solution, which may dif-

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particular labor bureau's letter and visits office. However, they also note that 12% of complaints received no response from officials, who cited an inability to contact one of the parties. Cases in which it is reported that one party could not be reached may actually be instances where local officials simply chose not to take action against an employer because of corrupt dealings between the two. Thireau & Hua, *supra* note 84, at 94, 96. However, a 2004 survey by the Chinese Academy of Social Sciences found that "only a small fraction of citizen petitions were eventually acknowledged" by the government (the survey was not limited to migrant workers). *Reported in* Minzner, *supra* note 166, at 133. In fact, one of the most significant provisions of the Regulation on Letters and Visits issued in 2005 is the requirement that all petitions receive a response and within a specified period of time. St. Council, *Xinfang tiaoli* [Regulations on Letters and Visits], art. 32, 33 (2005) (P.R.C).

170. *See* Human Rights Watch, *"We Could Disappear At Any Time:" Retaliation and Abuses against Chinese Petitioners*, Vol. 17, No. 11 (Dec. 2005), http://hrw.org/reports/2005/china1205/. A 2004 study by the Chinese Academy of Social Sciences revealed that over half of the petitioners surveyed experienced beatings or other reprisals for their activities. *Reported in* Minzner, *supra* note 166, at 133.

171. Richard McGregor, *Data Show Social Unrest on the Rise in China*, FINANCIAL TIMES, Jan. 19, 2006, http://www.ft.com/cms/s/171fb682-88d6-11da-94a6-0000779e2340.html; Jane Macartney, *China Admits Social Unrest Threatens Party's Iron Grip*, TIMES ONLINE, Dec. 9, 2006, http://chinaview.wordpress.com/2006/12/09/china-admits-social-unrest-threatens-partys-iron-grip/.

172. *See* Minzner, *supra* note 166, at 172-4.

fer from the strict dictates of the law. Generally speaking, mediation has a very flexible procedure, if any at all. This means that oftentimes, the only requirement for accepting a case is that both sides acknowledge that a dispute exists and have an interest in solving it. There is also less emphasis placed on evidence in mediation and there are few or no rules relating to its admission and use. If successful, mediation is often much faster than going through the formal proceedings of arbitration or litigation. Moreover, mediated agreements are more likely to be voluntarily implemented than decisions handed down by a third party.[173] A final advantage of mediation is that it does not necessarily destroy the relationship between employers and workers, because it is based on persuasion and dialogue, not confrontation and animosity.

Thus, in theory at least, mediation seems to be an ideal form of dispute resolution for migrant workers involved in labor conflicts. Nevertheless, while mediation might be extremely attractive to workers, its success also requires that employers buy into the process—that is, acknowledge that there is a dispute, have a desire to solve it, and be willing to compromise (that is, spend money) to do so. But while the lack of strict procedural rules provides some benefits to migrant workers, it may also hurt them by creating opportunities for coercion of the parties by the mediator. The following sections introduce and analyze the effectiveness of the handful of institutions both inside and outside of the formal labor dispute resolution system that are engaged in mediating conflicts involving migrant workers.

B. Mediation Inside the Formal Labor Dispute Resolution System: Limited Access, Limited Effectiveness

Although the enterprise mediation committees (EMCs) seem to play an extremely limited role today (not only for migrant workers, but even SOE employees), mediation is still an important part of the formal process—namely during

173. The legal effect of an agreement reached through mediation by a government organ is somewhat ambiguous and might not be recognized and enforced by a court. In cases where enforcement is a concern, such as when the agreement will not be immediately implemented, this lack of legal effect may discourage parties from mediating. Chinese mediators have found two solutions to this problem. The first is to sign a "people's mediation agreement" under the auspices of the justice bureau, since they have the legal weight of a contract. Chen Youde, Yiwu City Trade Union, presentation at the Sino-US Seminar on the Mediation and Conciliation of Labor Disputes, Institute of Labor Relations, Renmin University, Nov. 25, 2005. This heightened status of people's mediated agreements is the result of a Judicial Interpretation issued by the SPC in 2002. *See* Aaron Halegua, *Reforming the People's Mediation System in Urban China*, 35 HKLJ 724-725 (2005) (explaining the effect of this Judicial Interpretation). The second and an increasingly popular option is to take a mediated agreement to the LAC, which will then convert it into a court-recognized LAC Mediation Agreement. The Xicheng District Labor Union in Beijing did this for 170 agreements in 2003 and 2004. Kang Guizhen, Theoretical Research Investigation Group, Beijing Labor Union Official College, *Guanyu gonghui canyu laodong zhengyi tiaojie gongzuo qingkuang de diaoyan baogao* [Investigation into Labor Unions' Participation in Labor Dispute Mediation Work] *in* CONFERENCE MATERIALS, SINO-US SEMINAR ON THE MEDIATION AND CONCILIATION OF LABOR DISPUTES, INSTITUTE OF LABOR RELATIONS, RENMIN UNIVERSITY 8 (Nov. 25, 2005).

the arbitration process and, to a lesser extent, the litigation process. The 1993 HELDR establishes an "emphasis on mediation" as a principle of the labor dispute resolution system and calls on LACs to try to "first mediate" a voluntary agreement on the basis of the facts.[174] Thus, after both parties have stated their arguments, evidence has been presented and the arbitrator has questioned the parties, the arbitrator will give parties the chance to mediate. In reality, most LACs will actually allow, and even encourage mediation at any point in the process—starting from the time that a party comes to file a case to after the hearing is completed and all times in between. Some LACs even provide financial incentives for the parties to reach an agreement through mediation by returning a part of or the entire arbitration fee.[175]

In Shanghai, the labor bureau's office for migrant workers' issues (*wailaosuo*) is charged with mediating all labor disputes involving migrant workers. In many districts in this city, LACs refuse to accept cases that have not undergone such mediation, thus making it effectively mandatory.[176] Jiangsu Province also reports making a special effort to solve cases involving migrant workers through mediation in order to save workers time and money.[177] In fact, many local labor bureaus are stressing to their officials that migrant workers' disputes should be mediated, underscoring recognition of its comparative suitability.

As for those disputes that do go to LACs, based on official statistics from 2001, Ho calculates that 60% of cases are either resolved through negotiation, conciliation or mediation, or were withdrawn.[178] However, a report by a research office in the MOLSS confirms that LACs at all levels are finding it increasingly difficult to mediate cases and the percentage solved through mediation is decreasing.[179] Official statistics reveal that by 2000, the number of cases in which an arbitral decision was issued exceeded those solved through mediation.[180] By 2004, in LACs nationwide, the proportion of cases solved through

174. HELDR, *supra* note 11, art. 4(1), art. 27.

175. Interview, Dongcheng District LAC, *supra* note 69. The Director of the Dongcheng District LAC in Beijing noted that mediation is actually more time-consuming for the arbitrator than simply issuing an award, but it is still favored because it preserves the relationship between the parties and is more likely to be voluntarily implemented than is an arbitral award. Mediated agreements also cannot be appealed and thus overturned, which would reflect badly on the LAC.

176. As one Shanghai official explained, since requiring that cases first be mediated would violate regulations that make mediation voluntary, there are no formal documents setting out this policy. Instead, it has just become the standard practice by LACs in these districts, which are probably motivated by a desire to reduce their own workload. Telephone Interview with Official, Shanghai Municipal Labor Official, in Beijing (July 14, 2006).

177. *Jiangsu: Nantong pushe nongmingong laodong zhengyi zhongcai "lüse tongdao"* [Jiangsu: Nantong City Establishes a "Green Path" for Arbitrating Migrant Workers' Labor Disputes], JIANGSU NONGYE XINXIWANG [JIANGSU AGRICULTURAL INFORMATION NET], May 22, 2006, http://www.yzagri.gov.cn/infodetail.php?ej=18442e286b93a82c22781853384ba49b&infoid=1148284062.

178. Ho, *supra* note 63, at 188.

179. MOLSS Internal Report, *supra* note 12.

180. Labor Y.B. China, 2004, *supra* note 14, at 519.

mediation dropped to 32% and those solved by other means to 25%, with those solved by issuing an arbitral decision climbing to 43%.[181] At LACs in Beijing, half of all cases were concluded by issuing arbitral decisions in 2004.[182]

While the utility of using mediation by LACs to resolve all worker disputes is declining, there are several reasons why such mediation may be particularly ineffective for migrant workers. Most importantly, there is the issue of access. To even have the possibility to solve a case through mediation by the LAC, one must, first, make the decision to engage the formal system and, second, overcome numerous obstacles to the LAC's acceptance of the case. Further, while "voluntary" mediation might seem like a good opportunity to avoid a decision by a biased labor bureau arbitrator, it also presents an opportunity for coercion of the parties. Because the same arbitrator doing the mediation work will issue the arbitral decision, parties might be threatened with a ruling against them if they do not compromise or accept the settlement proposed by the arbitrator.[183] Should the arbitrator choose to use coercive tactics, the migrant worker—ignorant of his rights, unfamiliar with the law and less able to afford appealing an unfavorable arbitral award—is often more susceptible to succumb to the pressure.

If labor disputes enter the courts, judges also generally attempt to mediate the cases before issuing a verdict, as is customary for all civil cases. In 2004, nearly 40% of ordinary civil cases filed in courts nationwide were concluded through mediation, but the corresponding number for labor disputes was 24.17%.[184] This number is likely accurate for Beijing as well: an official from a civil tribunal of Beijing's Chaoyang District Court estimated that 20% of labor

181. Labor Y.B. China, 2005, *supra* note 14, at 610.

182. *Id.* at 613-614. By comparison, however, Shenzhen reported that, in 2003, nearly half of all labor disputes were solved before the formal proceeding even began and that 70-80% of cases were "speedily processed." Labor Y.B. China, 2004, *supra* note 14, at 362.

183. Another problem with having the same official mediate and arbitrate a case is that the parties might be unwilling to reveal to the mediator their true bottom-line or acknowledge their own wrongdoing in the matter, fearing that such information will hurt them should an arbitral award be issued. This impedes the success of the mediation process. Nonetheless, this practice of having the same person act as both a mediator and then arbitrator is quite common in China, particularly in the field of commercial arbitration. China's leading commercial arbitration body, CIETAC, argues that such a model saves the parties time and money because the same presentation of evidence, arguments, etc. need not be done twice. *See* Lijun Cao, *Combining Conciliation and Arbitration in China: Overview and Latest Developments*, 9 INT. A.L.R. 84 (2006). Some in China are also critical of this practice though. Professor Liu Cheng calls for the elimination of mediation by labor arbitrators, stating that parties may feel pressured to agree to mediate and it is difficult for arbitrators to avoid issuing decisions unfavorable towards parties that disagreed with the mediated result put forth by the arbitrator. Liu Cheng, *Laodong zhengyi tiaojie zhidu bijiao yanjiu* [Comparative Research on Labor Dispute Mediation Systems], *in* CONFERENCE MATERIALS, SINO-US SEMINAR ON THE MEDIATION AND CONCILIATION OF LABOR DISPUTES, INSTITUTE OF LABOR RELATIONS, RENMIN UNIVERSITY 20 (Nov. 25 2005). Even a report by the MOLSS' research department calls for separating mediation out from the arbitration process. MOLSS Internal Report, *supra* note 12. Shenzhen has already begun to implement such a practice. Ho, *supra* note 63, at 58.

184. Ying Zhu, *supra* note 22.

cases are successfully mediated.[185] One experienced judge quoted in the official press agreed that labor cases were particularly "piercing" and difficult to mediate.[186]

C. Outside the Formal Labor Dispute Resolution System: The "Mediator-Official"

The other institutions providing mediation are intended to be alternatives to the LACs and courts and to be engaged prior to entering the formal system. All of these bodies also provide this service free of charge. Both of these characteristics make mediation by these institutions more likely to produce an agreement than mediation by the LACs or courts. Success in mediation often requires both sides yielding or compromising; that is, the workers must lower their demand and the employer must increase the amount he is willing to pay. However, these concessions often become less likely once parties have entered the formal legal process for a number of reasons. First, the worker has usually already bore sizable costs in time and money to get to that point. Given that the amount in dispute is often small, there is not much room for compromise to begin with;[187] and the worker is often unwilling to forfeit even more of his backpay after having invested so much time and money simply to reach the mediation stage. Second, and closely related, entering the formal system puts parties into an adversarial, confrontational (*duikang*) mindset. By this point, parties rarely see any value in salvaging their relationship—something often relied on by mediators to induce compromise—and are instead solely focused on winning the dispute. Third, the employer, having already been pulled into the formal system by the worker, may wait to see if the worker can prevail in both arbitration and the court and endure the costs of these processes before offering any money.

Alternatively, there are times when initiating the formal legal process does facilitate settlement. The employer may have simply believed that the worker would not take any formal action, but once he does, the employer might prefer to pay some money rather than endure the financial and reputational costs of arbitration and litigation. Also, the worker, instead of hardening because of the time and money he has already invested, may become more likely to take whatever he can get rather than spend more money. However, these factors are less powerful than those making mediation less likely as parties get deeper in the process.

185. Interview, Chaoyang Court, *supra* note 100.

186. Zhong Angang, *supra* note 20.

187. A judge, commenting on the difficulty of mediating labor disputes, claimed that the average labor case involves less than 20,000 yuan. Zhong Angang, *supra* note 20. The amount in contention is likely even smaller for cases involving migrant workers.

1. Several Effective Organizations

In different localities, various government institutions have taken on this role of mediating migrant workers' labor disputes. One such institution is the labor unions. Many of the privately-owned companies in China, especially smaller ones, have not established internal unions.[188] Since it is enterprise-based unions that are responsible for chairing the EMCs, companies without unions usually lack an EMC as well. At present, labor union organizations that exist for the workers of a specific geographic area (for instance, Beijing City), instead of workers of a particular enterprise, often play a more important role in resolving actual labor disputes and are increasingly providing mediation services for workers and employers.

In Yiwu City of Zhejiang Province, where 10,000 factories employ 800,000 migrant workers, the area-based labor unions have been fairly successful in mediating labor disputes.[189] A specialized labor dispute mediation committee has been created by the municipal-level union[190] and a "three-tier web" of mediation organizations has been established at the "grassroots level."[191] In reality, parties will not attempt mediation at every level, nor will a higher-level organization turn parties away for not having first tried mediating at a lower level. Thus, the practical effect of the "web" is that it increases the options and accessibility of mediation for the parties. In the past few years, the city-level mediation committee has received 3434 cases, only 1% of which were brought by employers, and successfully settled 91% of them.[192]

If Yiwu's municipal-level labor union is unsuccessful in mediating a case, however, it will "definitely stand behind the worker through the arbitration and litigation processes."[193] The mediation committee is part of the Yiwu City

188. The ACFTU is working to create unions in these enterprises, particularly foreign-owned ones, of which only 26% are reported to have unions. *Wal-Mart sets up 19 Trade Unions in Chinese Outlets*, XINHUA, Aug. 18, 2006, http://english.peopledaily.com.cn/200608/19/eng20060819_294782.html. Some have suggested that the ACFTU's motive in this effort is merely to increase revenue, as any company with a union is obligated to pay the ACFTU an amount equal to 2% of its monthly payroll. Whatever the motivation is, however, these enterprise-based unions remain largely under the control of management and have rarely proved to be an effective advocate for workers.

189. Chen Youde, *Chuangxin shehuihua weiquan jizhi: chongfen fahui gonghui zai goujian hexie shehui zhong de zuoyong* [Building a Socialized Rights Protection Organization: Fully Utilizing Labor Unions to Construct a Harmonious Society] 1, *in* CONFERENCE MATERIALS, SINO-US SEMINAR ON THE MEDIATION AND CONCILIATION OF LABOR DISPUTES, INSTITUTE OF LABOR RELATIONS, RENMIN UNIVERSITY (APPENDIX) (Nov. 25 2005).

190. In cooperation with the municipal-level justice bureau, the municipal-level labor union created the Yiwu City Labor Union People's Mediation Committee (*Yiwushi gonghui renmin tiaojie weiyuanhui*). *Id.* at 6.

191. The three-tier web consists of mediation committees at the enterprise, sub-district and district levels. *Id.* at 4.

192. *Id.* at 6.

193. Chen Youde presentation, *supra* note 173.

Worker Legal Rights Protection Center, which has provided free legal representation for workers in 123 arbitration cases and provided or assisted with the arrangements for legal representation in 116 court cases—recovering over ten million yuan for workers.[194] One scholar, Feng Chen, describes how the Shanghai General Trade Union has similarly established a Legal Aid Center that provides consultation, mediation, and litigation services.[195] He notes that, if possible, the union prefers to try mediation before litigation for three reasons: litigation is more likely to trigger retaliation by the employer, mediation provides a better forum for problem-solving where the law is not clear, and mediation is often expected to provide a better outcome for workers than litigation or arbitration.[196] This far more active role in solving labor disputes is by no means limited to these two cases, but is part of a growing trend of labor unions—particularly area-based ones—aiding workers in their labor disputes. Feng Chen notes that, by 2004, at least 20 legal aid centers similar to the Shanghai one had been established.[197] Most recently, the 2007 Labor Contract Law also calls on labor unions to give "support" and "assistance" to workers who file claims before LACs or courts, which might translate into unions becoming more actively involved in mediating these workers' disputes.[198]

Local justice bureaus, sometimes acting through the people's mediation committees (PMCs) that they have established, are increasingly handling labor disputes as well.[199] These mediator-officials are primarily charged with mediating civil disputes, but since 2002, they have been expanding this scope actively. Several PMCs that are located in areas with a high concentration of migrant workers are reporting to be mediating an enormous number of labor disputes: for instance, one mediator-official in a township of Zhejiang Province is said to have handled 5,600 cases involving migrant workers since 2002 and successfully solved 95% of them.[200] One PMC in a sub-district of Ningbo claims that mediation has become the primary method of solving migrant workers' labor disputes because the process is informal, free and fast.[201]

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194. Chen Youde, Building a Socialized Rights Protection Organization, *supra* note 189, at 6-7.

195. Feng Chen, *Legal Mobilization by Trade Unions: The Case of Shanghai*, 52 CHINA JOURNAL 36 (2004).

196. *Id.* at 37. In 2003, the Legal Aid Center settled 1261 cases through mediation and represented 580 workers at LACs and courts. In 2001, the respective numbers were 1231 and 358. *Id.* at 38.

197. *Id.* at 32.

198. Labor Contract Law, *supra* note 130, art. 78.

199. On the relationship between justice office officials and PMCs, see Halegua, *supra* note 173, at 732-736.

200. Zhu Haibin, *Waidi wugongzhe de "zhi xin dajie"* [Migrant Workers' "Caring Sister"], RENMIN TIAOJIE [PEOPLE'S MEDIATION] (Jan. 2006), at 11.

201. The two judicial department officials who run the PMC have mediated 195 cases in the first 11 months of 2005, recovering 2.6 million yuan for migrant workers. Dong Huasheng, Luotuo Street Office, Ningbo, presentation at the Sino-US Seminar on the Mediation and Conciliation of Labor Disputes, Institute of Labor Relations, Renmin University, Nov. 26, 2005.

Labor mediation committees are even being established at the very lowest administrative level of urban government. The Residents Committee (RC) of Beijing's Tianqiao Community is one such an example of this.[202] Although RCs are technically "mass organizations," Chinese citizens often see them as another level of the government.[203] Tianqiao is home to 84 enterprises, 80% of which are small, privately-owned businesses (such as restaurants, beauty salons and shops) that almost exclusively employ migrant workers. The mediation committee was created to enable those closest to these disputes to resolve them locally and to lighten the workload of the over-burdened district LAC.[204] In its first year of operation, eight cases involving unpaid wages and security deposits were brought to the committee, of which seven were successfully resolved.[205]

2. Government Authority and Issuing Fines

In order to be an effective mediator for migrant workers, it is critical that mediators are able to persuade employers to participate in mediation and to pressure them to pay what is owed. The most important source of authority impacting mediators' ability to persuade and pressure employers is their status as government officials. Employers place a high value on having a good relationship with the local government, which determines the taxes they will pay, evaluates their compliance with various standards, issues fines, approves licenses, and provides various services. Therefore, once the government requests that an employer participate in a mediation or settle a case, employers have a powerful incentive to comply. As Feng Chen writes of an area-based labor union in Shanghai, its status as a "*de facto* government organ" means that it must "be taken seriously by enterprises."[206] In countless mediations, employers directly acknowledge that they are participating in the process in order to "give face" to the mediator-official, as opposed to a recognition of their own wrongdoing or their own interest in solving the matter.

Illustrations of the importance and power of government authority in pro-

202. Tianqiao is the name of both a sub-district/street (*jiedao*) in Xuanwu District, as well of a community (*shequ*) within that sub-district.

203. On RCs and their status as semi-government organs, see Benjamin L. Read, *Revitalizing the State's Urban Nerve Tips*, 3 CHINA QUARTERLY 163 (2000). *See also* Halegua, *supra* note 173, at 729-732 (discussing RCs as in the context of their mediation work).

204. In the first half of 2005, there were 826 labor disputes filed in Xuanwu District, 81% of which involved privately-owned companies. Liang Yuanyuan, *Benshi shou ge shequ laodong guanxi tiaoweihui luohu Xuanwuqu Tianqiao jiedao* [The City's First Community Labor Relations Mediation Committee Settles Down in Xuanwu District's Tianqiao Street], BEIJING CHENBAO [BEIJING MORNING REPORT], Aug. 18, 2005, http://news.sina.com.cn/c/2005-08-18/09266721134s.shtml.

205. Interview with Mediator Hu, Tianqiao RC, in Beijing (July 4, 2006). In the unsuccessful case, the employer refused to participate in mediation.

206. Feng Chen, *Legal Mobilization*, *supra* note 195, at 43. *See also*, Kang Guizhen, *supra* note 173, at 8-12 (analyzing unions' role in mediating labor disputes).

ducing settlements are abundant in the work of mediator-officials.[207] For instance, Mediator Hu, the head of the Labor Relations Mediation Committee in Beijing's Tianqiao Community, always invites the labor office official from the street-level government to accompany her. Hu explains that, whereas her work identification card simply states that she is an RC member, the labor official, dressed in his official uniform, clearly represents the government and employers cannot simply ignore him.[208] This practice of bringing in officials from higher levels of government or in higher positions to pressure the employer is quite common and often very effective.[209]

The extent to which mediator-officials can use their government identity to persuade, and almost even bind employers, can be very significant. A story related by a mediator-official, Dong Huasheng, from a local administrative justice office in Ningbo City, illustrates this point. One day, several migrant workers sought out Dong because their employer had not paid them several months of wages. Dong then called the employer, who responded that he was out of town but promised to pay the money when he returned. The mediator-official told the employer that he would pay the migrant workers himself and then collect the money from the employer after he returned to Ningbo.[210] Dong had no contract or written agreement obliging the employer to repay him the money, but merely relied on his status as an official. This alone gave him enough confidence to give his own money to the migrant workers. When the employer returned to Ningbo, Dong was repaid.

Threatening the imposition of fines is another method used by mediator-officials to induce compliance by employers. Such threats are effective because they raise the cost of not reaching an agreement. Moreover, threatened fines present this cost in clear, quantifiable terms, as opposed to less concrete costs such as bad relations with the government. Tai Dihui, a mediator-official from a local justice office in Shenzhen, explains how he utilizes his labor bureau colleague's authority to impose fines for labor violations in his mediations. Before the mediation begins, Tai invites his colleague to conduct an investigation of the enterprise. Tai is then able to threaten to impose fines on the employer if he is not sufficiently willing to yield during mediation.[211] Mediator-official Hu from Tianqiao Community reports employing a similar tactic when she conducts me-

207. *See* Halegua, *supra* note 173, at 735-736.

208. Interview with Mediator Hu, *supra* note 205.

209. Two articles in *People's Mediation* magazine both tell stories of mediator-officials in township-level justice offices who sought out the town mayor when mediating a dispute involving migrant workers' unpaid wages. Lu Guangming and Sheng Mingzhi, *Tuoqian gongzi liangwansi: yifa tiaojie dou zhuihui* [24,000 in Unpaid Wages is all Recovered through Law-Based Mediation], RENMIN TIAOJIE [PEOPLE'S MEDIATION], Feb. 2006, at 39; Zhu Haibin, *supra* note 200, at 11.

210. Dong Huasheng presentation, *supra* note 201.

211. Interview with Tai Dihui, Director, Xili Sub-district Justice Bureau in Nanshan County, Shenzhen (May 2, 2005).

diations along with the official from the street-level labor office.[212] When an employer refused to return a worker's security deposit, which is illegal to collect in the first place, the mediators threatened to fine the employer an amount far greater than the deposit.[213] The employer paid the worker, avoiding both the fine and offending the government official.[214]

The effectiveness of invoking government authority and threatening fines to pressure employers is vividly illustrated by a work injury case involving a migrant worker which was settled by mediator-official Tai of Shenzhen in 2005:

> While working on a construction project in Shenzhen, Xiao Wang, a 21-year old migrant worker, sustained an injury that required his leg be amputated. After his release from the hospital, Xiao Wang demanded that he be paid 300,000 yuan by his employer. The first 150,000 yuan was for the compensation he was entitled to based on the severity of his injury, his medical bills and the cost of his prosthetic leg. Xiao Wang wanted an additional 150,000 yuan because he would need to replace the leg every ten years and estimated he would live until age 71. Tai immediately rejected this latter amount, telling Xiao Wang that there was no legal basis for its collection. He then used the information provided by Xiao Wang to contact the project manager for whom he had worked. Further investigation revealed that this manager was only a subcontractor at the bottom of a five-rung ladder. In seeking out these five companies, Tai discovered that none of them had legal business licenses. When contacted by phone, each company suggested that someone else in the chain should be responsible. So the mediator brought all five companies to the justice bureau for mediation and told them to figure out amongst themselves how they would pay the 150,000 yuan owed to the worker. After the first mediation session, as the companies had still not reached an agreement, he told the companies that they were operating illegally and that each could be fined over 100,000 yuan for this. Soon after, the companies reached an agreement to pay the worker 146,000 yuan. The case was resolved in about three mediation sessions over the course of six weeks.[215]

In addition to demonstrating the importance of Tai's authority and ability to threaten fines in securing an agreement, this case also exemplifies how mediation avoids many of the obstacles that migrants face in the formal system. A solution was reached without proving a "labor relationship" or assigning liability amongst the various subcontractors—factors that could have prevented the worker from even filing, let alone winning a case before an LAC or court. Further, all of this was achieved quickly and at a small financial cost to the worker (the only expenses incurred were transportation fees to visit the local justice office).

While intervention by a mediator-official is almost a prerequisite for migrant workers to receive the money that they are owed, it does not guarantee that

212. Labor officials at the street-level (*jiedao*) labor office actually do not have the authority to issue fines, but it is quite easy to convince their colleagues at the district labor bureau (*diqu laodongju*) to issue fines when needed.

213. Interview with Mediator Hu, *supra* note 205.

214. *Id.*

215. Interview with Tai Dihui, *supra* note 211.

the workers will be paid *all* that they are owed or believe they are owed. In fact, there are some cases mediated by officials where no solution is reached.[216] In addition, mediator-officials sometimes refuse to get involved in these cases at all. Thus, the existence of these mediator-officials is far from a panacea to migrant workers' troubles. The following section describes how mediator-officials' very position as officials can limit their effectiveness in helping migrants achieve satisfactory outcomes.

3. Limitations on Mediator-Officials' Effectiveness

Helping migrant workers is not the sole interest of the mediator-officials who handle these labor disputes. Mediator-officials generally act to promote their own interests. Sometimes this means aiding migrant workers to achieve a satisfactory result; other times it does not. This section analyzes the motivations of various mediator-officials and how they influence decisions about whether and how to mediate cases.

i. Labor union mediators

Chinese labor unions suffer from an identity crisis that cripples their ability to deliver good outcomes for workers.[217] In addition to representing workers, unions are required to further the interests of the state by defusing conflicts and promoting stability.[218] This is why they chair the EMCs instead of serving as the workers' advocate. Union officials within enterprises are also beholden to the employer, who often hires them and pays their salaries.[219] This dynamic makes unions unable to even serve as effective neutrals, let alone advocates, causing Chinese workers to lose faith in unions and bypass the EMCs for arbitration.[220] Even those within the labor union bureaucracy have criticized union officials' lack of independence.[221]

The situation at the area-based labor unions is somewhat better, as they are

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216. *See, e.g.*, Zhan Minghui, *supra* note 124 (describing how a sympathetic police officer was unable to help seven migrant workers recover their unpaid wages).

217. Feng Chen writes about the "double identity" of Chinese labor unions. Feng Chen, *Between the State and Labour*, *supra* note 13.

218. The guiding principle of the ACFTU is "defusing contradictions, strengthening unity, promoting production and stabilizing situations." *Id.* at 1013.

219. *Id.* at 176. One telling statistic is that in the city of Tangshan, Hebei Province, 60-70% of enterprise union leaders were relatives of the employers and most of the remaining 30% were appointed by them. *Id.* The Trade Union Law explicitly prohibits close relatives of managers from serving as enterprise labor union officials. Nat'l People's Cong., *Gonghui fa* [Trade Union Law], art. 9 (2001), *translated in* CHINALAWINFO (last visited Jan. 14, 2007).

220. A survey by the ACFTU in 1992 revealed that 56% of union members felt that unions had failed to serve their function and a 1995 survey in Tianjin showed that 80% of workers were dissatisfied with unions' performance. Feng Chen, *Between the State and Labour*, *supra* note 13, at 1011.

221. Kang Guizhen, *supra* note 173, at 11.

not directly beholden to employers.[222] This is why the aforementioned labor bureau mediator-officials tend to be more pro-worker and more effective in actually solving labor disputes. Nonetheless, many workers remain skeptical of unions. This is particularly true of migrant workers, who do not expect to be helped by a labor union of which they are not a member. Workers also question the efficacy of union officials: one survey reveals that 41.9% of workers do not believe that union officials are capable of solving their disputes using mediation.[223] Nonetheless, these unions are likely to be flooded with requests for help: having no other place to turn, desperate workers will seek out the union despite their reservations about its efficacy.

A final problem with these area-based unions is that only part of their identity crisis has been solved. These union officials' salaries are paid from public coffers. Thus, although less beholden to employers, area-based unions must still represent the interests of the state.

ii. Representing government interests

In fact, all of these institutions that conduct mediations are actually state organs and, consequently, mediator-officials are motivated primarily by the interests of the government and its leaders. Economic growth remains the chief priority of officials. Therefore, although the government holds great sway with employers, they are also very important constituents. This co-dependent relationship limits the ability of a mediator-official to pressure an employer and his willingness to take on a case at all. For instance, the Legal Aid Center formed by the labor union in Shanghai only represents workers in cases that are "grave" and the "evidence of the employers' wrongdoing is clear and indisputable."[224] The effects of such economic considerations are usually most poignant at the lowest levels of government, where personal relationships between local officials and employers are closest and the number of enterprises may be few.

Local governments also have a keen interest in preserving social stability, which mediation can promote in two important ways. First, mediation can prevent workers from petitioning officials at higher levels to intervene in their disputes. When workers petition, it is a sign that the local government is unable to govern its jurisdiction, and thus, is very much feared by local officials. Second, mediation can resolve disputes before they escalate into more serious, and even criminal cases.[225] However, if the case already involves a large number of

222. While employers do not exercise direct control over the area-based unions in the way they do over enterprise-based ones, it is still of course possible for employer to influence union officials' work through their ties to the local government.

223. Kang Guizhen, *supra* note 173, at 10.

224. Feng Chen, *Legal Mobilization*, *supra* note 195, at 39. Of course, the limited resources of these government organs also impacts their decisions regarding which cases to pursue.

225. For instance, one case involved a migrant worker who threatened to kill his employer's two sons if he was laid-off. Zhu Haibin, *supra* note 200, at 12.

workers or is politically sensitive, officials may be hesitant to get involved at all.[226]

Therefore, when a mediator-official agrees to accept a case, the mission is often seen as putting out a fire rather than assisting the migrant worker. Furthermore, reaching an agreement that will end the dispute is often viewed as more important than ensuring that the migrant worker achieves an ideal result. In these cases, pressure is not only applied to the employer, but also on the worker to lower his demands or accept the employer's offer. And, as mentioned before, migrant workers, who are often ignorant of the law, their rights, and lack other options, are more vulnerable to such pressure than are their employers. Moreover, the local government can create problems for migrant workers, just as it can for employers; thus, workers must also "give face" to mediator-officials when they are asked to make concessions.[227]

iii. Going the extra mile?: The inadequate motivation of bureaucrats

In many cases, helping migrant workers solve their labor disputes requires the mediator to do far more than simply call the employer or threaten to impose a fine. At the outset, a mediator may need to help locate the employer, or even multiple employers, and then convince them all to mediate. After an agreement is reached, the mediator may need to ensure that employers implement the promises that they made, which can be an extremely time-consuming and exhausting process. Mediator-officials are frequently unwilling to go to such great lengths in order to help a migrant worker. In this respect, mediator-officials outside the formal system who are working for a fixed salary may share the same bureaucratic mindset as those within it. At present, however, at least one non-government mediation provider in Beijing has shown a willingness to take these extra steps to help migrant workers.[228]

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226. *See* Feng Chen, *Legal Mobilization*, *supra* note 195, at 44-45 (noting how the Legal Aid Centers established by labor unions in Shanghai tend to avoid involvement in collective cases involving over ten workers).

227. The work injury case from Shenzhen described above demonstrates this aspect of mediation: when the injured migrant worker requested that he be paid 150,000 yuan for the medical care he would require in the future, mediator-official Tai simply stated that this claim was not supported by the law and dismissed the request.

228. As a counterexample to this generalization, one PMC mediator-official from Yunnan Province repeatedly sought out and negotiated with a labor contractor to help recover the unpaid wages of several workers that had labored on a road construction project. However, these workers were from the same village as the mediator, not migrants from elsewhere working in his jurisdiction. Wang Xueze, Wang Huawei & Gong Zujin, *Shengming zhi huo buxi—Huang Yingdong tongzhi xianjin shiji baodao zhi er aimin pian* [Life is an Undying Fire—The Meritorious Acts of Comrade Huang Yingdong], RENMIN TIAOJIE [PEOPLE'S MEDIATION] 9 (Nov. 2005).

D. The NGO Experience: Little Bird, Beijing[229]

1. Background

Wei Wei, the founder of Little Bird, came to Beijing as a migrant worker in 1996, where he encountered obstacle after obstacle. Based on his belief that the lack of information, social networks, and resources were primary causes of the hardships faced by migrant workers, Wei Wei decided to found Little Bird in 1999. The organization sought to serve as an information center where migrant workers could share information that they had gained while learning about resources available to them. At first, the focus was on conducting a radio show for and about the lives of migrant workers and operating a counseling hotline. In October 2002, the Little Bird Cultural Dissemination Center registered as a company with the local bureau of industry and commerce.

Until the end of 2003, when Little Bird received a grant to train volunteers from a Canadian organization, funds were always tight: Wei Wei had to work part-time jobs just to keep Little Bird running and the organization has changed locations twelve times until now. Since then, they have received grants from several international organizations and their financial situation has improved.[230] This also allowed Wei Wei to grow the staff of the organization. During the period in which this research was conducted, Little Bird's staff included 28-year old Ma Yang, who is a former soldier, migrant worker and graduate of a technical college and 25-year old Liu Ming, who holds a law degree from a three-year college and worked briefly at a law firm. Two women, one part-time and one full-time, worked at Little Bird answering the hotline.[231]

Since its founding, Wei Wei and Little Bird have strived to help migrant workers settle their labor disputes with employers. These "rights protection" (*weiquan*) activities constitute about 70% of the organization's work. Little Bird estimates that 80% of these cases involve deferred wages.[232] The focus is not on aiding workers through the arbitration and litigation process: in Wei Wei's words, "once it enters that stage, the worker has already lost." Migrant workers, always on the move, need these disputes settled quickly and in a way that

229. The organization's Chinese name is "*Xiao Xiao Niao*," but it is referred to as "Little Bird" in the English-language press. Sources for this section include interviews and conversations with the organization's staff and volunteer lawyers, as well as annual reports, press releases and promotional materials produced by Little Bird. The author observed several phone mediations, roughly five site mediations, training sessions for the volunteer lawyers and other activities organized by Little Bird. Where media reports are relied upon, citations are provided.

230. These donors include Oxfam Hong Kong, the German and US Embassies in Beijing, and the Ford Foundation.

231. This represents the composition of Little Bird from September 2005 to August 2006, during which the field research of that organization took place. The staffing has changed somewhat since that time.

232. Xu Ke, *supra* note 165.

doesn't cost them more money. Thus, Little Bird goes to great lengths to help persuade the employer to pay the money owed to migrant workers.

On September 24, 2004, Little Bird reached a significant milestone for its mediation work when the "Little Bird People's Mediation Committee" of the Donghuamen Sub-district in Beijing was established. Although PMCs, like RCs, are technically "mass organizations," they are closely tied to the government and are seen as government organs by Chinese citizens.[233] Therefore, this new status as a PMC greatly improved Little Bird's success in performing mediations. Wei Wei recalls that employers were generally unwilling to even receive him before 2004, but, since Little Bird was given its "legitimate identity," he has been able to effectively use this status in mediations in order to appear as a government organ, and thus, put pressure on employers to settle the disputes.

Simply comparing the amount of money that Little Bird was able to recover for workers before and after it became a PMC demonstrates the importance of gaining this status. Wei Wei estimates that, in the four years preceding the establishment of the PMC, Little Bird had only been able to recover 4 million yuan in workers' salaries. However, in its first year as a PMC, Little Bird recovered over 15 million yuan for 1269 migrant workers.[234] In the 45 days preceding the 2006 Spring Festival alone, Little Bird and 21 volunteer lawyers processed 66 cases of unpaid wages involving 1273 workers and recovered 5.7 million yuan.

2. The Mediation Process

The process begins when migrants fill out case forms at the office or relate their case background to a Little Bird staffer over the phone. Most workers have the name and phone number of their employer (or labor broker) who owes them money; if not, they are asked to find it. Afterwards, Little Bird begins its two-step mediation process: first, mediation is attempted over the phone ("phone mediation"); and, if that is unsuccessful, mediation takes place at the worksite ("site mediation"). If the site mediation also fails to produce a result, and the worker is interested in pursuing litigation, they are then referred to a network of lawyers who voluntarily mediate cases with the organization (but will often charge a fee for representation services). Wei Wei reports that about 80% of cases brought to Little Bird are settled—50% through phone mediations and 30% through site mediations.[235]

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233. See Halegua, *supra* note 173, at 724-725 (discussing the relationship between PMCs and the local government).

234. Wang Wentao & Deng Jing, *Yongwei jincheng dagong qunti daiyan "Xiao Xiao Niao" neng fei duo gao?* [The Words of a Courageous Group of Migrant Workers: How High can "Little Bird" Fly?], XINHUAWANG [XINHUA NET], Jan. 12, 2006, http://news.xinhuanet.com/focus/2006-01/12/content_4037149_2.htm.

235. Little Bird does not have any firm statistics about this, and variation exists between estimates offered by Wei Wei and Ma Yang or even by Wei Wei at different times. The range of figures quoted for cases solved through phone mediations is from 30-50%, from 30-40% for site mediations and 20-30% of cases need to use the formal legal process.

Little Bird usually makes the initial call to an employer within five minutes of a worker bringing a case to them.[236] After introducing themselves, depending on the attitude of the employer, the mediator then takes one of two approaches. The mediator may present himself as someone who is there to help the employer satisfy his interests by saying, "We are calling to help you solve this problem." Alternatively, the mediator may try a more threatening approach, demanding, "You need to solve this problem immediately!"

While some cases resolved through phone mediation settle after just a few minutes, most cases require more time or a second phone call. There are a number of reasons why phone mediation may also fail to produce any solution at all: for instance, the employer wants to talk in person, does not believe that he is responsible (that is, he already gave money to the labor broker), has no money or simply does not want to pay.[237] In any of these cases, the Little Bird staff then increase the pressure on the employer by conducting a site mediation.

Site mediations can be quite burdensome to perform. Because migrant workers may not have current information regarding the whereabouts of their former employer, the first challenge is often to locate this person. For instance, in a case involving the unpaid wages of ten construction workers, the mediators had to travel over one hour simply to get to the main office of the construction company that employed the workers, where they then had to negotiate to get the location of the construction site at which the workers' former manager was currently working. They then traveled nearly two hours to this location.[238]

Upon arriving at the worksite, there are still significant obstacles to conducting a successful mediation. Generally, the mediators meet with the workers or their representative just outside the site to better understand the situation and then ask the workers to find the employer and explain that the mediators would like to talk with him. At this point, however, the mediators (and workers) may not be able to enter the site due to a locked gate or other obstructions. The employer is frequently not present at the site when the mediators get there.[239] For

236. Of course, not every call can be made so quickly; however, the first attempt at phone mediation will always be made within one or two days.

237. Wei Wei estimates that only about 10% of the employers that they encounter maliciously withhold money from workers and most have a reason for not paying the money. (Of course, it is hard to determine when these reasons are legitimate and when they are a cover for not wanting to pay).

238. Little Bird staff generally travel by public transportation from their office in central Beijing to the construction sites and factories out in the suburbs and often spend well over an hour to get there. If there is a very urgent matter, however, the staff may take a taxi to the site, such as when over 100 workers had cut the electricity and water to the hotel they constructed and were protesting outside. Xiao Panpan, *supra* note 160. Little Bird pays for all of their own transportation costs; although, there are occasions where the workers are already at the office or meet mediators at the bus station and insist on paying. On occasion, Little Bird mediators are also not too proud to accept a ride from employers after the conclusion of a mediation.

239. Although Little Bird usually confirms with the worker that the employer is at the site before heading out, he may have left in the time it took the mediators to get there. In such a case, the mediators will try to contact the employer and encourage him to return to the site. In the meantime,

instance, one journalist, who accompanied Little Bird on six site mediations, reports that they only met with the relevant employer or labor contractor on two of those occasions.[240] Even if the employer is present, he may refuse to speak with the mediators. One factory manager, after hearing the mediators introduce themselves, pushed them out of the factory, saying, "This is a matter for the labor bureau; your Bird-whatever, it's none of your business!"[241] Finally, Ma Yang notes that most cases are only solved after three or four mediations, making dedication and perseverance necessary qualities of a successful mediator.[242]

There are also those cases that are solved very quickly: some phone mediations are concluded in three minutes and site mediations may be performed in ten minutes.[243] In such cases, the employer has the money that is owed. But, when it is merely the workers making demands, employers feel no pressure whatsoever to comply or fulfill their legal obligations. Threats to contact the labor bureau or even file a lawsuit often fail to faze employers. However, as soon as some outside pressure is put on the employer, they act quickly to correct the situation.[244]

If the mediators are successful in meeting with the employer and negotiating a settlement, the rate of execution is quite high. In most cases, the money is paid on the spot with the Little Bird mediators observing. However, in cases where the employer lacks the cash to pay the workers, mediators can ask the employer to sign a written agreement promising to pay the money by a specified date. If the workers report that the money was not paid, Little Bird will follow-up with the employer. In the end, virtually all of the employers that pledge to pay follow through on that promise. For those that do not pay, the signed agreement can be a crucial piece of evidence in subsequent legal proceedings. It can serve as proof of the relationship between the worker and employer, acknowledgement of the specific amount owed, and the date signed can serve as the start

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they may talk with whoever *is* at the site—for instance, a manager, a relative of the employer, etc. The mediators will often encourage this person to call the employer or to give them the employer's cell phone number and call themselves. If there is no hope of the employer returning, they may try negotiating with the person that is there; however, the approval of the employer is usually required before any money is actually paid out. As can be imagined, it is very difficult to get this approval over the phone, when the employer has not heard the dialogue, arguments and threats that precipitated the settlement agreement.

240. Zhao Linnuo, et al., *Cengceng tuoqian 120 ren gongzi wu zhuoluo* [The Wages of 120 People are Nowhere to be Found], XINJING BAO [BEIJING NEWS], Dec. 27, 2005, http://life.people.com.cn/GB/1089/3976653.html.

241. Liu Yingcai, *Lüshi zhiyuanzhe bang mingong taoxin bei ma* [Insults Hurled at Lawyers Volunteering to Help Migrant Workers Recover Unpaid Wages], June 30, 2005, http://news.thebeijingnews.com/0557/2005/06-30/012@109552.htm.

242. Zhao Linnuo, *supra* note 240.

243. Xu Ke, *supra* note 165 (quoting Ma Yang's statement about phone mediations). The figure of ten minutes for a site mediation comes from a story that Wei Wei told the author.

244. Interviews of two lawyers in Beijing who frequently represent migrant workers in their disputes with employers report rates of 20% and 30% for the cases that are solved by telephone. Interview with Shi Fumao, *supra* note 83; Interview with Gao Daozhi, *supra* note 92.

of the statute of limitations period for filing a claim.

3. Little Bird's Mediation Strategies and Techniques

i. Leveraging government authority

In order to successfully resolve disputes, Little Bird's mediators must find ways to pressure employers to agree to participate in mediation and to pay money to settle the case. Just as mediator-officials leverage their government authority to persuade employers, the most important and effective tactic employed by Little Bird is to make employers believe that they represent the government. Thus, when performing mediations, either by phone or at a worksite, the Little Bird staff introduces itself as the "Beijing Justice Bureau" or the "Beijing Justice Bureau Mediation Committee." The mediators also find ways to restate this identity throughout the session in order to remind employers that they represent the government. On at least one occasion, when an employer mistakenly referred to the Little Bird mediators as employees of the "Beijing Labor Bureau," which most employers know has explicit authority to inspect labor violations and issue fines, the mediators made no effort to correct him. Towards this goal of increasing the employer's perception of the mediator's status and authority, Wei Wei even occasionally drops the names of high-ranking officials during the mediation, regardless of whether or not he actually knows them.

In fact, the introduction that Little Bird mediators use is also designed to increase perceptions of their authority, but is not entirely accurate. Little Bird is not actually part of the Justice Bureau, which is a government organ, but a non-governmental mediation committee under its supervision. In addition, Little Bird is not a mediation committee established under the Beijing Justice Bureau, but the Donghuamen Justice Office—a sub-district of a district in Beijing (and thus, two administrative levels below the Beijing Justice Bureau). The obvious reason for Little Bird's exaggeration of its status is to increase the pressure that employers feel to "give face" to the mediators and entertain their demands to mediate and settle the case. However, the introduction used by Little Bird is also designed to avoid raising suspicions of Little Bird's authority to handle cases outside of Donghuamen. Although Little Bird's jurisdiction should technically be confined to that particular sub-district, not a single case that it has handled is from that area.[245] In the past, employers have discovered this fact, which is clearly written on the ID cards that the mediators always carry with them, causing the employers to question Little Bird's right to be performing this work. In those situations, the mediators often respond that they are a "special" (*teshu*)

245. *Four Districts*, *supra* note 37. Donghuamen is a small sub-district in a highly-commercialized, central area of Beijing. Little Bird has its office there because it is relatively easy for migrant workers to find. However, most factories employing migrant workers are located in the suburbs of the city.

mediation committee and try to change the subject.

ii. Creating an appearance of neutrality

Unlike most mediator-officials, Wei Wei does not think of himself as a neutral third-party, but openly admits that "we are on the side of the workers." However, he recognizes that mediation is an art of persuading and pressuring employers to meet workers' demands while not appearing so pro-worker that the employer refuses to mediate or feels coerced. The latter is particularly important at the outset of the mediation, when the mediators are struggling to explain their purpose to a skeptical and uncooperative employer. While Little Bird may have spoken on the phone previously with the employer, many of the site mediation cases are those in which the employer could not be reached.

At site mediations, after stating their identity, the mediators usually use the less confrontational of the two greetings, saying, "We are here to help you solve your problem." Wei Wei often tries to be overtly friendly with the employer, calling him "buddy" (*gemenr*) and patting him on the back. Wei Wei has even offered to help employers to find workers in the future. When the employer lists his own grievances (such as about the quality of the work done) or mentions how good he is to the employees (for instance, because he let them rest a few days when sick or bought them meat to eat during Spring Festival) the mediators often nod in agreement. Such approving gestures are extremely important, as much of the mediation consists of pressuring the employer. When this combination of praise and pressure is not balanced appropriately, mediators have been met by angry objections: "You can't only listen to what the workers tell you!" or "You are only considering their side!" In best case scenarios, however, the dispute is settled leaving all sides satisfied: some employers have even treated the mediators to dinner afterwards.

iii. Volunteer lawyers and the role of law in mediation

Another important aspect of Little Bird's strategy is to employ volunteer lawyers to serve as mediators. There are rare occasions where Little Bird staff or lawyers alone conduct a mediation, but, almost all of the mediations are conducted by a team of both.[246] While nearly 100 lawyers have registered as volunteers with Little Bird, there is a corps of less than ten lawyers that regularly do site mediations, thereby limiting the number of cases the organization can handle. Most recently, Little Bird has been urging law firms to sign agreements

246. According to Wei Wei, lawyers volunteer their time to Little Bird for the "psychological benefits." However, there was one case where a lawyer offered his legal services to the employer during a mediation. Wei Wei says that this obviously compromises their position and the lawyer was not asked to mediate again in the future. Interestingly, in his study of public interest law in China, Benjamin Liebman also wrote of how many lawyers in Beijing that perform legal aid services have a "mixed motive" in doing so, hoping that they will gain some material benefit (such as publicity) from their pro bono work. Liebman, *supra* note 144, at 238.

pledging to provide a lawyer whenever one is needed.

Little Bird employs lawyers as mediators so that they can analyze the strength of a worker's case. Before the mediation starts, lawyers help determine what amount of money would be a reasonable opening request and decide on a suitable settlement amount. A case mediated in 2006 by Ma Yang of Little Bird and Zhou Qiang, a young volunteer lawyer, demonstrates how this works:

> Three migrant workers who were employed as security guards for a Beijing company had not been paid a year's worth of overtime. According to their own calculation, they were owed 7000 yuan each and demanded this amount when they filed a case at the labor supervision agency (before contacting Little Bird). When the mediators arrived at the site and met with the workers, the lawyer closely analyzed their contract and time sheets. He told them of a labor arbitration he recently handled where the worker was owed wages dating back to 2001, but the LAC only gave him the past two months of wages. The lawyer continued, if these workers went to arbitration, they should expect only 1000-2000 yuan each *at most*. The mediators and workers then proceeded upstairs to the company's office. The mediators sat in a room with a representative from the human resources department and the workers were told to wait outside. In the mediation, the representative from the human resources department first stated that he had consulted with his own lawyers and they believed that the company does not owe any money, so they prefer to let the labor supervision agency process the case and then exercise their right to a trial and an appeal if need be. After some discussions about how well the company had treated these three workers and how overtime pay is calculated, before leaving, Ma Yang revealed that the three workers would be willing to accept 10,000 yuan total. The next day, the company called Ma Yang offering 6000 yuan to settle the matter. The workers agreed to the 6000 yuan, but Ma Yang called back the employer and asked for 8000 yuan; the two sides finally settled for 7500 yuan. A few days later, the workers sent a banner to Little Bird thanking them for their help.[247]

Had the lawyer not significantly lowered the workers' expectations at the beginning of the mediation, it is quite likely that the workers, originally asking for 7000 yuan each, would not have readily settled for 7500 yuan total.

While the volunteer lawyers' legal knowledge is useful for certain purposes, somewhat ironically, they are generally not encouraged to make legal arguments during the mediation. At a training session organized for volunteer lawyers, Wei Wei warned that speaking in legal terms (*jiang fa*) is confrontational, makes employers defensive and risks escalating a conflict. In fact, for the same reasons, volunteer lawyers are also instructed not to identify themselves as lawyers, but simply as mediators. In one case, a factory had deducted 8 yuan/day in living expenses from its workers' salaries before paying them. Two girls, who had taken the reduced amount and gone home for Spring Festival, called Little Bird upon returning to Beijing to complain that 8 yuan was too much. As Ma Yang and the employer discussed what an appropriate amount to deduct is, a volunteer lawyer, aggravated by the employer's reluctance to pay more money,

247. Observed mediation, in Beijing, May 9-10, 2006.

interjected, "if you [the employer] would have signed a labor contract as required, then we wouldn't have this problem at all!" While an accurate and insightful statement, the accusatory manner in which it was delivered ignited the employer. Only after Ma Yang worked to calm down the employers for several minutes could the mediation continue.

There are situations, however, where quoting law *has* proven to be an effective means of persuading employers, causing even Wei Wei himself to occasionally engage in this practice. In one case, an employer resolutely refused to pay the salaries of eight migrant workers because he had already given the 5000 yuan that he owed to a labor broker who then disappeared. At that point, a volunteer lawyer told the employer that a Judicial Interpretation of the SPC clearly states that he, as the employer, is responsible for the workers getting paid. Soon after, the employer agreed to pay the workers 3500 yuan. In conversing with an employer that was drunk when the mediators arrived and seemingly not very knowledgeable about the law, Wei Wei said that a Judicial Interpretation required the employer to not only pay the 13 months of salaries he owes, but actually double that amount because he has not paid his workers for over one year.[248] This employer eventually agreed to pay the owed money to the workers in two weeks time.

Thus, while legal provisions can sometimes be useful in pressuring employers, for the most part, legal training is not necessary to be an effective mediator and is less important than certain other skills. Experience in dealing with people is far more important to conduct a successful mediation. Therefore, Little Bird does not invite lawyers with bad interpersonal skills to attend future mediations. For those lawyers who seem to possess the necessary skills, Little Bird nurtures this talent by providing training on specific mediation techniques, such as how to converse with employers and workers. Providing mediation training of this sort makes Little Bird quite unique amongst Chinese organizations, which often "train mediators" by inviting legal experts to give lectures on substantive law and neglect teaching mediation techniques.[249]

iv. Engaging other government bureaus and the media

In order to pressure employers, Little Bird also encourages workers to invite other government bureaus to get involved in the mediation, such as the labor supervision bureau. While Wei Wei believes that it is beneficial to workers if

248. In actuality, workers are only entitled to compensation totaling 25% of the deferred amount.

249. In the United States, mediators are trained through their participation in role plays by which they learn techniques and skills. In China, however, mediation is generally viewed as an "art" that one either possesses or lacks the talent to perform, but which cannot be taught. The one training session observed by the author that was designed specifically to teach mediation "techniques," consisted of a justice bureau official—who admittedly had never done a mediation herself—reading stories from a book to a room of 80 people.

these officials intervene, he recognizes that they are rarely willing to do so. The police often do not want to get involved with such issues, as they may have close ties to the employer, question their own ability to solve the dispute, or discover that no physical fighting has occurred and decide that they can, therefore, ignore the matter. Even worse, police that do intervene sometimes join in battering the migrant workers or detain them for "causing trouble."[250] Nonetheless, Wei Wei believes that the police can be an effective force in solving disputes between migrant workers and employers because of their authority and ability to respond immediately. He has even suggested that a law be passed requiring the police to respond and conduct mediation whenever migrant workers dial 110.[251] Without such a law, however, mediators must find ways to persuade the police to get involved. For instance, in a case where a woman was being beaten by her employer after requesting money owed to her, Wei Wei called the local police station because he feared that he alone could not handle the matter. To prevent the officer from leaving shortly after his arrival, Wei Wei informed him that a journalist was on her way to the site and, if the officer stayed, she would report that he solved the dispute. This persuaded the officer to stay and help to settle the conflict.

As demonstrated by the above case, Little Bird sometimes strategically uses its relationships with the media to aid its mediation work. For employers that are sensitive to negative press, such as restaurants, Little Bird might invite a reporter to join the mediation.[252] Mediators may also threaten to inform the media about a dispute to pressure employers: a volunteer lawyer once said to a real estate developer, "Surely you don't want there to be a story in *The Beijing News* tomorrow that your company failed to pay its migrant workers again."

The media's participation in site mediations can also create obstacles to reaching a settlement with some employers: for instance, by heightening tensions, intensifying the conflict and creating suspicions of Little Bird's true intentions. When one reporter entered a factory with a video camera, the angered manager shook his fists and threatened to smash the camera.[253] Because of this, reporters are usually told to say that they are "Little Bird volunteers." Cameramen are instructed to say that they are there to make a "mediation record," but still may not be allowed to observe the mediation if the employer objects strongly. Moreover, simply increasing the number of people that Little Bird brings to the mediation, regardless of their identity, can irritate an employer and make him unwilling to participate. Therefore, Little Bird is careful about when it invites reporters to a mediation. However, sometimes reporters request to ob-

250. Xu Ke, *supra* note 165.

251. "110" in China is equivalent to "911" in the US.

252. Zhao Linnuo, *supra* note 240.

253. Wu Ping & Zhang Penglei, *Eyi tuoqian gongzi; mingong baigan 45 tian* [Wages Maliciously Deferred; Migrant Workers Work 45 Days for Nothing], BEIJING TV, June 29, 2005, http://www.btv.org/gb/content/2005-06/29/content_159327.htm.

serve Little Bird perform its mediation work. In such instances, Little Bird usually honors the request because, as a public interest organization that is always seeking funding and volunteers, it relies heavily on receiving positive media coverage.

4. Comparing the Effectiveness of Little Bird and Mediator-Officials

In comparison to the mediator-officials described above, there are several factors that make Little Bird more effective in helping migrant workers, especially in difficult cases. First, Little Bird is free from virtually any government oversight. This allows Little Bird to be involved in sensitive or large-scale disputes that most mediator-officials would purposefully avoid. For instance, in a case where 100 workers cut the electricity to a hotel that they had constructed, the police on the scene preferred to have Little Bird handle the mediation rather than do it themselves. Second, Little Bird's staff is dedicated to helping migrant workers and, therefore, willing to make an extra effort to bring employers to the mediation table. Mediator-officials might only be willing to process cases in which they are able to contact the employer by phone and he is willing to come to the government office to participate. However, Little Bird, as described above, will travel long distances to track down employers and even pursue employers that have stated an unwillingness to mediate.

Of course, Little Bird's lack of actual government authority or the ability to issue fines makes it difficult for its mediators to pressure employers to the same extent that mediator-officials can. Little Bird mediators try to mitigate against this reality by exaggerating the level of government authority that they do have. The other tactics used by Little Bird's mediators, such as engaging the media, can be understood as efforts to compensate for the lack of leverage that they have vis-à-vis employers.

Thus, Little Bird mediators and mediator-officials each have their own advantages and the effectiveness of each relative to the other varies with each individual case. Sometimes the critical obstacle to overcome is tracking down the employer and Little Bird is better-suited for such work. In other cases, threatening an employer with a fine is necessary to produce a settlement, in which case a mediator-official is more effective. Generally speaking, however, Little Bird has been able to compensate for its lack of authority to issue fines and leverage its advantages in ways that allow it to successfully resolve the vast majority of cases in which migrant workers seek its assistance—including some cases that mediator-officials have failed to resolve.

III.
MEDIATION V. LITIGATION REVISITED: SHOULD MIGRANTS REALLY "SETTLE?"

The Beijing Migrant Workers Legal Aid Station was established in September 2005 in order to provide free legal counseling and representation services to migrant workers. In its first eight months, the Station's three full-time lawyers and four legal interns report having provided legal advice in 3468 cases, of which 1600 were related to unpaid wages and work injury. The Station also provides litigation services for "more complicated" cases: by June 2006, the Station took on 800 cases, resolving 482 of them and collecting 1,828,310 yuan for migrant workers.[254] Shi Fumao, the Station's director, and Xu Yuling, a full-time attorney there, note that their first step in handling a case, like Little Bird's, is to call the employer. They estimate that about 20% of cases are resolved over the phone.[255] In contrast to Little Bird, however, if phone mediation is unsuccessful, Shi explains, they will not continue trying to mediate the case, but move straight to arbitration and litigation:

> Mediation is based on the principle of both sides compromising (*rang*); therefore, migrant workers will inevitably suffer losses (*chikui*) in this process. Moreover, migrant workers are not aware of their rights: a worker that sustains a work injury might be willing to accept 20,000 yuan, not knowing that he is legally entitled to 60,000 yuan.[256]

While there are many instances in which migrant workers are paid the full amount owed to them as a result of mediation, there are also numerous cases where workers do "settle" for less than owed, or perhaps only a fraction of that amount. There are those who, like Shi, believe that, after already suffering the injustice of not being paid the money they have earned on time, migrant workers should not have to suffer the second injustice of only receiving a portion of this money. Employers exploit the fact that migrant workers lack the time, money and knowledge to litigate by offering small settlement packages that migrant workers feel they have no choice but to accept. By contrast, if litigation is successful, the court can award compensation of 25% on top of the amount owed (in "labor disputes").[257] If a case is settled through mediation, even if employers are willing to give the full amount owed, they are never willing to pay additional compensation.[258] A final advantage of not "settling," Shi notes, is that a court

254. Interview with Shi Fumao, *supra* note 83.

255. Interview with Shi Fumao & Xu Yuling, *supra* note 54. As of December 2005, the percentage of cases solved through mediation by the Station was only 10%. "Four Districts," *supra* note 37. However, a more systematic review of the 826 cases that had been concluded by the Station between September 2005 and September 2006 showed that 25.7% of cases had been resolved through negotiations by the lawyers and another 1.7%, 2.5% and 4.6% of cases were resolved through mediation by the labor supervision agencies, LACs and courts respectively. Beijing Migrant Workers Legal Aid Station, Report on Unpaid Wages, *supra* note 36, at § 1(10).

256. Interview with Shi Fumao, *supra* note 83.

257. *See* Beijing's Regulation on the Payment of Wages, *supra* note 135, art. 35.

258. Interview with Shi Fumao, *supra* note 83; Interview with Gao Daozhi, *supra* note 92.

verdict acknowledging that a construction company deferred workers' salaries will make that company ineligible to start new projects in Beijing.[259]

At least in Beijing, the courts are becoming quite supportive of migrant workers seeking to recover unpaid wages. Shi Fumao states that he and his team of lawyers have never lost a case in court. In fact, Station lawyers chose to frame their cases as "employment disputes" in the hope that the LAC will refuse to hear them so that they can apply directly to court. One court official in a civil tribunal of Beijing's Chaoyang District Court, which processes a large number of cases involving migrant workers, explains how these cases are handled:

> These migrant workers come to court with no evidence at all: they have no labor contract, often just a sheet with their name and a check mark next to it, indicating they went to work on a certain day. Sometimes their only proof of having worked at a place or how much the boss promised to pay them is the testimony of the other workers, also co-defendants in the case . . . I estimate that, if these cases were strictly decided and tried in the same way as other civil cases, then 90% of the workers would lose. In practice though, they win in about 50% of cases. We cannot only consider the law, we also need to consider social stability—especially if it is a collective case . . . involving over 10 workers. Also, there are government policies (*zhengce*) calling for us to support migrant workers, especially right before the Spring Festival.[260]

However, for judges in this court, mediation continues to be the preferred option:

> The legal questions in many of these cases are very complicated. Moreover, between all the different government organs at the national, city, and district levels, new policies, laws and rules are always being issued. If we issue a verdict, there is a chance that one side will appeal the decision and the verdict will be overturned, which is bad for us. So, we prefer to mediate the case. If forced to decide it, we will award just slightly more than the employer agreed to pay during mediation—this way the amount is likely to fall within the range of what he is willing to pay and he won't appeal.[261]

But, this mediation work, especially by the time the case has reached the court, is not easy. The above court official estimates that only 20% of cases are solved through this means.[262] Not unlike mediator-officials, he also suggests that the reason some employers are willing to mediate and pay is not an ac-

259. *See* Beijing, Regulation on Construction Companies, *supra* note 130, at art. 29.

260. Interview, Chaoyang Court, *supra* note 100. The 2004 edition of the Law Yearbook of China, an official government publication, communicated a similar message of support for migrant workers in describing how the nation's courts handled labor dispute cases: "[in trying cases where employers violated the interests of workers] and particularly those cases where migrant workers wages were not paid, in accordance with the Labor Law and relevant laws and regulations, the legitimate interests of workers were fully protected and powerful judicial assurance was provided for the construction and protection of the labor system of the socialist market economy." Law Y.B. China, 2004, at 125.

261. Interview, Chaoyang Court, *supra* note 100.

262. *Id.*

knowledgement of their wrongdoing, but to "give face" to the judge and preserve their relationship with the court, which they are likely to interact with in the future. Further, as evidenced by the 2006 Judicial Interpretation on resolving labor disputes, which amongst other things instructs courts to accept cases of workers only possessing an IOU from their boss, the courts continue to become more worker-friendly venues for dispute resolution.

Nonetheless, courts remain an imperfect solution for all workers' problems. First, not all courts exist in a place like Beijing, where promoting "social stability" is frequently interpreted as supporting migrant workers. Second, sometimes workers don't have any evidence whatsoever on which the court can rely to accept their case or issue a decision in their favor. Third, enforcement of the decision may remain an obstacle. Fourth, using the courts may require a significant investment of time and money. At least one group of over 20 construction workers that was owed over 30,000 yuan, after waiting three months as the Station pursued their claim in court, grew impatient and sought out Little Bird.[263] Given the obstacles involved in litigation, even Shi Fumao admits that, in some cases, after looking at the evidence, he must encourage workers to settle: "if they can get around 80% of the money back, we often suggest that they take it."[264] And, despite the Stations' lawyers' aversion to settling, it is not an uncommon occurrence: a review by the Station of unpaid wages cases concluded that, during its first year, over 25% of parties' disputes were resolved through negotiation by the lawyers.[265]

Surely, free, quality legal aid can help migrant workers overcome some of the above obstacles in litigating cases, but such help is limited. Lawyers at the Station, which has approval from the Beijing Justice Bureau to handle these cases, estimate that they can only represent 20-30% of the migrant workers that seek legal aid from them.[266] The Migrant Woman's Club, another of the few organizations that provides legal aid to migrant workers in Beijing, also faces this problem. They have one staff member, Zhang Zhiqiang, who is responsible for their "Rights Protection Group." Zhang is a former migrant worker who has studied some law but is not a lawyer; like Shi Fumao, he too claims to have never lost a legal proceeding.[267] Nonetheless, of the nearly 3000 requests for help received between April 2002 and the end of 2005, legal representation has only been provided in 54 cases (another 17 were successfully mediated).[268]

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263. Interview with Ma Yang, Staff, Little Bird, in Beijing (July 11, 2006).

264. Interview with Shi Fumao, *supra* note 83.

265. Beijing Migrant Workers Legal Aid Station, Report on Unpaid Wages, *supra* note 36, at § 1(10).

266. Interview with Shi Fumao, *supra* note 83.

267. *Not* being a lawyer actually provides Zhang some flexibility in handling cases, as he does not need to comply with all of the regulations on lawyers regarding pro bono work, etc.

268. *Weiquan zai xian* [Rights Protection Hotline], DAGONGMEI ZHI JIA SHI ZHOU NIAN TEKAN [MIGRANT WOMAN'S CLUB TENTH ANNIVERSARY SPECIAL ISSUE] 25 (2006). Not all of these litigation cases where handled by Zhang; sometimes volunteer lawyers will represent migrant workers

Cases handled by other legal aid providers, such as clinics or centers affiliated with law schools, may also involve migrant workers on occasion.[269] These few, scattered legal aid providers are far from able to meet the enormous demand of migrant workers. Meeting actual demand levels would require significantly expanding the formal, government-sponsored legal aid system.

Even if the formal legal aid system is expanded, however, providing a level of service that is as effective and efficient as that provided by the Station will be difficult. In addition to representing workers at hearings, Station lawyers also do all the paperwork for parties, including traveling to the LAC or court to file them. If a fee exemption application is denied, the Station pays the arbitration and litigation fees itself. This allows migrant workers to continue working (earning enough to feed and house themselves) while someone else fights their battle in the formal legal system.[270] Although Shi claims that 95% of the migrant workers that they represent get paid, the Station is able to hand-select which cases it takes. The Station's lawyers are also extremely familiar with this field of law as they do nothing other than represent migrant workers in labor disputes, almost all of whom have unpaid wages or work injury cases and 80% of which are construction workers.[271] Since any large-scale legal aid effort is unlikely to find lawyers as selflessly committed to migrant workers, give them total discretion over which cases to take or allow them to focus exclusively on labor cases, achieving a rate of success similar to that of the Station is unlikely.

IV.
CONCLUSION

A. The Ingredients for Successful Mediation

The Western emphasis on the absolute neutrality of the mediator is often not shared in China. In fact, given the enormous power disparity between employers and workers, particularly migrant workers, simply adding a neutral third-party into the mix is not enough to mitigate this imbalance and produce a solution satisfactory to workers. In reality, migrant workers need an advocate who can both support them and pressure employers, thus creating a more balanced power dynamic. Little Bird's mediators and legal aid workers admittedly stand on the side of the worker for this purpose. In contrast, the EMCs stand be-

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who seek out this organization.

269. For instance, Benjamin Liebman noted that one of the cases handled by Peking University's Center for Women's Law Studies and Legal Services involved 23 female migrant workers from Hebei Province who had not been paid all of their wages. Liebman, *supra* note 144, at 249. Clinics at universities in Shanghai, Chengdu and Guangzhou also report occasionally handling cases involving migrant workers.

270. Interview with Shi Fumao, *supra* note 83.

271. *Id.* Of the subjects in the aforementioned 2006 Report, over 91% were construction workers. Beijing Migrant Workers Legal Aid Station, Report on Unpaid Wages, *supra* note 36, at § 1(4).

hind the employer and are largely ineffective in resolving disputes. Meanwhile, mediator-officials are successful to the extent that they are able to overcome the bias towards employers and, instead, exert pressure upon or even threaten them.

A commitment to helping workers is alone insufficient, however; a mediator must possess the authority, tools and ability to persuade employers to agree to mediate and to reach an agreement. This is the lesson learned by Wei Wei and Little Bird through the mediations attempted before a formal PMC was established. In China, the best way to achieve this is to use a mediator that can represent the government—the higher the level the better. The prospect of litigation alone is not a very effective means of convincing employers to compromise or settle; although, this seems to be changing somewhat as the threat becomes more credible, chances of workers' success rise, and the stakes of a losing verdict carry more severe penalties. Nonetheless, a far more significant concern for employers is the prospect of souring their relationship with the government. The authority of some officials to impose clear economic costs on employers through fines is also helpful in encouraging agreement.

The paradox lies in that the same status that increases government officials' ability to pressure employers also makes them more hesitant to exercise that ability. Whether it is officials at the labor bureau, the judicial bureau's PMC, letters and visits offices or labor union legal aid centers, they all must consider the government's interest in each case. For instance, concerns over social stability may restrict the mediator from getting involved in large, collective cases. Mediator-officials may also receive direct pressure or instructions from their superiors, who are primarily concerned with fostering economic growth, to aid employers. Corruption and bribery are problems as well. Thus, at a minimum, it may be difficult for these mediators to pursue employers with the same vigor that Little Bird does.

Dedication, perseverance and vigor are often required to be a successful mediator-advocate though. In settling migrant workers' disputes, obstacles exist in contacting, meeting and persuading the employer. Simply determining the appropriate party with whom to mediate can be a difficult puzzle, solved only after several calls and meetings. More difficult cases cannot be solved by sitting in an office and using a telephone, but may require going to the work site, employer's home, or elsewhere—perhaps multiple times. And, even after an agreement is reached, it may not be implemented without further intervention by the mediator. Officials with a fixed salary, high workload, and poor access to transportation—in other words, lacking any material or psychological motivation to help migrant workers—are often unlikely to make the extra effort in these difficult cases.

On the other hand, if a mediator is too overzealous or too strong an advocate, this can backfire on the worker. Mediation is a voluntary process. If employers feel that the mediator is biased against them, they may not consent to participate. A mediator must use the right balance of carrots and sticks to induce the employer to buy into the process. For a government mediator, parties' fear of

offending the government by not participating ("not giving face") after being requested to do so is a significant and usually adequate cost to make employers participate. An organization such as Little Bird, however, which employers might be less fearful of offending, may have more trouble. Thus, it is essential that such organizations are careful to mask their biases towards the migrant workers. Further, these groups may need to "sell" the mediation process by stressing the employer's own interest in settling the dispute.

B. Finding the Best Mediation Model

1. Replicating the Little Bird Model

One approach to creating an effective, nation-wide system for mediating migrant workers' labor disputes would be to reproduce the Little Bird model. This could happen in two ways. The first is top-down: city or district justice bureaus create and fund people's mediation committees that are focused on migrant issues. These organizations would closely resemble those discussed in Part II(C) above. They would have a thicker administrative character than does Little Bird, be staffed by bureaucrats and be required to comply with rules defining the scope and acceptable practices of PMCs. These mediators are unlikely to adopt the "whatever it takes" approach used by Little Bird. The systematic creation of these committees, however, might also eliminate the need for some of the rule-bending tactics that Little Bird employs, such as traveling outside of its jurisdiction. The flipside, of course, is that mediators may be more reluctant to be tough on employers that are located in their own district and important to the local economy.

Alternatively, Little Bird itself (or other NGOs) could grow and create more mediation committees. Wei Wei has long hoped to establish Little Bird branches in cities throughout China, but such expansion also faces significant obstacles. For instance, the Little Bird branch created in Shenzhen in 2006 has been unable to find a government partner to legitimize the authority of its mediation work, and thus, is largely limited to providing legal advice to workers. In addition, finding mediators who are not only dedicated, but also possess the skills and techniques to be effective has proved challenging. The most critical issue is finding funding sources that will allow Little Bird to grow without changing its management style. If money comes from the Chinese government, it would be difficult for Little Bird to avoid some of the problems presented by the top-down model above. However, it is unlikely that foreign donors alone could support expansion of a serious degree.

2. A New Role for Labor Supervision

Another means by which to provide greater access to mediation is to give labor supervision agencies a larger role in the process. These agencies, which are authorized to fine employers, have already been monitoring and enforcing compliance with labor standards. However, they must pass on all compensation issues to the local LAC. It would be far more efficient for the labor supervision agents, who have already met with the parties, examined the evidence, often gone to the site, etc., to mediate the related dispute.[272] The experience in Tianqiao (see Part II(C)(1) above) suggests the effectiveness of on-site mediations performed by those empowered to issue fines. Some cities, including Beijing and Shenzhen, are already giving labor supervision agencies a more substantial role in mediating certain disputes. These agencies cooperate with local construction bureaus to resolve wage disputes involving construction workers.[273]

There are reasons, however, to be hesitant about giving the same officials the power to issue fines and the authority to mediate disputes. While such an arrangement may be more effective at producing settlements, it also increases the opportunities for abuse and coercion. This is especially true where mediators are very directive and dictate to the parties how the conflict ought to be settled, as is often the case in China. The fear is that even if no real basis exists for imposing a fine, mediator-officials will use or threaten to use their power to compel parties to accept the proposed solution or prevent them from discontinuing the mediation. Such practices raise serious questions about the voluntary nature of the mediation process.[274] Further, such practices may also cause parties to question the fairness of the process.

Perhaps an even greater obstacle, however, is the fact that many local supervision agencies have been ineffective in actually identifying, let alone reporting or correcting existing labor violations. The recent "brick kiln" scandal, in which hundreds of kidnapped children were discovered to have been laboring under slave-like conditions while knowing local government officials took no action, is a prime example of this problem.[275] The new Labor Contract Law

272. This could be modeled after China's traffic police, who have the authority to both issue fines for violations and mediate disputes.

273. The Beijing Labor Bureau reports processing 7327 such cases involving 98,400 migrant workers in 2004. Labor Y.B. China, 2005, *supra* note 14, at 324. From January-August 2004, the Shenzhen Labor Bureau officially reports handling 187 such cases, involving 29,260 migrant workers and over 90 million yuan. *Id.* at 431.

274. The MOLSS' Labor Science Research Office has called for giving labor supervision agencies a clear role in mediating labor disputes, so long as both parties consent. It further suggested that, if the mediation is successful, parties should be restricted from then filing for administrative review or administrative litigation to challenge the agreement, thereby giving finality to the process. MOLSS Internal Report, *supra* note 12. However, it seems that some mode of redress ought to be available for ensuring, at the very least, the legality of the agreement and that the parties were not coerced in reaching it.

275. Howard W. French, *Beijing's Lack of Penalties in Labor Cases Stirs Outrage*, N.Y. TIMES, July 17, 2007, A8.

seeks to resolve this problem, stating that labor officials who neglect or fail to perform their duties are both liable for resulting damages to workers and may be subject to administrative and possibly criminal penalties.[276]

3. The Labor Dispute Mediation and Arbitration Law

Many in China have called upon the government to reform the labor dispute resolution system. Some experts and practitioners have proposed fairly dramatic changes to the "one mediation, one arbitration, two trials" system. For instance, at least one labor lawyer favored eliminating labor arbitration and replacing it with free, mandatory mediation.[277] Some suggested sending all parties directly to the courts, where specialized tribunals that try labor cases using a "summary procedure" should be established.[278] Others have proposed giving parties the option to choose either arbitration or a trial and making the result of that process final.

In December, 2007, China's National People's Congress (NPC) passed the Labor Dispute Mediation and Arbitration Law.[279] Not surprisingly, the law does not fundamentally change the structure of the dispute resolution system. In almost all cases, labor disputes must still be arbitrated by a LAC and arbitral awards can be appealed to the people's court.[280] Mediation remains optional, but its use is encouraged and the law lists three types of organizations that can perform this function: EMCs, PMCs and other organizations authorized by the local government.[281] LACs are also instructed to attempt mediation before rendering an arbitral award.[282]

Although the law does not change the basic structure of the dispute resolution system, it does make several particular reforms that could significantly

276. Labor Contract Law, *supra* note 130, art. 95.

277. Interview with Jiang Junlu, Attorney, in Beijing (June 28, 2006). Despite the fact that the LACs have received a great deal of criticism over the years, their total elimination seemed unlikely because of the MOLSS" bureaucratic interest in maintaining them as well as the reality that LACs still dispose of 260,471 cases each year. *See* MOLSS Internal Report, *supra* note 12 (arguing that labor arbitration should remain a mandatory process before a lawsuit can be filed); Peng Guanghua, *Zhongcai zai laodong zhengyi chuli jizhi zhong zuoyong juda* [The Large Role Played by Arbitration in the Labor Dispute Processing System], GONGREN RIBAO [WORKERS' DAILY], Jan. 2, 2006, 7 (arguing that LACs are the organization best suited to handle labor disputes and stressing the impracticability of suggestions to eliminate them).

278. *See, e.g.*, Wang Doudou, *"Yi tiao yi cai liang shen" tizhi cunzai biduan* [Abuses Exist in the "One Mediation, One Arbitration, Two Trial" System], FAZHI RIBAO [LEGAL DAILY], Feb. 7, 2006, http://www.legaldaily.com.cn/misc/2006-02/08/content_261561.htm (quoting a person connected to Sichuan Province's High Court who favors eliminating labor arbitration).

279. Nat'l People's Cong., *Laodong zhengyi tiaojie zhongcai fa* [Labor Dispute Mediation and Arbitration Law] (2007), http://news.sina.com.cn/c/2007-12-29/193414631617.shtml.

280. *Id.* art. 5.

281. *Id.* art. 10. The law does not, however, reform the problematic structure of EMCs, in which the labor union both chairs the committee and is responsible for representing the worker.

282. *Id.* art. 42.

benefit workers. First, the law extends the statute of limitations on filing an arbitration claim from 60 days to one year.[283] While still far shorter than the statute of limitations for filing in court, this change will significantly increase the number of unpaid wages cases that are eligible for arbitration. Furthermore, in those LACs where this time limit is employed to restrict the damages award rather than to limit whether a case is accepted, this extension will greatly increase the size of the award for those workers who are owed between two and twelve months of wages. This difference may make pursuing a legal claim worthwhile for some migrant workers that would otherwise be unwilling to start the process.

Second, the law makes arbitral awards legally effective upon their issuance for several categories of cases, including those seeking to recover unpaid wages.[284] This provision is intended to shorten the time needed by workers to recover unpaid wages. Employers can only appeal such awards on a limited number of grounds and must do so within 30 days.[285] The third reform, which also aims to shorten the dispute resolution process, allows parties to file a lawsuit in court if the LAC does not issue a decision within 45 days of accepting an ordinary case and within 60 days of accepting a "complex" (*fuza*) one.[286] Fourth, the law makes arbitration free of charge for all parties.[287]

It is difficult to predict exactly what impact the new law will have when it takes effect on May 1, 2008.[288] The aforementioned reforms, if rigorously implemented, should result in more unpaid wage claims being heard by LACs and the quicker resolution of these cases. However, as with so many well-intentioned laws in China, such implementation is by no means a certainty. For instance, local governments and labor bureaus may invent new ways to collect fees from disputants. Labor officials are also likely to continue discriminating against migrant workers and prioritizing the interests of the local government above all else. Therefore, despite the passage of this new law that further regulates the procedures and rules by which LACs operate, calls to reform the fundamental structure of LACs are likely to persist, and may even increase.[289]

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283. *Id.* art. 27.

284. *Id.* art. 47.

285. *Id.* art. 49. There are six reasons for which an employer can appeal such an award: an error in the application of the law; a lack of jurisdiction; a procedural violation; the award relied on fabricated evidence; significant evidence was concealed; the arbitrator accepted a bribe or committed some other violation. Workers also have a right to appeal such awards but must do so within 15 days.

286. *Id.* art. 43.

287. *Id.* art. 53.

288. *Id.* art. 54.

289. For instance, some suggest that all LACs be transformed into "labor arbitration courts" (*laodong zhongcaiyuan*), as has already been done in some cities. These bodies are more independent from the labor bureau (often being in a separate building and having personnel that do arbitration exclusively) as well as more professional (requiring higher qualifications for arbitrators and having separate, specialized tribunals for different types of labor disputes). *See* Zhuang Xin, *Zhongcaiyuan kaizhang jie jiulei laodong zhengyi; Xin moni fating yunxu pangting* [Labor Arbitration Courts Opened to Settle Nine Types of Labor Disputes; New Model Courts Allow Observers], SHENYANG

C. Shifting the Balance in Labor Relations

While the Labor Dispute Mediation and Arbitration Law will provide an opportunity to create a more efficient, accessible and fair set of institutions for processing labor disputes, China must also strive to reduce the number of labor violations and disputes which occur in the first place. Some see the answer in narrowing the huge power imbalance that exists between migrant workers and employers; others suggest more targeted measures to discourage employers from committing labor violations. These various proposals are explored and analyzed below.

1. Unionization

Some scholars, including a researcher at a government-operated think tank, believe that the most effective means of ensuring migrant workers' rights is through forming and organizing unions.[290] Theoretically, this practice could help; but, in practice, there are many significant obstacles. First, as one scholar argues, migrant workers may not be interested in organizing because "they consider themselves to be temporary workers who sell their 'young' labour as a cheap commodity."[291] Second, any new union would be under the control of the ACFTU, and thus, face the same restraints in representing workers that limit the efficacy of existing unions. Thus, even if migrant workers could be convinced to join the union, its ability to protect their interests could be rather limited.

2. Labor Contracts

Signing written labor contracts with employers would help to avoid some of the rights infringements and problems in seeking redress that migrants frequently experience. Previously, the benefits of not having any clear, contractual obligations greatly outweighed the costs employers bear by avoiding contracts. For instance, although employers are legally required to conclude such agreements, the 2005 Regulation on Labor Security Supervision contains no provision authorizing the labor bureau to fine employers who do not sign contracts.[292] Nonetheless, some local governments decided to address this situation on their

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JINBAO [SHENYANG DAILY NEWS], Nov. 30, 2005, http://liaoning.nen.com.cn/77994956827918336/20051130/1803015.shtml (describing the labor arbitration courts in Shenyang); *Guangyuan: laodong zhongcaiyuan zuori guapai* [Guangyuan Establishes Labor Arbitration Courts], HUAXI DUSHI BAO [WEST CHINA METROPOLITAN NEWS] Nov. 8, 2005, http://www.chengdu.gov.cn/glamor_chengdu/detail.jsp?id=38777 (describing the labor arbitration courts in Guangyuan).

290. Liu Weifeng, *supra* note 64.

291. Yuchao Zhu, *supra* note 46, at 1017.

292. Regulations on Labor Security Supervision, *supra* note 24, art. 24. The implementing provisions for this Regulation do authorize compensation for any worker whose employers did not sign a labor contract, but only if this lack of action resulted in damages. Provisions Regarding Implementation of "Labor Supervision Reg.," *supra* note 38, at art. 16(4).

own by fining noncompliant employers.[293] In addition, the 2007 Labor Contract Law has stipulated that employers who have failed to conclude a written contract with workers in their employ between one month and one year shall (*yingdang*) pay compensation that is double the employee's monthly salary.[294]

However, some have argued that signing contracts is not enough; the content of what goes in them is also important. An article by several justice bureau officials in Hebei Province notes that employers often sign "hegemonic" labor contracts that grossly favor employers, and may even violate the law.[295] Thus, one challenge for the future will be ensuring that migrant workers, who are often lacking in education and legal consciousness, do not sign something that does them more harm than good. Hopefully, the substantive requirements regarding the content of employment contracts found in the new Labor Contract Law will mitigate against this possibility.

3. Criminalizing Wage Default

There are some experts who argue that protecting workers' rights requires legislative action. In March 2006, Fang Chaogui, Director of the Guangdong Provincial Labor Bureau, stated that wage violations by factory owners "cannot be effectively prevented under current civil laws, labor laws or other administrative [regulations]."[296] Despite all the government's efforts in this area, Director Fang states that the number of unpaid wages cases is actually increasing.[297] A person connected to Sichuan's High Court agrees and suggests that the punishments for violating the Labor Law are insufficient to deter employers.[298] Beijing's Chaoyang District Court has called for the criminalization of maliciously withholding workers' salaries.[299] In January 2006, Shenzhen jailed eight company executives for one month for defaulting on wage payments, the first such criminal prosecution in China.[300] Even if such a law were not routinely used to

293. In the municipality of Chongqing, employers who fail to sign labor contracts with workers after being instructed to do so by officials may now be fined up to 2000 yuan. Chongqing People's Gov't, *Jincheng wugong nongmin quanyi baohu he fuwu guanli banfa* [Methods on Protecting the Legitimate Rights and Managing Services for Migrant Workers], No. 186, art. 51(2005), http://www1.cei.gov.cn/rei/doc/DQCQZC/200510102251.htm.

294. Labor Contract Law, *supra* note 130, art. 82. Donald Clarke notes that the legal weight of the Chinese word "*yingdang*" is actually disputed amongst Chinese scholars: some interpret this phrase as a simple behest lacking any coercive force, while others equate it with the Chinese term for "must" (*bixu*). Donald C. Clarke, "Dispute Resolution in China," in Tahirih V. Lee (ed), Contract, Guanxi and Dispute Resolution in China (New York: Garland Publishing Inc, 1997), pp. 414-415.

295. Li Qinghua, et al., *supra* note 47, at 21 (describing contracts that list the obligations of the worker but do not list any corresponding obligations of the employer).

296. *Quoted in Laws Needed*, *supra* note 1.

297. *Id.*

298. Wang Doudou, *supra* note 278.

299. Zhang Lei, *supra* note 5.

300. Chen Hong, *supra* note 1.

prosecute employers, the threat presented by the possibility of criminal prosecution would most likely motivate many employers to pay wages on time or reach settlements in mediation. However, the new Labor Contract Law made no such provisions.

4. Supply and Demand

Observers have often pointed to China's enormous "surplus" of unskilled laborers to explain why wages remain so low and abuses are so prevalent. However, in the past several years, factory owners in the Pearl River Delta have noted the increasing difficulty of finding enough workers, especially young and skilled ones, which has allowed workers to go to those places where conditions and wages are better.[301] The *New York Times* reports that this shortage of laborers persists, and is spreading further up China's eastern coast and pushing up workers' wages.[302] If such trends continue, it could begin to narrow the enormous power imbalance between migrant workers and their employers, increase workers' bargaining power and help improve their working conditions and treatment.

D. Mediation, the Formal Legal System and the Rule of Law

"Informal" or "traditional" mediation is often framed as not only incongruous with but actively impeding the development of the formal legal system and rule of law in China.[303] However, this does not accurately capture the type of mediation described in this Article. In traditional mediation, the mediator's authority stems from his position in a close-knit community and parties are persuaded by appeals to shared social or community norms.[304] No such close-knit web exists between a migrant worker from the countryside, the urban construction site manager who he is meeting for the first time, and the Little Bird media-

301. *China's Rural Workers "Vote by Foot" for Better Payment*, XINHUA, June 29, 2005; Edward Cody, *supra* note 163; Robin Munro *quoted in* Greenlees & Lague, *supra* note 162.

302. Keith Bradsher, *Wages Are on the Rise in China As Young Workers Grow Scarce*, N.Y. TIMES, Aug. 29, 2007, A1.

303. *See generally* Frank K. Upham, *Who Will Find the Defendant if He Stays with His Sheep? Justice in Rural China*, 114 YALE L.J. 1675 (2005) (reviewing ZHU SULI, SONG FA XIAXIANG: ZHONGGUO JICENG SIFA ZHIDU YANJIU [SENDING LAW TO THE COUNTRYSIDE: RESEARCH ON CHINA'S BASIC-LEVEL JUDICIAL SYSTEM] (2000)) (describing the use of mediation in rural China and the debate about how to build the rule of law).

304. *See* FEI XIAOTONG, FROM THE SOIL: THE FOUNDATIONS OF CHINESE SOCIETY 104 (Gary Hamilton & Wang Zheng trans., University of California Press, 1992) (describing traditional mediation in Chinese villages). *Compare* Haini Guo & Bradley Klein, *Bargaining in the Shadow of the Community: Neighborly Dispute Resolution in Beijing Hutongs*, 20 OHIO ST. J. ON DISP. RESOL. 825 (arguing that modern mediation in urban areas still shares much of the informal nature that characterizes mediation in traditional villages) *with* Halegua, *supra* note 173, at 747-750 (arguing that people's mediation committees in urban China are not simply informal alternatives to courts, but are actually becoming increasingly "legalized" and are stressing their formality and similarity to the courts).

tor who he contacted by telephone the day before. Instead, the authority of the mediator, as well as his ability to pressure and persuade the parties, derives from his status as a government official. Moreover, in contrast to the appeals to social norms in traditional mediation, these mediators and parties regularly invoke laws and regulations in order to persuade the parties. Thus, elements of the formal system are very much relevant to these mediations.

However, the mediation discussed here also differs in an important way from mediation conducted "in the shadow of the law" in Western countries. In the West, mediation is often seen as a "first option," with the realistic prospect of litigation always looming in the background. For China's migrant workers, however, mediation is often the "only option" that they have to resolve their dispute. Hence, the calculation of whether or not to settle is quite different. The comparative strength of each side's legal claim is less determinative because it is far from certain that a migrant worker can ever obtain or enforce a decision made on this basis.

The existence of this mediation option to migrant workers may actually increase their faith in the "rule of law" and legitimacy of China's legal system. The largest threats to the formal system's legitimacy are often internal to the system itself, such as its lack of accessibility, rampant corruption and inability to enforce judgments. The mediation discussed in this Article is very much a response to these inadequacies. Mediation provides an alternate means for achieving a substantive result that is similar to the one that the formal system ought to produce. Surely, the outcome will rarely be identical (for example, an employer will never pay compensation in addition to the wages owed), but the general assignment of rights and duties created by the law will be upheld. Without such mediation, the law would amount to no more than an unbinding suggestion to employers and a hollow promise of protections and rights to workers. Thus, at the very least, these mediated solutions demonstrate that the work of the legislature is not done entirely in vain. Therefore, instead of further undermining the perceived legitimacy of the formal system or faith in the rule of law, the availability and use of mediation may actually be working to salvage them.

E. Stability

The formal legal system's failure to protect migrant workers threatens China's stability. Existing legal standards are too frequently ignored, leaving workers the victims of rampant and severe rights violations. The formal dispute resolution system should address these injustices in a way that depoliticizes and deescalates the conflict. As it stands, migrants' inability to access and receive such a resolution from the system leaves many of them frustrated, desperate and more likely to engage in destabilizing actions. Local governments have been able to stymie these individual uprisings by detaining protestors, arresting petitioners and occasionally pressuring an employer to pay angry workers. However, if the number and intensity of such mass incidents continue to rise, it is by

no means clear that such a reactive approach will be sufficient to maintain stability.

Instead, constructing the "harmonious society" envisioned by China's leadership will require a more systematic response. Reforms that can enable the formal system to be more efficient and fair and create incentives for employers to sign labor contracts and disperse wages are a good start. However, more fundamental, long-term changes are also needed. New regulations are only meaningful if local officials overcome their immediate economic interests and enforce them. Labor contracts are only useful if workers have enough power to negotiate the terms with employers. Finally, unions are of limited efficacy when serving primarily to represent the interests of the state, rather than of the workers'. Therefore, reforming aspects of China's political system is an important piece of any strategy that hopes to address the problems faced by migrant workers.

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How Much Time Is Reasonable - The Arbitral Decisions under Article 21.3(c) of the DSU

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How Much Time is Reasonable? – The Arbitral Decisions under Article 21.3(c) of the DSU

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I.
INTRODUCTION:
A "GRACE PERIOD" FOR WTO-INCONSISTENT MEASURES

The Dispute Settlement Body (DSB) came into being during the extended Uruguay Round of negotiation on trade for the purpose of assisting governments to better manage problems of international economic interdependence.[1] Now the real test of these new World Trade Organization (WTO) rules is in their use in dispute settlement proceedings. For no matter how carefully and precisely negotiated, the rules in the WTO Agreements maintain their value only if a system for resolving disputes is in place to allow the expeditious application and reliable enforcement of rules.

Although justice delayed is better than justice denied, the delay must still be reasonable. In order to ensure that responding parties do not operate with an open-ended timeframe to comply with the recommendations and rulings of the DSB,[2] the Understanding on Rules and Procedures Governing Settlement of

1. Final Act Embodying the Result of the Uruguay Round of Multilateral Trade Negotiation, Apr. 15, 1994, 33 I.L.M. 1125 (1994).

2. Generally speaking, the WTO is a three-tiered organization headed by the Ministerial Conference, which consists of representative WTO members. The WTO Agreement provides that all decision-making powers shall be in this conference, which meets every two years. The Ministerial

Dispute (DSU)[3] has established procedures for setting a deadline for responding parties to implement dispute settlement rulings and recommendations. Article 21.1 of the DSU requires prompt compliance with recommendations and rulings of the DSB in order to ensure an effective resolution of disputes for the benefit of all Members.[4] After a Panel or Appellate Body issues a report finding that a Member's actions are inconsistent with its WTO obligations and nullifies or impairs benefits accrued to other Members, the Member has thirty days to notify the DSB of its plan for implementing the recommendations and rulings at a DSB meeting.[5] Compliance includes withdrawal of the WTO-inconsistent measures by the responding party, usually achieved by changing laws, regulations or practices.[6] Article 21.3 also provides that, where immediate compliance is "impracticable," implementation must be completed within a "reasonable" period of time, to be determined by a separate arbitration.[7] Article 21.3 arbitrations are significant mechanisms for balancing the respondent's desire for an indefinite compliance period, and the petitioner's desire for immediate compliance.[8]

During the reasonable period of time determined in Article 21.3 arbitrations, responding parties may continue their WTO-inconsistent measures without further penalty.[9] Thus, Article 21.3 proceedings have great practical significance. In *US- Section 129(c)(1) URAA*, the arbitration Panel noted that,

> [n]othing in Article 21.3 suggests that Members are obliged, during the course of the reasonable period of time, to suspend application of the offending measure. . .Rather, in the case of antidumping and countervailing duty measures, entries that take place during the reasonable period of time may continue to be liable for the payment of duties.[10]

Conference functions as the Dispute Settlement Body (DSB) and the Trade Policy Review Body. Therefore, the membership of the DSB is the same as that of the General Council, but it has a separate chairman, a separate staff, separate rules of procedure, and a separate document series.

3. Understanding on Rules and Procedures Governing the Settlement of Disputes, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, Legal Instruments -- Results of the Uruguay Round vol. 1 (1994), 33 I.L.M. 1125, 1226 (1994). For background information on the DSU, *see generally* WTO Website, http://www.wto.org.

4. DSU Article 21.1.

5. *Id.*

6. DSU Article 22.

7. DSU Article 21.3.

8. Article 21.3(c) should be interpreted in its context and in light of the object and purpose of the DSU. Relevant considerations in this respect include other provisions of the DSU, including, in particular, Articles 21.1 and 3.3. Article 21.1 stipulates that: "*Prompt compliance* with recommendations and rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members" (emphasis added). Article 3.3 states: "The *prompt* settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members" (emphasis added).

9. U.S. – Section 129(c)(1) of the Uruguay Round Agreements Act, WT/DS221 (2002), ¶ 3.90, 3.93.

10. *Id.*

The Panel added that Articles 22.1 and 22.2 of the DSU confirm not only that a Member may maintain the WTO-inconsistent measure until the end of the reasonable period of time for implementation, but also that neither compensation nor the suspension of concessions or other obligations are available to the complaining Member until the conclusion of the reasonable period of time.[11] Indeed, almost no interim requirements are imposed upon the implementing party between the time it informs the DSB of its intentions with respect to implementation of the DSB recommendations and rulings, and the expiration of the reasonable period.[12] The minimal requirements imposed upon the implementing party during the reasonable period thus, as a matter of logic, raise the question of whether implementing Members can legally use the reasonable period merely as a tool to continue violating their WTO obligations.

At the time of writing, the DSU has been in force for twelve years, and during this period, twenty-one arbitration awards have been issued under Article 21.3(c).[13] Using different analytical methods, this paper attempts to explain how procedures function for establishing a compliance deadline under the WTO regime. It uses applications of statistical analysis, case-based reasoning, and a normative, theoretical review of Article 21.3 and other provisions of the DSU, for the purpose of discussing the effectiveness of the 21.3(c) proceeding. Furthermore, this paper provides an empirical review of the Article 21.3 arbitral decisions in order to demonstrate what occurs when parties to a dispute cannot agree on the length of a compliance period.[14]

The grace period for maintaining WTO-inconsistent measures has raised numerous legal questions that remain to be clarified.[15] The goal of this paper is to construct an analytical framework to better understand the legal implications of the 21.3(c) proceeding. The body of this paper will therefore explore the factors used to determine the time allowed for implementation and will comment

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11. *Id.* It should be noted, however, that there is an exception on prohibited subsidies. In *Brazil-Aircraft*, the Appellate Body concluded that the provisions of Article 21.3 of the DSU are not relevant in determining the period of time for implementation of a finding of inconsistency with the prohibited subsidies provisions of Part II of the *SCM Agreement*.

12. Article 21 provides that six months into each losing Member's implementation period, the Member must begin providing regular "status reports" at all scheduled DSB meetings. Nothing more than these reports is required of the losing Member during its compliance period. *See generally* DAVID PALMETER & PETROS C. MAVROIDIS, DISPUTE SETTLEMENT IN THE WORLD TRADE ORGANIZATION: PRACTICE AND PROCEDURE 237 (1999) [hereinafter *Dispute Settlement*]. Although footnote 13 to article 21.3(c) provides that the arbitrator shall be interpreted as referring either to an individual or a group, in most cases a single arbitrator has been named, usually a member of the Appellate Body.

13. This number does not include the arbitrations in which no awards were made because the parties agreed on the "reasonable period of time" after Article 21.3(c) proceedings were initiated.

14. Although in quantitative research a statistical analysis of a large number of cases is the preferred methodology, only twenty-one cases involve the 21.3(c) proceeding. Therefore, a survey of all 21.3(c) cases completed through binding arbitration should be helpful in examining the system.

15. *See generally* WTO Website, Analytical Index, http://www.wto.org/english/res_e/booksp_e/analytic_index_e/dsu_08_e.htm#article21B3.

on how awareness of the ensuing grace period affects arbitrators' decisions. This paper will then close with a critical analysis of the difficulty arbitrators face when determining a reasonable implementation period and establishing a compliance deadline that is fair to both sides.[16]

II.
OVERVIEW OF THE ARBITRAL DECISIONS UNDER ARTICLE 21.3(C) OF THE DSU

A. When Prompt Compliance is "Impracticable" – The Implementation Plan and its "Deadline"

There are three alternative methods to determine a reasonable period of time. The first option, under Article 21.3(a), is the period of time proposed by the Member concerned, provided that such period is approved by the DSB.[17] Second, in the absence of such approval, Article 21.3(b) provides that a reasonable period of time is the period of time agreed to by the parties to the dispute within forty-five days after the date of adoption of the final report.[18] Finally, in the absence of such agreement, Article 21.3(c) provides that a reasonable period of time will be determined through binding arbitration within ninety days after the date of adoption of the final report.[19] Despite the ninety-day provision in Ar-

16. *See generally* WorldTradeLaw.net, http:// www.worldtradelaw.net/dsc/database/rptawards.asp (last visited Feb. 15, 2007).

17. Article 21 of the DSU Surveillance of Implementation of Recommendations and Rulings

1.Prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members.

2.Particular attention should be paid to matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement.

3.At a DSB meeting held within 30 days after the date of adoption of the panel or Appellate Body report, the Member concerned shall inform the DSB of its intentions in respect of implementation of the recommendations and rulings of the DSB. If it is impracticable to comply immediately with the recommendations and rulings, the Member concerned shall have a reasonable period of time in which to do so. The reasonable period of time shall be:

(a)the period of time proposed by the Member concerned, provided that such period is approved by the DSB; or, in the absence of such approval,

(b) a period of time mutually agreed by the parties to the dispute within 45 days after the date of adoption of the recommendations and rulings; or, in the absence of such agreement,

(c) a period of time determined through binding arbitration within 90 days after the date of adoption of the recommendations and rulings. In such arbitration, a guideline for the arbitrator should be that the reasonable period of time to implement panel or Appellate Body recommendations should not exceed 15 months from the date of adoption of a panel or Appellate Body report. However, that time may be shorter or longer, depending upon the particular circumstances.

18. *Id.*

19. *Id.*

ticle 21.3(c), however, actual practice indicates that an arbitrator will only have forty-five days to decide the deadline for implementation, if the first forty-five days under 21.3(b) are fully consumed by unsuccessful negotiations to try and reach an agreement on the issue.[20]

While the reasonable period of time should not exceed fifteen months from the date of adoption of a panel or Appellate Body report, Article 21.3(c) indicates that the "time may be shorter or longer, depending upon the particular circumstances."[21] Since the DSU does not indicate the criteria to be addressed in determining the reasonable period, disputed issues usually pertain to the length of a reasonable period of time. A textual analysis of Article 21.3 would suggest that there is a very limited range of factors an arbitrator may use to determine a reasonable time for compliance, and indeed, the ambiguous language of the DSU led to several early WTO decisions embracing the 15-month standard.[22] Also, early arbitration awards, such as *Japan-Alcohol*, *EC-Bananas* and *EC-Hormones*, followed the fifteen-month guideline set out in Article 21.3.[23] These early awards fostered widespread concern that implementing parties were automatically entitled to a compliance period of fifteen months, and this outcome struck many as both contrary to the "prompt compliance" standard of Article 21 and an unfair extension of the dispute settlement process.[24]

The first of the arbitral decisions to award a reasonable period of less than fifteen months was the *Indonesia-Automobiles* case in 1998.[25] There, the arbitrator established a reasonable period of twelve months by applying the "shortest period possible"[26] standard to the special circumstances of Indonesia.[27] The award authoritatively defined the reasonable period of time as "the shortest period possible within the legal system of the Member to implement the recom-

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20. *See* JEFF WAINCYMER, WTO LITIGATION: PROCEDURAL ASPECTS OF FORMAL DISPUTE SETTLEMENT 645-647 (2002).

21. Article 21, *supra* note 17.

22. Award, *Korea-Taxes on Alcoholic Beverages*, Arbitration under Article 21.3(c) of the DSU, WT/DS75/16, WT/DS84/14 (June 4, 1999) [hereinafter *Korea-Alcoholic Beverages*]; *see also* Award, *European Communities-Regime for the Importation, Sale and Distribution of Bananas*, Arbitration under Article 21.3(c) of the DSU, WT/DS27/15 (Jan. 7, 1998) [hereinafter *EC-Bananas*]; *see also* Award, *EC Measures Concerning Meat and Meat Products (Hormones)*, Arbitration under Article 21.3(c) of the DSU, WT/DS26/15, WT/DS48/13 (May 29, 1998) [hereinafter *EC-Hormones*].

23. Award, *Japan-Taxes on Alcoholic Beverages*, Arbitration under Article 21.3(c) of the DSU, ¶ V WT/DS8/15, WT/DS10/15, WT/DS11/13 (Feb. 14, 1997). *EC-Hormones, id.* ¶ VI.

24. *See generally* Ernst-Ulrich Petersmann, *The Negotiations on Improvements of the WTO Dispute Settlement System*, 6 J. INT'L ECON. L. 237 (2003).

25. Award, *Indonesia – Certain Measures Affecting the Automobile Industry*, Arbitration under Article 21.3(c) of the DSU, ¶ 25, WT/DS54/15, WT/DS55/14, WT/DS59/13, WT/DS64/12 (Dec. 7, 1998) [hereinafter *Indonesia-Automobiles*].

26. "Read in context, it is clear that the reasonable period of time, as determined under Article 21.3(c), should be the shortest period possible within the legal system of the Member to implement the recommendations and rulings of the DSU." *EC-Hormones*, *supra* note 31, ¶ 26.

27. *Indonesia-Automobiles*, *supra* note 25, ¶ 24, 25.

mendations and rulings of the DSB."[28]

Since *Indonesia-Automobiles*, there has been a clear trend away from the 15-month standard.[29] Currently, the fifteen-month guideline is no longer read as establishing a fixed maximum or outerlimit for a reasonable period of time, nor does it constitute aflooror innerlimit for a reasonable period of time. In the most recent case where an award was issued, the *EC-Chicken Classification*, a period of nine months was set.[30]

B. Tug of War: Preliminary Findings of the Statistical Analysis

To further demonstrate the trend of arbitral decisions, a summary of Article 21.3(c) arbitration awards since 1997 is compiled in Table 1. The summary is divided into several columns to allow more accurate interpretation of the arbitral awards. While the heaviest users of the 21.3(c) mechanism have been the United States and European Community, which were involved in nineteen cases as either an implementing or a complaining party, Table 1 also shows that a wide range of other WTO Members, including for example, Brazil and Canada, have been active in the 21.3(c) arbitration proceedings.

TABLE 1

(Source: Author's analysis based on the arbitration awards)

Arbitral Case Name	Dispute Settlement Number	RPT Proposed by Implementing Party	RPT Suggested by Complaining Party	Award
Japan – Alcohol Feb. 14, 1997	8, 10, 11	23 months	US - 5 months EC - 15 months CA – 15 months	15 months
EC – Bananas Jan. 07, 1998	27	15 months & 1 week	Ecuador, Guatemala, Honduras, Mexico, U.S. - 9 months	15 months & 1 week

28. *Id.* ¶ 12, 22.

29. *See* Table 1.

30. Award, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, Arbitration under Article 21.3(c) of the DSU, ¶ 84, WT/DS269/13, WT/DS286/15 (Feb. 20, 2006) [hereinafter *EC-Chicken Classification*].

EC – Hormones May 29, 1998	26, 48	39 months	US - 10 months CA - 10 months	15 months
Indonesia – Autos Dec. 07, 1998	54, 55, 59, 64	15 months	EC - 6 months US -1 month JP - not explicitly proposed	12 months
Australia– Salmon Feb. 23, 1999	18	15 months	CA - much less than 15 months	8 months
Korea – Alcohol Jun. 04, 1999	75, 84	15 months	EC - 6 months US - 6 months	11 months & 2 weeks
Chile – Alcohol May 23, 2000	87, 110	18 months	EC - 8 months & 9 days	14 months & 9 days
Canada– Pharmaceuticals Aug. 18, 2000	114	11 months	EC - less than 12 months	6 months
Canada – Autos Oct. 04, 2000	139, 142	11 months & 12 days	EC - 90 days JP - 90 days	8 months
U.S. – Copyright Jan. 15, 2001	160	15 months	EC - 10 months	12 months
U.S. - 1916 Act Feb. 28, 2001	136, 162	15 months	EC - 6 months JP - 6 month	10 months

Canada-Patent Term Feb. 28, 2001	170	14 months & 2 days	US - 6 months	10 months
Argentina- Bovine Hides Aug. 31, 2001	155	46 months & 15 days	EC - 8 months	12 months & 12 days
U.S. - Hot-Rolled Steel from Japan Feb. 19, 2002	184	18 months	JP -10 months	15 months
Chile- Agricultural Products Mar. 17, 2003	207	18 months	Argentina - 9 months & 6 days	14 months
U.S. - Offset Act ("Byrd Amendment") Jun. 13, 2003	217, 234	15 months	Australia, Brazil, Canada, Chile, EC, India, Indonesia, Japan, Korea, Mexico, Thailand - 6 months	11 months
EC-Tariff Preferences Sep. 20, 2004	246	20 months & 10 days	India - 6 months & 2 weeks	14 months & 11 days
U.S. – OCTG Sunset Reviews Jun. 07, 2005	268	15 months	Argentina - 7 months	12 months
U.S. - Gambling Services Aug. 19, 2005	285	15 months	Antigua & Barbuda - 6 months (sport related)	11 months & 2 weeks

			- 1 month (non-sport related)	
EC - Sugar Subsidies Oct. 28, 2005	265, 266, 283	19 months & 12 days	Australia, Brazil, Thailand - 6 months & 6 days	12 months & 3 days
EC - Chicken Classification Feb. 20, 2006	268, 286	26 months	Brazil - 5 months & 10 days Thailand - 6 months	9 months

A summary of Table 1 appears in Figure 1 below. Figure 1 shows that the average reasonable period of time proposed by the implementing party is much longer than that suggested by the complaining party. To better understand these decisions, this paper will further review the twenty-one arbitral decisions and examine the factors affecting the reasonable time allowed for implementation. As reflected in the decisions, the concept of reasonableness inherently involves taking into account relevant circumstances. In some cases these influential circumstances may be singular or few in number; in other cases, however, there are many relevant circumstances. Figure 2 below shows the factors most frequently raised by parties in dispute and considered by arbitrators when determining a reasonable period of time. They are as follows: (1) legislative procedures; (2) political sensitivity; (3) general economic matters; (4) congressional schedule; (5) developing country's special attention claim; (6) particular political events; (7) other international obligations; (8) fiscal difficulty; (9) scientific studies; and (10) punitive deadlines.

An overview of the arbitral decisions shows that, in all cases, the responding party raised arguments concerning domestic legislative procedures. Furthermore, in eighteen of the decisions, responding parties raised arguments regarding political sensitivities and domestic contentiousness. Factors such as fiscal difficulty and the need for scientific studies prior to legislation have also been strongly emphasized in some cases. Part III of this paper will more closely examine the factors raised by parties and their subsequent influence on arbitrators' decisions.

FIGURE 1

(Source: Author's calculations based on arbitration awards)

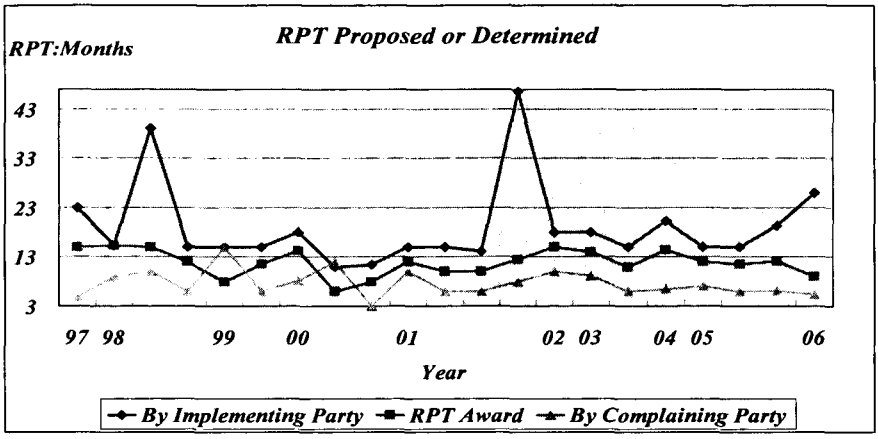
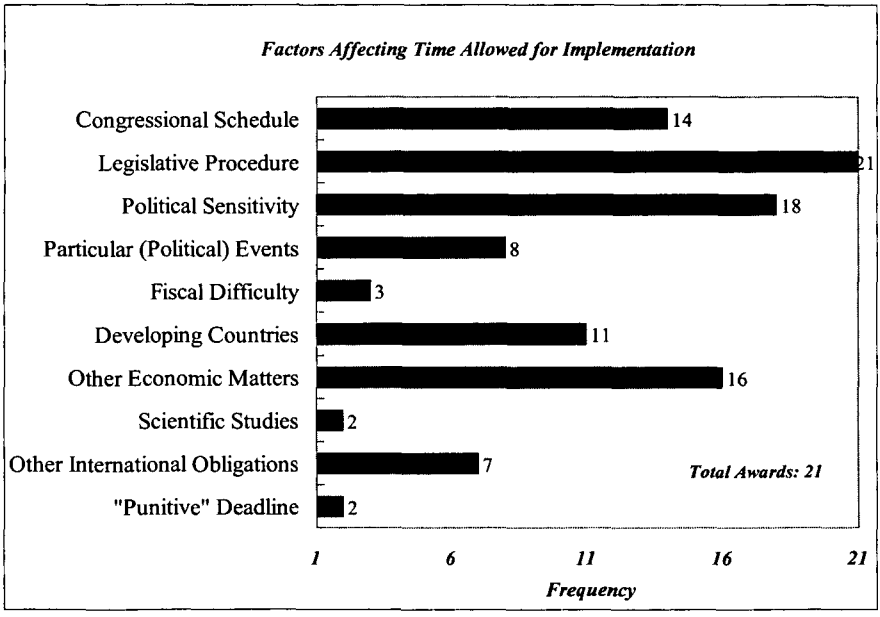


FIGURE 2

(Source: Author's calculations based on arbitration awards)



III.
FACTORS AFFECTING HOW MUCH TIME IS "REASONABLE"? – INDICATING THE FACTORS

A. Constitutional Reasons

1. Congressional Schedule: Normal versus Extraordinary

Constitutional reasons for extending the grace period of enforcement have been a dominating factor set forth by parties in several disputes. For instance, in *Korea-Alcoholic Beverages*, Korea urged the arbitrator to grant fifteen months as the reasonable period of time for implementation, arguing that it intended to implement the DSB rulings and recommendations through an increase in tax rates applicable to the disputed product, "which require[d] an amendment of its Liquor Tax Act."[31] Korea stated that such a legislative amendment required at least fifteen months because it involved the National Assembly and other "administrative actions."[32] However, the EC argued that an amendment to the Liquor Tax Act could be completed much earlier if it was implemented via the extraordinary session of the National Assembly.[33] The EC contended that, under the Korean Constitution, the extraordinary session could convene at any time, and was a regularly invoked procedure.[34]

In response, the arbitrator ruled that, while the reasonable period of time should be the shortest period possible within the legal system of the Member concerned, the Member in question should not be required to utilize "*extraordinary* legislative procedures" to comply with the recommendations and rulings of the DSB (emphasis in original).[35] Taking into account all of the particular circumstances of this case, the arbitrator believed that it was reasonable to allow Korea to follow its normal legislative procedure for the consideration and adoption of a tax bill with budgetary implications – that is, to submit the proposed amendments to the "next regular session" of the National Assembly.[36]

In *EC-Sugar Subsidies*, the arbitrator reaffirmed the reasoning in *Korea-Alcoholic Beverages* and stated that "an implementing Member is not required to adopt 'extraordinary legislative procedures' in every case."[37] The arbitrator agreed with the EC's argument that requiring a Member to use "all flexibility

31. *Korea-Alcoholic Beverages, supra* note 22, ¶ 6.

32. *Id.*

33. *Id.* ¶19.

34. *Id.*

35. *Id.* ¶ 42.

36. *Id.*

37. Award, *European Communities-Export Subsidies on Sugar*, Arbitration under Article 21.3(c) of the DSU, ¶ 64, WT/DS265/33, WT/DS266/33, WT/DS283/14 (Oct. 28, 2005) [hereinafter *Europe-Sugar Subsidies*].

and discretion in its legal system" should not be interpreted to mean that an implementing Member is required to utilize an extraordinary procedure rather than a normal procedure.[38]

2. Legislative Procedure: Law-making versus Administrative Action

Domestic legislative procedure is the most frequent factor addressed in the arbitral decisions. As indicated in Table 2, responding parties raised arguments regarding legislative procedure in twenty-one different decisions. For example, in *EC-Banana*, the EC requested a longer period of time and explained that the amendment of its banana import regime would require a "complex legislative procedure" involving the European Parliament, the European Commission, and the Council of European Union.[39] In response, the arbitrator recognized the demonstrated complexity of the implementation process and awarded a compliance period of fifteen months and one week.[40]

Consistent with its arguments in *EC-Banana*, the EC, as one of the complaining parties in *Indonesia-Automobiles*, argued that in determining the reasonable period of time, the arbitrator should consider the legal nature of the required implementing act, as well as the procedures which are necessary to adopt the particular type of act under the domestic law of the Member concerned.[41] In this context, the amendment of an act by the Indonesian Parliament is generally more time-consuming than the amendment of an act by the Indonesian Executive.[42] The EC thus contended that the Indonesian measures could be amended within a relatively brief period of time because they were acts of the Indonesian Executive, and not acts of the Indonesian Parliament.[43] The arbitrator ultimately determined, based on the economic situation rather than the legislative process of Indonesia, that the reasonable period of time for Indonesia to implement the recommendations and rulings of the DSB should be twelve months from the date of adoption of the Panel Report by the DSB.[44] The decision demonstrated the reluctance by the arbitrator to shorten the time for implementation based on the executive/legislative dichotomy.

U.S. - Offset Act (Byrd Amendment) is also illustrative here. In this case, the U.S., as the implementing party, argued that the most significant factors for the arbitrator to consider were: "the legal form of implementation (legislative versus administrative measures)," the "technical complexity" of those measures, and the period of time necessary for implementation within the existing governmen-

38. *Id.* ¶ 85.
39. *EC-Bananas*, *supra* note 22, ¶ 7.
40. *Id.* ¶ 19-20.
41. *Indonesia-Automobiles*, *supra* note 25, ¶ 13.
42. *Id.* ¶ 14.
43. *Id.*
44. *Id.* ¶ 25.

tal system.[45] According to the U.S., since the Continued Dumping and Subsidy Offset Act was "mandatory legislation", the implementation required legislative action and thus required more time.[46] The arbitrator acknowledged that the need for implementation by legislative means is a relevant circumstance for determination of the reasonable period of time.[47] By explicitly accepting the U.S. arguments that "the entire legislative process is controlled exclusively by the United States Congress", the arbitrator seemed to affirm the idea that, as a general rule, implementation by legislative measures will, more often than not, require a longer period of time than implementation by means of administrative measures.[48] Since the complaining parties to the dispute did not dispute the need for implementation by legislative means, the arbitrator accepted the U.S.'s explanation that legislative steps were generally required as a matter of practice and could be time-consuming.[49]

In the aforementioned proceedings, the arbitrators considered the legal nature as well as legal form of implementation in determining a reasonable period of time. The most recent dispute, *EC-Chicken Classification*, further elaborates on this line of reasoning. Here, the arbitrator ruled that the European Commission could exclusively accomplish the implementation steps proposed by the EC, without the involvement of the Council or the European Parliament, and therefore the steps were not "legislative" in the context of Article 21.3(c).[50] He further clarified the reasoning found in previous arbitral decisions and stated that:

> [p]revious arbitrations have highlighted that implementation achieved through administrative processes generally requires less time than implementing legislation. This distinction is premised on the fact that administrative action generally may be accomplished solely by one institution (often the Executive Branch) of the implementing Member, whereas legislative action generally requires the participation of additional institutions (typically at least the Legislative Branch—likely to have slower, more deliberative processes—possibly in conjunction with the Executive Branch as well).[51]

Indeed, administrative regulations and rules can usually be changed more quickly than statutes. Although there may be some variance with specific circumstances, the complexity of the legislative action would also be a relevant factor in the determination of time periods under Article 21.3(c) proceedings.

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45. Award, *U.S.-Continued Dumping and Subsidy Offset Act of 2000*, Arbitration under Article 21.3(c) of the DSU, ¶ 8, WT/DS217/14, WT/DS234/22 (June 13, 2003) [hereinafter *U.S.-Offset Act*].

46. *Id.* ¶ 9.

47. *Id.* ¶ 74.

48. *Id.*

49. *Id.*

50. *EC-Chicken Classification*, *supra* note 30, ¶ 67.

51. *Id.*

B. Political Complexity

1. Political Sensitivity, Controversy and Domestic Contentiousness

Responding parties often argue that the time granted for implementation should be longer due to the complexity of the proposed implementation. They assert that complex implementation procedures qualify as "particular circumstances" under Article 21.3(c).[52] These arguments, however, have been largely unsuccessful.[53] For instance, in *Canada-Pharmaceuticals*, Canada contended that the "revocation" of the relevant regulations would be a "very sensitive political matter in Canada."[54] It further argued that an eleven-month period would be needed in order to conduct the necessary but extensive "consultations with stakeholders, interest groups and the general public."[55] This argument proved unsuccessful, however, as the arbitrator ruled that, while the modification of the Canadian PatentActmight have a great impact on Canada's health care system, the intensity of the political opposition and existence of domestic controversy were not relevant factors in determining a reasonable period of time.[56] Instead, the arbitrator noted that, "[a]ll WTO disputes are "contentious" domestically at least to some extent," and, therefore, concluded that "contentiousness" should never be an issue.[57]

In contrast to the arguments set forth by Canada above, the U.S. argued, as one of the complaining parties in *Japan-Alcohol*, that the question of "particular circumstances" should not "imply a policy judgement, but rather a technical inquiry" into the domestic system of the Member concerned.[58] The U.S. asserted that political tension is "inevitable whenever a government proposes to end its protection of a domestic industry."[59] It further argued that taking into account such considerations would "threaten the integrity of the WTO dispute settlement system."[60] Instead, it argued, the arbitrator's task should be to determine the shortest period of time in which implementation can take place, rather than to determine if the particular length of time would make implementation "less burdensome" for

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52. *See* WTO Analytical WTO Website, Analytical Index, <http://www.wto.org/english/res_e/booksp_e/analytic_index_e/dsu_08_e.htm#article21B3>.

53. *Id. See also* JEFF WAINCYMER, WTO LITIGATION: PROCEDURAL ASPECTS OF FORMAL DISPUTE SETTLEMENT 653 (2002).

54. Award, *Canada-Patent Protection of Pharmaceutical Products*, Arbitration under Article 21.3(c) of the DSU, ¶ 21, WT/DS114/13 (Aug. 18, 2000) [hereinafter *Canada-Pharmaceuticals*].

55. *Id.*

56. *Id.* ¶ 60; *see also* Award, *Chile-Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, Arbitration under Article 21.3(c) of the DSU, ¶ 14-15, WT/DS207/13 (Mar. 17, 2003) [hereinafter *Chile-Agricultural Products*].

57. *Canada-Pharmaceuticals*, *supra* note 54, ¶ 60.

58. Award, *Japan-Taxes on Alcoholic Beverages*, Arbitration under Article 21.3(c) of the DSU, ¶ 13 WT/DS8/15, WT/DS10/15, WT/DS11/13 (Feb. 14, 1997).

59. *Id.*

60. *Id.*

the implementing Member.[61] Ultimately, the arbitrator determined that Japan had not proved that any particular circumstances existed to "justify a departure from the 15-month 'guideline' either way."[62] He concluded, therefore, that a reasonable period of time for Japan to implement the recommendations and rulings of the DSB was fifteen months.[63]

Similarly, in *U.S.-Copyright*, the EC, as the complaining party, argued against taking into account "domestic contentiousness" when determining a reasonable period of time.[64] The EC referred to a number of examples of intellectual property legislation to demonstrate "the normal time-period in which this type of legislation is enacted."[65] In particular, the EC emphasized that the implementation of the recommendations and rulings in this dispute was "rather straight forward."[66] The EC noted that "highly complex" pieces of legislation have been enacted in the United States in "very short periods of time, ranging from 28 to 113 days."[67] The arbitrator quoted the decision in *Canada-Pharmaceuticals*, stating that "[n]othing in Article 21.3" indicates that the "supposed domestic 'contentiousness' of a measure taken to comply with a WTO ruling should in any way be a factor to be considered in determining a 'reasonable period of time for implementation.'"[68] He agreed with the complaining party's arguments that any claims as to domestic contentiousness were irrelevant.[69]

Contrary to the arbitral outcomes of previous decisions, *Chile-Agricultural Products* is an outlier case where the arbitrator determined that the measures in dispute (the price band system, hereinafter the "PBS") were "so fundamentally integrated into the policies of Chile, that domestic opposition to their repeal" might seriously impact Chile's agricultural policy.[70] In the arbitral proceeding, Chile contended that the PBS was a "cornerstone" of its agricultural policy, and had been so for almost twenty years.[71] And, in fact, Argentina, the complaining party, did not dispute the existence of significant opposition in Chile to repeal or reform the PBS.[72] The arbitrator determined that, given its unique role and impact on Chilean society, the PBS was a "relevant factor in the determination of

61. *Id.*

62. *Id.* ¶ 27.

63. *Id.*

64. Award, *United States – Section 110(5) of the US Copyright Act*, Arbitration under Article 21.3(c) of the DSU, ¶ 8, WT/DS160/12 (Jan. 15, 2001) [hereinafter *U.S.-Copyright*].

65. *Id.*

66. *Id.* ¶ 9.

67. *Id.*

68. *Id.* ¶ 41.

69. *Id.* ¶ 42.

70. *Chile-Agricultural Products*, *supra* note 67, ¶ 48.

71. *Id.* ¶ 46.

72. *Id.* ¶ 47.

the 'reasonable period of time' for implementation."[73]

2. Particular (Political) Circumstances or Events

Often central to the question of whether political complexity should be a determining factor is the existence of "particular circumstances." In *U.S.-Offset Act (Byrd Amendment)*, *U.S.-Copyright*, and *U.S.-1916 Act*, the U.S. consistently argued that an election year might have an effect on its ability to proceed with implementation.[74] For example, in *U.S.-1916 Act*, the U.S. emphasized that, as a result of the Presidential elections, bringing the 1916 Act into conformity with its WTO obligation would require the collaboration of a new President and Executive administration, as well as a new Congress.[75] For these reasons, the U.S. requested that it be granted a reasonable period of at least fifteen months from the date of adoption of the Panel Report for implementation of the DSB rulings.[76] Nevertheless, the arbitrator ruled that these reasons should not affect, in any substantial way, the obligations of the U.S. to implement the recommendations and rulings of the DSB in a particular dispute.[77] The arbitrator thus concluded that the U.S. had ten months to implement the DSB rulings.[78]

In at least one instance, however, an arbitrator has found particular political circumstances determinative. In *EC-Tariff Preferences*, the enlargement of the European Union on May 1, 2004 became an issue of discussion during the proceedings.[79] The EC claimed that the decision-making process "has become more cumbersome and time consuming since the enlargement of the European Union from 15 to 25 Member States."[80] The EC further argued that considerable time would be needed to translate certain instruments connected with the implementation into the twenty official languages.[81] The arbitrator agreed that these circumstances were likely to increase the period of time reasonably required to complete certain steps in the implementation process.[82] The arbitrator determined that fourteen months and eleven days was a reasonable period of time for implementation.[83]

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73. *Id.* ¶ 48.

74. *U.S.-Offset Act*, *supra* note 57; *U.S.-Copyright*, *supra* note 76; Award, *United States-Anti-Dumping Act of 1916*, Arbitration under Article 21.3(c) of the DSU, WT/DS136/11, WT/DS162/14 (Feb. 18, 2001) [hereinafter *U.S.-1916 Act*].

75. *U.S.-1916 Act*, *supra* note 74, ¶ 19.

76. *Id.*

77. *U.S.-Copyright*, *supra* note 65, ¶ 40.

78. *Id.* ¶ 45.

79. Award, *European Communities-Conditions for the Granting of Tariff Preferences to Developing Countries* Arbitration under Article 21.3(c) of the DSU, ¶ 11, WT/DS246/14 (Sept. 20, 2004) [hereinafter *Tariff Preferences*].

80. *Id.*

81. *Id.* ¶ 53.

82. *Id.*

83. *Id.* ¶ 60.

The different reasoning and outcome in the previous proceedings demonstrated the arbitrator's discretionary power in taking into account the implications of the domestic/regional political circumstances. From these cases one can conclude that arbitrators consider the correlation between specific domestic political events and members' WTO obligations in reaching their decisions.

C. *Economic Situations*

1. *Financial Difficulty*

An implementing party's economic situation may also be relevant to the determination of the reasonable period of time. In *Indonesia-Automobiles*, Indonesia requested fifteen months to allow existing industries to make the necessary structural adjustment.[84] Indonesia emphasized that the "impracticability" of immediate compliance resulted "not from any particularly complex legislative procedure, but rather from its current economic difficulties."[85] Indonesia pointed out that its economy was "near collapse," unemployment had "reached unprecedented levels," and that the economic slump had pushed many companies into bankruptcy, with the automotive industry particularly affected.[86] Indonesia further argued that "comprehensive deliberations" were needed in order to bring the measure in dispute—the so-called 1993 Programme—into conformity with Indonesia's obligations under the WTO Agreement.[87] Indonesia emphasized that the 1993 Programme involved "190 labour-intensive companies/industries employing tens of thousands of Indonesian workers."[88] Thus, Indonesia argued that additional time was needed to prevent further unemployment and a further deepening of the economic crisis.[89]

The arbitrator in the case, however, did not view these structural adjustments to Indonesia's affected industries as relevant "particular circumstances" under Article 21.3(c).[90] Instead, the arbitrator declared that "for virtually every case in which a measure has been found to be inconsistent" with a Member's WTO obligations, "some degree of adjustment by the domestic industry" will be necessary in order for the Member to come into compliance.[91] Consequently, the arbitrator determined that difficult structural adjustments should not be relevant to the determination of a reasonable period of time under Article 21.3(c).[92]

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84. *Indonesia-Autos*, *supra* note 25, ¶ 7-8.
85. *Id.* ¶ 7.
86. *Id.* ¶ 8.
87. *Id.* ¶ 9.
88. *Id.*
89. *Id.*
90. *Id.* ¶ 23.
91. *Id.*
92. *Id.* In these very particular circumstances, the arbitrator concluded that an additional pe-

Argentina made a similar argument to that made by Indonesia as the implementing party in *Argentina-Bovine Hides*.[93] Argentina requested that the arbitrator grant forty-six months and fifteen days to implement changes, and stressed that its financial situation had "seriously deteriorated over the past years" due to a drop in "tax revenue brought about by an economic recession in the third quarter of 1998 in the wake of the 1997 'Asian crisis.'"[94] The arbitrator cited the ruling in *Indonesia-Autos*, and stated that, "the need for structural adjustment of the industry or industries in respect of which the WTO-inconsistent measure was promulgated and applied, has generally been regarded, in prior arbitrations under Article 21.3(c) of the DSU, as *not* bearing upon the determination of a 'reasonable period of time.'"[95]

Proceedings have consistently ruled that financial difficulty is not in itself relevant to the determination of the implementing time. Although the implementing parties referred to economic difficulties that required a lengthier period, the arbitrators explicitly stated that structural adjustments should not be relevant to the determination of a reasonable period of time under Article 21.3(c).

2. *Developing Countries*

i. When the implementing party is a developing country and the complaining party is a developed country

Article 21.2 provides that "particular attention should be paid to matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement."[96] Several 21.3 proceedings have noted this requirement and resulted in a longer period of time in some cases.[97] For example, in *Argentina-Bovine Hides*, Argentina emphasized Article 21.2 of the DSU and argued that the arbitrator should take into account its status as a developing country Member.[98] The arbitrator agreed that under Article 21.2 of the DSU and Article 21.3(c), Argentina's status as a developing country was a relevant circumstance.[99] The arbitrator cited the ruling in *Indonesia-Auto*, and agreed that, "under Article 21.2 of the DSU in conjunction with Article 21.3(c),

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riod of six months over and above the six-month period required for the completion of Indonesia's domestic rule-making process constituted a reasonable period of time for implementation of the recommendations and rulings of the DSB.

93. Award, *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather* Arbitration under Article 21.3(c) of the DSU, ¶ 8, WT/DS155/10 (Aug. 13, 2001) [hereinafter *Argentina-Bovine Hides*].

94. *Id.* ¶ 5, 7.

95. *Id.* ¶ 41.

96. DSU, art. 21.2.

97. *See, e.g.*, *Argentina-Bovine Hide*, *supra* note 110.

98. *Argentina-Bovine Hides*, *supra* note 110, ¶ 51.

99. *Id.*

account may appropriately be taken of the circumstance that the WTO Member . . . is a developing country confronted by severe economic and financial problems."[100]

ii. When both the implementing party and the complaining party are developing countries

However, one further difficulty facing arbitrators is the situation in which both the implementing party and the complaining party are developing countries. The language of Article 21.2 is not entirely clear on whether the arbitrator should pay "equally" "particular attention" to the interests of (both implementing and complaining) developing country Members. *Chile-Agricultural Products* involved two developing countries as parties to the dispute, where Chile was the implementing party and Argentina was the complaining party. The arbitration raised the question of how to pay "particular attention" under Article 21.2 when both parties are developing countries.[101] The arbitrator noted that Chile had not suggested that it faced any "additional *specific* obstacles" as a result of its status as a developing country (emphasis in original).[102] In contrast, the arbitrator determined that the "acuteness" of Argentina's daunting financial situation "amplified" its "burden as a developing country complainant."[103] Ultimately, however, the arbitrator, took both parties' interests as developing countries into account respectively, but declared that he was "not swayed towards [granting] either a longer or shorter period of time by the 'particular attention' [he paid] to the interests of developing countries."[104]

iii. When the implementing party is a developed country and the complaining party is a developing country

A logical next step is to ask whether Article 21.2 requires the arbitrator to determine a shorter reasonable period of time for implementation when the implementing party is a developed country. In *U.S.-Gambling Services*, the arbitrator directly addressed the issue of how to approach a case where the implementing party is a developed country and the complaining party is a developed country.[105] Antigua invoked Article 21.2 of the DSU, and argued the "importance of a well-regulated cross-border gambling and betting service industry" to its economic health.[106] It contended that Article 21.2 required the arbitrator to

100. *Id.*

101. *Chile-Agricultural Products*, *supra* note 67, ¶ 30.

102. *Id.* ¶ 56.

103. *Id.*

104. *Id.*

105. Award, *United States-Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, Arbitration under Article 21.3(c) of the DSU, WT/DS285/13 (Aug. 19, 2005) [hereinafter *U.S.-Gambling Services*].

106. *Id.* ¶ 26.

determine a shorter reasonable period of time for U.S. implementation.[107] The U.S., however, argued that Article 21.2 was not relevant to the proceeding because the provision is only relevant where the "*implementing* Member is a developing country" (emphasis in original).[108] The arbitrator disagreed and declared that Article 21.2 does not contain any such limitation.[109] The arbitrator found that the text of Article 21.2 did not "expressly limit its scope of application to developing country Members as *implementing*, rather than as complaining parties to a dispute" (emphasis in original).[110]

iv. Developing country Members who are not parties to a dispute

In *EC-Sugar Subsidies*, the complaining parties, Brazil and Thailand, argued that the arbitrator should pay particular attention to their respective interests as developing WTO Members.[111] However, the EC as the implementing party, contended that Article 21.2 is "also applicable to developing country Members who are not parties to a dispute."[112] The EC argued that a shorter implementation period, combined with the suspension of sugar exportation, as advocated by the complaining parties, could result in an "increase in the world market price of sugar."[113] This, the EC argued, would "adversely affect sugar-importing developing countries."[114] While the arbitrator agreed with the view in *US-Gambling* that the text of Article 21.2 does not limit its scope of application to an implementing developing country Member,[115] he did not directly address the question of whether the provision applies to developing country Members who are not parties to a dispute.[116] As the arbitrator noted, the EC had not "identified such other developing country Members in its submission or at the oral hearing."[117] Accordingly, the arbitrator concluded that he need not decide whether Article 21.2 also applies to "developing country Members that are *not* party to the arbitration proceedings under Article 21.3(c)" (emphasis in original).[118]

As discussed, article 21.2 has been repeatedly examined by arbitrators acting under Article 21.3(c) of the DSU in the determination of the period of time for implementation. However, there are only a small and very limited number of

107. *Id.*
108. *Id.* ¶ 57.
109. *Id.* ¶ 59.
110. *Id.*
111. *EC-Sugar Subsidies*, *supra* note 37, ¶ 47, 56, 98.
112. *Id.* ¶ 98.
113. *Id.*
114. *Id.*
115. *U.S.-Gambling*, *supra* note 105, ¶ 59.
116. *EC-Sugar Subsidies*, *supra* note 37, ¶ 99.
117. *Id.* ¶ 103.
118. *Id.* ¶ 104.

situations in which an arbitrator relied solely on Article 21.2 in granting an additional period of time for implementation.

D. Other Factors

1. Scientific Studies

It is not clear how the reasonable time period would interact with scientific risk assessments. In *EC-Hormones*, the EC argued that the reasonable period of time for implementation should be four years: two years for risk assessment (that is, a scientific study) and two years for "any legislative action which might be necessary in light of the results of the risk assessment."[119] The arbitrator stated that, while scientific studies or consultations with experts may form part of the domestic implementation process, the time required to conduct such studies or consultations should not be included in the reasonable period of time.[120] Similarly, in *Australia-Salmon*, Australia requested a significant period of time for scientific risk assessments.[121] However, the arbitrator held that conducting risk assessments was not relevant to his determination of a reasonable period of time for implementation, and thus, determined that the reasonable period of time for Australia to implement the recommendations and rulings of the DSB was eight months from the date of adoption of the Appellate Body and Panel Reports by the DSB.[122]

2. Other International Obligations

Several arbitrators have also considered other international treaty obligations when making determinations of a reasonable period of time. In *EC-Banana*, the EC requested that the arbitrator determine fifteen months and one week to be a reasonable period of time.[123] In justification of their request, the EC noted that amending the existing EC import regime for bananas, as required by the recommendations and rulings of the DSB, would be a difficult and complex task because it would "have to strike a difficult balance between the co-existing international obligations" under the WTO Agreement and the Lomé Convention.[124] The arbitrator, however, was not persuaded that these issues warranted a longer period of time.[125]

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119. *EC-Hormones*, *supra* note 31, ¶ 5.

120. *Id.* ¶ 39.

121. Award, *Australia - Measures Affecting Importation of Salmon*, Arbitration under Article 21.3(c) of the DSU, ¶ 18, WT/DS18/9 (Feb. 23, 1999) [hereinafter *Australia-Salmon*].

122. *Id.* ¶ 36, 39.

123. *EC-Banana*, *supra* note 22, ¶ 5.

124. *Id.* ¶ 6.

125. *Id.* ¶ 19.

3. "Punitive" Deadline

In some cases, a central question is whether the deadline set by the arbitrator can be a punitive one. In *EC-Chicken Classification*, Brazil and Thailand, as complaining parties, emphasized that since the adoption of the Panel and Appellate Body Reports in the dispute, the EC had failed to take sufficient steps towards implementation.[126] Brazil and Thailand urged that this failure to act should affect the arbitrator's determination of what constituted a reasonable period of time.[127] During oral hearings, the EC acknowledged that it had not yet taken any concrete steps toward implementation of the proposed Regulation.[128] From its submissions, it appeared that the only thing to have occurred were internal discussions within the EC.[129] Consequently, the arbitrator found that mere discussion did not constitute implementation.[130] The arbitrator explained "there must be something more to evidence that a Member is moving toward implementation."[131] Therefore, ultimately the arbitrator agreed with Brazil and Thailand that the EC's "failure to commence implementation of the DSB's recommendations and rulings was a factor that [should be taken] into account in determining the reasonable period of time for implementation."[132]

As the above discussion demonstrates, it is not only difficult for arbitrators to determine a reasonable implementation period, but also the criteria for determining when a reasonable period of time is not fully established. One arbitrator noted that "estimating the duration of the various factors involved in a domestic legislative process is not an exact science."[133] The arbitrator even admitted that it would be impossible to arrive at a "non-speculative" estimate.[134]

Nevertheless, analysis of the arbitral decisions under Article 21.3(c) has important practical implications. While the legal status of WTO interpretations that underlie arbitral decisions remains controversial, and the question of whether we should formally recognize precedent as a source of law in the WTO remains debatable,[135] this author is of the view that a fundamental principle of the administration of justice is that like cases should be decided alike, and thus, previous arbitral rulings should have, to some degree, legal effect beyond the

126. *EC-Chicken* Classification, *supra* note 30, ¶ 22, 66.

127. *Id.*

128. *Id.* ¶ 66.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *U.S.-Offset Act*, *supra* note 45, ¶ 66.

134. *Id.*

135. *See* Raj Bhala, *The Myth About Stare Decisis and International Trade Law (Part One of a Trilogy)*, 14 AM. U. INT'L L. REV. 845-956 (1999); *see also* Raj Bhala, *The Precedent Setters: De Facto Stare Decisis in WTO Adjudication (Part Two of a Trilogy)*, 9 FLA. ST. U. J. TRANSNAT'L L. & POL'Y 1-151 (1999); *see also* Raj Bhala, *The Power of the Past: Towards De Jure Stare Decisis in WTO Adjudication (Part Three of a Trilogy)*, 33 GEO. WASH. INT'L REV. 873 (2001).

dispute in question.

IV.
SHORTER OR LONGER: RETHINKING THE CRITERIA FOR DETERMINING A COMPLIANCE DEADLINE

A. Mandate for the Arbitrator: Not "What" but "When"

In order to determine what criteria an arbitrator should consider in 21.3(c) proceedings, the scope of the arbitrator's jurisdiction must be clarified. As indicated above, it has been the practice of many arbitrators to interpret a reasonable period of time as the shortest period of time possible to effect implementation within the concerned Member's legal system. However, in determining the shortest period possible, arbitrators also face the difficulty of determining the scope of their mandate.[136] Among those who debate this issue, the dominant view is that the arbitrators' mandate relates exclusively to the determination of a reasonable period of time for implementation.[137] That is to say, "it is not within the arbitrators' mandate to suggest ways and means to implement the recommendations and rulings of the DSB."[138] Rather, while it is the responsibility of an arbitrator to examine the relevance and duration of the steps necessary for implementation, the arbitrator does not need to ensure the consistencyof the proposed implementing measure with the recommendations and rulings of the DSB.[139] At least one arbitrator heeded this reasoning by rejecting the complaining parties' request to examine the nature of the implementation proposed by the responding parties and indicating that Article 21.5 procedures (that is, the compliance panel) are more suitable for assessing consistency.[140]

There is, however, ongoing debate as to whether Articles 21.5 and 21.3(c) are mutually exclusive.[141] As argued by one arbitrator, the fact that Article 21.3(c) arbitration focuses on the period of time for implementation does not render the substance of the implementation (that is, the precise means or manner of implementation) immaterial.[142] In line with this argument, the more information an arbitrator has regarding the implementing measure, the more likely the reasonable period selected by the arbitrator will fairly balance the needs of the

136. JEFF WAINCYMER, WTO LITIGATION: PROCEDURAL ASPECTS OF FORMAL DISPUTE SETTLEMENT 654 (2002); *see also EC-Hormones*, ¶ XXIV, XXXVIII.

137. *See generally* WTO Website, Analytical Index, <http://www.wto.org/english/res_e/booksp_e/analytic_index_e/dsu_08_e.htm#article21B3>.

138. *Korea-Alcoholic Beverages*, *supra* note 22, ¶ 45.

139. *See generally Dispute Settlement*, *supra* note 12, at 237-239 (1999); *see e.g., Korea - Alcoholic Beverages, supra* note 22, ¶ 45.

140. *Canada-Pharmaceuticals*, *supra* note 54, ¶ 27.

141. *See generally* WorldTradeLaw.net, http:// www.worldtradelaw.net/dsc/database/rptawards.asp (last visited Feb. 15, 2007).

142. *Chile-Agricultural Products, supra* note 56, ¶ 37.

implementing Member with those of the complaining Member.[143] After all, it seems logical that a consideration of potential methods for implementation is necessary for an accurate determination of how much time is reasonable. For example, if there were five potential methods for implementation, arguably it would not be a wrong textual reading of Article 21.3(c) to view an arbitrator as being entitled to consider the compatibility of each, as any method which is compatible could give rise to a reasonable period of time.[144] Thus, it would seem difficult to determine what a reasonable period of implementation should be without considering the various options for implementation.

This debate also raises the question of whether the arbitrators must consider the shortest period of time within which the measure can be withdrawn or modified, or if they should instead consider the shortest period of time for implementation according to the means chosen. This paper agrees with the view that an arbitrator acting under Article 21.3(c) does not have the power to determine the proper scope and content of legislation necessary for implementation. Instead, the proper scope and content of anticipated legislation should be, in principle, left to the implementing WTO Member to determine.[145] Indeed, from a policy perspective, it is essential to make a distinction between "the duration of each necessary step leading to implementation" and "the consistency of the proposed implementing measures." In other words, the implementing Member should determine the proper scope and content of anticipated legislation and only after such a determination is made, should an arbitrator consider whether the proposed period of time is the shortest period possible for the anticipated means of implementation. Thus, the proper concern of an arbitrator under Article 21.3(c) should be when,but not what.[146]

B. Special and Differential Treatment in the Implementation Period: Who Deserves Particular Attention?

Another difficult question regarding an arbitrator's task concerns the link

143. *Dispute Settlement*, *supra* note 12, at 237.

144. JEFF WAINCYMER, WTO LITIGATION: PROCEDURAL ASPECTS OF FORMAL DISPUTE SETTLEMENT 658 (2002).

145. *See* Award, *United States-Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, Arbitration under 21.3(c) of the DSU, ¶ 30, WT/DS/184/13 (Feb. 19, 2002). In this award, the arbitrator stated that "I do not believe that an arbitrator acting under Article 21.3(c) of the DSU is vested with jurisdiction to make any determination of the proper scope and content of implementing legislation, and hence do not propose to deal with it. The degree of complexity of the contemplated implementing legislation may be relevant for the arbitrator, to the extent that such complexity bears upon the length of time that may reasonably be allocated to the enactment of such legislation. But the proper scope and content of anticipated legislation are, in principle, left to the implementing WTO Member to determine" [hereinafter *U.S.-Hot-Rolled Steel from Japan*].

146. *Canada-Pharmaceuticals*, *supra* note 54, ¶ 41. If there is any question about whether "what" a Member chooses as a means of implementation is sufficient to comply with the recommendations and rulings of the DSB, as opposed to "when" that Member proposes to do it, then Article 21.5 applies, not Article 21.3.

between Articles 21.2 and 21.3(c). Article 21.2, which requires that particular attention be paid to matters affecting the interests of developing country Members, is a general provision that does not provide specific guidance.[147] As discussed earlier, it is not clear how the reasonable time period interacts with the special and differential treatment for developing countries. Previous arbitrations have raised the question of whether the phrase "developing country Members" refers exclusively to the implementing Member, or whether it also applies to developing country Members other than the implementing Member (for example, the complaining Member, third parties to the dispute, or any developing country Member of the WTO).[148] This question, however, remains unanswered.

The arbitrators in both *U.S.-Gambling* and *EC-Sugar Subsidies* left the precise nature of the relationship between Article 21.2 and Article 21.3(c) undetermined.[149] While they recognized that "Article 21.2 does not expressly limit its scope of application to developing country Members as implementing, rather than as complaining, parties to a dispute," both arbitrators concluded that it was not necessary for them to decide this question, given the lack of sufficient evidence demonstrating how the interests of the developing countries in the case would be affected.[150] It remains to be seen how future arbitrators will deal with this issue.

The core issue is whether Article 21.2 is relevant to the determination of a reasonable period of time for implementation only when the implementing Member is a developing country. As noted above, in a literal sense, there is nothing in the plain meaning of the DSU that limits the scope of Article 21.2 to an implementing Member. However, economic harm suffered by foreign exporters does not, and cannot, impact a determination of the shortest period possible for implementation.[151] The particular circumstances, within the meaning of Article 21.3(c), can only be of such nature as will influence the evolution and unfolding of the implementation process itself. Factors external to the legislative process are of no relevance to the determination of the reasonable period of time for implementation. Otherwise, the phrase "developing country Members" in Article 21.2 would apply to any developing country Member of the WTO, which would render the provision overly broad. Thus, although Article 21.2 makes no explicit distinction between cases where a developing country Member is a complaining party, and those where a developing country Member is an implementing party, its scope should be limited to those disputes in which the implementing party is a developing country Member.

147. DSU, art. 21.2.

148. *See* III-C-2 of this paper.

149. *EC-Sugar Subidies*, *supra* note 49, ¶ 23-24; *U.S.-Gambling*, *supra* note 105.

150. *EC-Sugar Subidies*, *supra* note 49, ¶ 23-24. *U.S.-Gambling*, *supra* note 105, ¶ 63.

151. *Indonesia-Autos*, *supra* note 25, ¶ 23.

C. *Political and Social Complexity: Totally Irrelevant?*

As demonstrated in the previous section, different views have been expressed in past 21.3(c) arbitrations as to whether factors such as political instability, adjustment costs, and social unrest, should be relevant to the determination of a reasonable period of time for implementation. On the one hand, it is clear that a complex process may justify a lengthier time period. But, on the other hand, equity does not suggest that violating Members with more complex offending provisions deserve greater leeway than those with more simplistic offending measures. Thus, the relevance of political and social complexity is debatable.

This paper agrees with the majority view that the mere fact that the implementation of recommendations and rulings by the DSB necessitates complex domestic procedures should not, in and of itself, affect the determination of a reasonable period of time for implementation.[152] Simple contentiousness should not be sufficient consideration for a longer period of time under Article 21.3(c), as everyimplementation measure could be considered complex. In other words, complexity does not constitute a relevant particular circumstance; rather, complexity is a standard aspect of every implementation. Social and political tension is inevitable whenever a government proposes to end its protection or carry out a structural reform of a domestic industry.[153] As aptly asserted by some Members in previous arbitrations, all WTO disputes are, to some extent, contentious domestically; if they were not, there would be no need for WTO Members to seek recourse in dispute settlement.[154] As argued in *Canada-Pharmaceuticals, Japan-Alcohol, U.S.-Copyright* and *Chile-Agricultural Products*, taking such considerations into account would threaten the integrity of the WTO, as well as have the paradoxical effect of maintaining the most protectionist measures for the longest period of time.[155]

V.
CONCLUDING REMARKS

Over the decades since its inception, the dispute settlement system under GATT/WTO[156] has undergone a process of legalization, judicialization and adjudication. During the Uruguay Round negotiations, promoting the resolution of trade problems through multilaterally agreed upon procedures and, at the same

152. *See* III-B of this paper.

153. *Canada-Pharmaceuticals*, *supra* note 54, ¶ 60.

154. *Id.*

155. *Japan- Alcoholic Beverages*, *supra note* 23, ¶ XIII. If arbitrators considered such issues as domestic contentiousness, this would have the ironic, if not contradictory, result of keeping in place the most protectionist measures for the longest period of time, after they have been declared inconsistent with a Member's WTO obligations.

156. General Agreement on Tariffs and Trade, opened for signature Oct. 30, 1947, 61 Stat. A5, 55 U.N.T.S. 187 [entered into force Jan. 1 1948] [hereinafter GATT].

time, ensuring legal certainty and predictability in the operation of international trade, were the Members major concerns in supporting a more rule-based trading system. Certainty requires that panel decisions be implemented before they are too late to matter. Having said that, the arbitral decisions under Articles 21.3(c) of the DSU raise various legal questions that may threaten the certainty and predictability of the WTO regime.[157] This paper explores the potentially relevant factors for determining implementation periods, and performs a critical analysis of the difficulties arbitrators face when determining reasonable implementation periods. This paper also seeks to clarify what criteria should be relevant to the determination of a compliance deadline.

In addition, this paper highlights factors that arbitrators may find determinative in 21.3(c) proceedings. With regard to domestic constitutional issues surrounding implementation, most arbitral decisions take the position that the amendment of an act by a Parliament or Congress is generally more time-consuming than the amendment of an act by the Executive. With regard to social and political complexity, this paper concludes that simple contentiousness is not a sufficient consideration under Article 21.3(c) to justify a longer period of time. With regard to economic situations, it agrees with the view that economic harm suffered by foreign exporters should not have an impact on what is the shortest period possible within the legal system of the Member to implement the recommendations and rulings of the DSB. As for the mandate of the arbitrator, this paper concludes that it is up to the implementing Member to determine the proper scope and content of anticipated legislation, and that only after the Member has determined how it will implement the DSB's recommendations and rulings, should an arbitrator consider whether the proposed reasonable period of time is the shortest period possible for the anticipated means of implementation within the legal system of that Member. The proper concern of an arbitrator under Article 21.3(c) is "when,"not "what."

This paper is of the view that a substantial improvement of Article 21.3(c) of the DSU, which would bring additional legal certainty and predictability to the dispute settlement system, is possible on these points. From a real world perspective, the ambiguous language of 21.3(c) has led to confusing decisions and has revealed unresolved technical issues. Indeed, there is a need to provide more detailed rules to ensure that a compliance deadline can be established that is fair to both sides. While the prevailing view of Members is that the DSU has functioned generally well to date, participants representing a large part of the WTO membership have submitted a large number of specific proposals for clarifica-

157. Generally speaking, the WTO is a three-tiered organization headed by the Ministerial Conference, which consists of representative WTO members. The WTO Agreement provides that all decision-making powers shall be in this conference, which meets every two years. The Ministerial Conference functions as the Dispute Settlement Body (DSB) and the Trade Policy Review Body. Therefore, the membership of the DSB is the same as that of the General Council, but it has a separate chairman, a separate staff, separate rules of procedure, and a separate document series.

tions and improvements.[158] Since January 2003, negotiations on improvements and clarifications to the DSU (for example, possible amendments to provisions concerning panel procedures, appellate review procedures, surveillance of implementation) have focused on specific draft legal texts proposed by Members. However, none of the negotiating papers provide a comprehensive review of Article 21.3(c) of the DSU.[159]

Indeed, there is a need to clarify the provision so as to expressly limit the mandate of the arbitrator, the application of special and differential ("S & D") treatment, and other technical issues. To be more specific, Articles 21.2, 21.5, 21.3(c), which are closely interconnected, require further legal refinement or need further substantive development. Members should make an overall assessment of the implications of the possible changes to these three provisions, and better make clear that Articles 21.5 and 21.3(c) are mutually exclusive. In addition, although S & D treatment for developing country Members has already been extensively discussed by the Special Session of the DSU negotiation,[160] the interpretation of Article 21.2 requires urgent attention and action. The scope of the provision must be limited to those disputes in which the implementing party is a developing country Member.

Prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members. However, when prompt compliance is impracticable (or undesirable), Article 21.3 proceedings become a tug of war between the complaining party and the implementing party, and it becomes the arbitrator's job to strike a balance between the competing arguments of "the longer the better" and "the shorter the better." Thus, the choice of criteria for determining a compliance deadline has ongoing and important practical implications for the effectiveness of dispute resolution.

158. New negotiations on the Dispute Settlement Understanding, the WTO Website at http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm#negotiations.

159. SPECIAL SESSION OF THE DISPUTE SETTLEMENT BODY, REPORT BY THE CHAIRMAN, AMBASSADOR PÉTER BALÁS, THE TRADE NEGOTIATIONS COMMITTEE, TN/DS/9 (JUNE 6, 2003).

160. New negotiations on the Dispute Settlement Understanding, the WTO Website at http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm#negotiations.

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From Whipped Cream to Multibillion Euro Financial Collapse: The European Regulation on Transnational Insolvency in Action

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From Whipped Cream to Multibillion Euro Financial Collapse: The European Regulation on Transnational Insolvency in Action

By
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"EIGHT BILLION, 11 BILLION, 14 BILLION—IT'S ALL THE SAME."†

I. INTRODUCTION

This Article explores a particular aspect of the biggest bankruptcy in history involving the Italian corporation Parmalat S.p.A. ("Parmalat"). This multi-

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† Calisto Tanzi, patron of the Parmalat Group that collapsed in 2003, to Parmalat's CFO, as reported by Peter Gumbel, *How It All Went So Sour*, TIME INTERNATIONAL, Nov. 29, 2004.

national enterprise was involved in multibillion Euro transactions that included certain financial operations in Ireland, through a small subsidiary called Eurofood IFSC Ltd. ("Eurofood"). The transnational aspects of the *Eurofood* litigation and, more generally, the legal implications of multinational enterprises' default jurisdiction represent the objects of the present piece.

In commencing, it is useful to recall the history of Parmalat as well as provide a summary of the bankruptcy proceedings. In 1961, a 22-year-old student named Calisto Tanzi founded Parmalat and created a pasteurization plant, which was subsequently passed on to his sons. The plate bearing the original name, *Calisto Tanzi & Figli*, is still on the wall at the entrance to the company headquarters in Collecchio, near Parma. From its humble beginnings in pasteurization, the company soon expanded to the global production and trade of milk, the acquisition of TV channels and, finally, emerged into the industry of financial services. After two decades of aggressive acquisitions, especially in Latin America, Parmalat attained the status of a multinational giant in the world economy of milk, food and financial services. At the top of the group pyramid sat Coloniale S.p.A., the personal holding company owned by the Tanzi family, which held the majority of Parmalat Finanziaria S.p.A. ("Parmalat Finanziaria"), which in turn controlled the main operative entity, Parmalat. Parmalat's financial status in 2002 is described below:

> Parmalat's 2002 last quarterly report showed Euros 3.35 billion in cash and equivalents; Parmalat Group's assets amounted to Euros 10 billion and its liabilities Euros 7.17 billion. Amongst these liabilities was Euros 1.5 billion in bond debt, launched through 31 different issues.[1]

In 2003, the Parmalat CFO announced the issuance of bonds in the amount of 500 million Euros. Suddenly, newspapers and rating agencies began to publish suspicious statements about the Parmalat group's amount of debt, its complex structure, and its lack of disclosure. Calisto Tanzi, who did not like the idea of increasing the group's debts, replaced the financial board. The new CFO reassured the market that he would use the group's cash in order to pay its debts. Nevertheless, the summer newspapers began to rail against an alleged new bond that had suddenly been issued by Parmalat for an unknown amount. Journalists and analysts suspected that the group would not have exploited the cash for the purpose of paying debts. The CONSOB, the equivalent of the U.S. Securities Exchange Commission (SEC) in Italy, requested more information, but Parmalat's auditors declared that they could not be more precise about the existence of a mysterious "Epicurum Fund," in which Parmalat was said to have an interest.[2]

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1. Guido A. Ferrarini & Paolo Giudici, *Financial Scandals and the Role of Private Enforcement: The* Parmalat *Case*, *in* AFTER ENRON: IMPROVING CORPORATE LAW AND MODERNISING SECURITIES REGULATION IN EUROPE AND THE US 159-213 (John Armour & Joseph A. McCahery eds., 2006), at 165.

2. Precisely, auditors "could not give a 'fairness opinion' of the true value of Parmalat's open ended mutual fund Epicurum, recorded as cash equivalent by Parmalat Finanziaria for a book value of Euros 497 million." Ferrarini & Giudici, *supra* note 1, at 167. On the problematic nature of the

By the end of Fall 2003, the controversy had escalated. On December 8, 2003, Parmalat announced that Epicurum was not able to liquidate Parmalat's interest and that, accordingly, Parmalat could not pay its debt on another bond. One day later, Calisto Tanzi publicly admitted that the group's financial statements were false.

As a result, several investigations were launched. The CONSOB demanded that Parmalat's auditors certify whether Eurolat, a Cayman Island-based subsidiary, held a significant bank account with the Bank of America ("BofA"). Evidence of this account's existence appeared in a document produced by Parmalat to confirm the group's solvency. The certified answer, rendered on December 19, was particularly astonishing: 3.95 billion Euros of the group's cash—which was presumably being held by BofA in the bank account of Bonlat, a company owned by Parmalat and incorporated in the Cayman Islands—did not exist and the aforementioned document had been falsified.[3] Subsequently, Parmalat's share price collapsed and, one by one, all of the group's companies fell bankrupt. The Italian government reacted by electing an extraordinary commissioner, Enrico Bondi, to oversee the group's restructuring.[4] It was "one of the largest and most brazen corporate financial frauds in history."[5]

Significantly, the SEC noted that "[i]n order to hide losses, Parmalat had used various wholly-owned entities."[6] Economic experts and scholars pointed to the role of these entities as one of the "various tactics [used by Parmalat] to understate its debt."[7] However, while the creditors' claims received much attention, scholars nevertheless ignored the potential litigation that the questionable

"true and fair view" of the corporate situation after the Parmalat scandal, see Andrea Melis, *Critical Issues on the Enforcement of the 'True and Fair View' Accounting Principle: Learning From Parmalat*, 2 CORP. OWNERSHIP & CONTROL 108 (2005).

3. According to Eric Sylvers, *A Parmalat Trial, But No Change to Law*, INT'L HERALD TRIBUNE, Sept. 29, 2005, "[t]he house of cards began to collapse in December 2003, when Bank of America revealed that a $4.8 billion account, worth about 3.9 billion at the time, that Parmalat claimed it had with the bank did not exist. Shortly afterward, Parmalat revealed that its net debt was more than 14 billion, eight times higher than it had previously stated."

4. On Dec. 23, 2003, the Italian government enacted a decree in order to subject Parmalat to insolvency proceedings. *See* Decree-Law no. 347, Dec. 23, 2003, (Gazz. Uff., Dec. 24, 2003, No. 298) ("Urgent measures for the industrial restructuring of large enterprises in insolvency" ["Misure urgenti per la ristrutturazione industriale di grandi imprese in stato di insolvenza"]).

5. Securities and Exchange Commission v. Parmalat Finanziaria S.p.A., Case No. 03 CV 10266, 2003 SEC LEXIS 3078 (SEC 2003), at *1; Securities and Exchange Commission v. Parmalat Finanziaria, 2004 SEC LEXIS 1631 (SEC 2004), at *1 (considering that Parmalat "engaged in one of the largest financial frauds in history and defrauded U.S. institutional investors when it sold them more than $ 1 billion in debt securities in a series of private placements between 1997 and 2002.").

6. In addition, "amongst [these wholly-owned entities] the most significant was Bonlat, the Cayman Island waste basket of the Group in its final five years, and the holder of the Bank of America's false account. Uncollectible receivables were transferred from the operating companies to these nominee entities, where their real value was hidden. Fictitious trades and financial transactions were organized to offset losses of operating subsidiaries and to inflate assets and incomes. Securitization schemes based on false trade receivables and duplicate invoices were recurrently used to finance the group." Ferrarini & Giudici, *supra* note 1, at 169.

7. SEC v. Parmalat Finanziaria, 2004 SEC LEXIS 1631, at *2.

use of these entities triggered from a transnational standpoint.

This Article addresses this issue through its focus on the *Eurofood* litigation.[8] First, it examines the dispute between the Italian and Irish courts over the regulatory domain of Eurofood, motivated by the interest in acquiring Eurofood's assets, and also as a matter of prestige in big bankruptcy adjudications (Part 2). Moreover, this adjudication process is not without significant transnational implications. A European regulatory framework, enacted in 2000, attempts to allot jurisdictional claims between the national courts. Since the *Eurofood* litigation occurred under this framework, it is useful to describe it in depth (Part 3). By itself, the allocation of jurisdiction in a supranational context impacts the global economy; thus the purposes of the European framework should be correctly respected in order to prevent market distortions. This concept directly applies to the *Eurofood* litigation (Part 4). Finally, this Article will provide some critiques about the application of the European framework to *Eurofood* (Part 5) and conclusions about the broader problem of transnational insolvency regulation (Part 6).

II.
THE EUROFOOD CONTROVERSY

As mentioned above, Parmalat's wholly owned entities played, and continue to play, an important role in the scandal. In fact, when Parmalat collapsed in December 2003, nearly all of its subsidiaries, now deprived of any centralized direction and financial support, collapsed as well—although some still owned money or facilities. On the one hand, these entities represented an essential piece of the efforts by the new commissioner in Collecchio to depict a limpid schema regarding the group's assets, in order to assess the new group structure and, eventually, repay creditors and investors. On the other hand, the entities that Parmalat had used to conceal its debts, before being liquidated, required a proper investigation in order to reveal any potential criminal or civil liabilities on the part of managers and directors.

Incorporated in 1997, Eurofood represents one of these entities, with Parmalat as its sole stockholder. On January 27, 2004, its largest creditor, BofA, filed a petition to the High Court of Dublin and was granted the election of a provisional liquidator and the initiation of a compulsory winding-up (liquidation) procedure.[9] Yet, on February 9, the Italian government appointed Mr. Bondi as the extraordinary commissioner of Eurofood and charged him with the task of restructuring of the company.[10] Ten days later, the Tribunal of Parma de-

8. *See* Matteo M. Winkler, *Le Procedure Concorsuali Relative ad Imprese Multinazionali: la Corte di Giustizia si Pronuncia sul Caso* Eurofood [The Insolvency Proceedings Concerning Multinational Enterprises: The Court of Justice Decides Eurofood], INT'L LIS, 2007, at 15.

9. On the Irish compulsory winding up procedure, see Arthur Cox, *Ireland, in* EUROPEAN CROSS BORDER INSOLVENCY (Jennifer Marshall ed., 2d ed., 2005), at 14-5.

10. Ministero delle Attività Produttive [Decree of the Ministry of the Production Activities],

clared Eurofood's insolvency.[11] BofA and the Irish liquidator challenged the government's preemptive action before the Regional Administrative Tribunal of Lazio. On July 16, 2004, the tribunal decided that, having been seized first, the Italian courts had jurisdiction over the insolvency proceedings involving Eurofood.[12] According to the administrative judges, the appointment of a provisional liquidator was insufficient to initiate a regular insolvency procedure in Ireland. The Irish courts disagreed. On March 23, 2004, the High Court of Dublin confirmed the decision to liquidate the company,[13] and on July 27, the Irish Supreme Court rejected the opinion of the Italian courts and appealed to the European Court of Justice (ECJ) for a preliminary ruling as to which country had jurisdiction over the Eurofood insolvency.[14] The ECJ delivered a verdict on *Eurofood* on May 2, 2006, which will be discussed in greater depth later in this Article.[15]

Before discussing the outcome of the case, it is useful to note that the status of Eurofood as a Parmalat subsidiary in Ireland is the cause of these parallel litigations. As the Tribunal of Parma pointed out, Eurofood's incorporation was intended to "ease the cash-flow inside the group,"[16] and therefore Eurofood was "simply a financial articulation [of Parmalat]."[17] Moreover, Eurofood did not have an operative headquarters in Dublin; its seat was located in a financial center and consisted of only a mailbox.[18] Additionally, all of Eurofood's obligations were guaranteed by Parmalat, and whatever profits resulted from the few operations it carried out were transferred to other companies controlled by Parmalat.[19] Finally, any decisions concerning Eurofood were made in Collecchio by its managers, who presumably also sat as managers of the parent company,[20] and

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Admission of Eurofood IFSC Ltd. into the procedure of extraordinary administration pursuant to the Decree-Law no. 347, Dec. 23, 2003, (Feb. 9, 2004) (Gazz. Uff., Feb. 13, 2004, No. 36).

11. Trib. di Parma [Court of Parma], *In re* Eurofood IFSC Ltd., 20 Feb. 2004, *Foro It. I*, 1567.

12. TAR del Lazio [Regional Administrative Court of Lazio], 16 July 2004, n. 6998, *Foro It. III*, 615.

13. *In re* Eurofood IFSC Ltd., [2004] IESC 607 (H. Ct., 23rd, March, 2004) (Ir.), http://www.bailii.org/ie/cases/IEHC/2004/607.html.

14. *In re* Eurofood IFSC Ltd., [2005] 1 ILRM 161 (S.C.) (Ir.), http://www.bailii.org/ie/cases/IESC/2004/45.html.

15. Case C-341/04, Bondi v. Bank of Am. (Eurofood IFSC Ltd.), 2006 E.C.R. I-3813.

16. Trib. di Parma, *supra* note 11, at 1577.

17. *Id.* ("[Eurofood] può considerarsi semplice articolazione finanziaria [di Parmalat]").

18. Case C-341/04, *supra* note 15, ¶ 17.

19. In particular, "[t]he Company engaged in three large financial transactions which were described as the Brazilian, Venezuelan and Swap transactions respectively. These were as follows: a) on 29th September 1998 the Company issued notes by way of private placement in an aggregate amount of US$80,000,000 (to provide collateral for a loan by Bank of America to Venezuelan companies in the Parmalat group); b) on 29th September 1998 the Company issued notes by way of private placement in an aggregate amount of US$100,000,000 (to fund a loan by the Company to Brazilian companies in the Parmalat group); c) there was a "Swap" agreement with Bank of America dated 10th August 2001. The liabilities of the Company under the first two transactions were guaranteed by Parmalat." *In re* Eurofood IFSC Ltd., [2005] 1 ILRM 161, *supra* note 14.

20. *See* Trib. di Parma, *supra* note 11, at 1574.

the firm had no employees in Ireland.[21] If one cannot conclude from these facts that Eurofood was a "shell company," then certainly Eurofood's status as a company does not signify very much.

Eurofood was apparently only a means for realizing financial transactions in Ireland to serve the interest of the group, by taking advantage of some fiscal benefits granted by Irish law. One must wonder why the courts of different states, governments and a creditor like BofA were so interested in apportioning the assets of such an empty vessel. In the absence of significant information, it is hard to answer this question. Instead, one could only compare two different readings of this *haute finance* operation, and begin by noting that each country's courts strove to adjudicate the case for different reasons. While the Italian courts were concerned with Eurofood's restructuring, Irish creditors like BofA, turned to the question of liquidation. Which side ultimately prevailed was, in turn, a function of the complex European regulatory framework within which this case occurred.

III.
THE EUROPEAN REGULATION ON TRANSNATIONAL INSOLVENCY

A. The Problem of Transnational Insolvency

Determining the most competent court for the adjudication of a transnational insolvency case is an old problem. In this regard, scholars and practitioners posit four different theories. Under an approach called "universalism," only one judge would be called to rule on the bankruptcy of a debtor holding assets or doing business in different countries. Accordingly, a universal forum could competently adjudicate all claims on that debtor's assets.[22] A second, and very different approach, is called "territorialism." The territorial theory, indeed the most traditional and practiced one, recommends several different proceedings

21. *Id.* at 1578.

22. On this theory, see John Lowell, *Conflict of Laws as Applied to Assignments of Creditors*, 1 HARV. L. REV. 259, 264 (1888), according to which

> [i]t is obvious that, in the present state of commerce and of communication, it would be better in nine cases out of ten that all settlements of insolvent debtors with their creditors should be made in a single proceeding, and generally at a single place; better for the creditors, who would thus share alike, and better for the debtor, because all his creditors would be equally bound by his discharge.

Therefore, according to Jay Lawrence Westbrook, *Theory and Pragmatism In Global Insolvencies: Choice of Law and Choice of Forum*, 65 AM. BANKR. L. J. 457, 464-466 (1991), the adoption of a universalist approach "will invariably change the outcomes for some or all claimants" and that "[u]niversalism internationally would provide the same benefit of maximization of asset values for creditors and other parties across the range of cases." *See also* Lucian Bebchuck & Andrew T. Guzman, *An Economic Analysis of Transnational Bankruptcies*, 42 J. L. & ECON. 775 (1995); Andrew T. Guzman, *In Defense of Universalism in Cross-Border Insolvencies*, 98 MICH. L. REV. 2177 (2000).

among the various countries in which the debtor maintains its assets. Necessarily, there would be a number of courts involved, which would have the authority to adjudicate parallel bankrupcty proceedings, with jurisdiction limited in each case to the assets present in that particular country.[23] Under a third approach, called "modified universalism," the court principally responsible for the debtor's insolvency is assisted by foreign courts in "ancillary proceedings," whose jurisdiction does not extend beyond the debtor's establishment and the territorial boundaries of the respective countries.[24] Finally, a fourth approach, known as "cooperative territorialism," suggests strict cooperation between equal courts, without any priority-standing or ancillary link between their initial competence settings.

Although different in some senses, all four theories aim to balance the same interests: domestic adjudication of foreign assets, efficiency of the bankruptcy proceedings, and protection of local investors and markets. Yet universalism and territorialism alone, in their pure forms, fail to capture the complexities of transnational insolvency characterized by these interests. On the one hand, both universal and territorial approaches require a strong legal framework characterized by strict cooperation between courts. The hypothetical universal court, in fact, must be determined carefully at the international level, for its jurisdiction needs to be established under a treaty signed by all countries that might potentially host major bankruptcy cases. In addition, the aforementioned treaty should establish a system of priority among courts, such that once a bankruptcy proceeding is initiated, all other courts must refrain from initiating parallel proceedings on the same matter.[25] Such a treaty does not exist yet, due to the problem of isolating the relevant criteria for determining the competent court and establishing a deferential setting. Significantly, all attempts to foster such a setting have failed so far.[26] On the other hand, a territorialism regime does not require that

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23. In practice,

> [g]enerally, the courts of each country administer the insolvent firm's assets located within its borders according to its own laws without any regard to the firm's assets located elsewhere. This approach to transnational bankruptcies has come to be known as the "territorial approach," or, more derisively, as the "grab rule."

Robert K. Rasmussen, *A New Approach to Transnational Insolvencies*, 19 MICH. J. INT'L L. 1, 16 (1997).

24. On this "intermediate position," see Albéric Rolin, *Des conflits de lois en matière de faillite [Bankruptcy-related choice-of-law]*, 14 RECUEIL DES COURS 25, 382-386 (IV-1926).

25. For instance, for a long time Luxembourg courts have acknowledged automatic enforcement to foreign decisions concerning the opening of bankruptcy proceedings. In *Finoper*, the Luxembourg *Tribunal d'Arrondissement* rejected a petition for the enforcement of the decision rendered by the Tribunal of Rome and declared the bankruptcy of an Italian company. The Tribunal argued that an appropriate decision was not necessary, since the recognition and enforcement is automatic. *In re* Finoper S.p.A., Judgm. Comm. II no. 1190/04 (Nov. 12, 2004) (Lux.).

26. All the treaties proposed at the international level had been abandoned because of lack of ratifications. The first treaty, called the Model Treaty on Bankruptcy, had been negotiated at the Hague Conference in 1925. It provided for a universal jurisdiction of the courts of the state "in which the debtor has his principal industrial or commercial establishment [or] his domicile[, or] where the statutory registered seat is located provided that it be neither fraudulent nor fictitious."

the initiated proceedings be strongly coordinated. It calls, as a matter of fact, on a "grand international free-for-all, with each country claiming plenary power [. . .] and pay[s] no attention to to what other countries may say[. . .] and no attention to whatever foreign interests may be involved . . . ."[27]

The difficulties arising from the application of these theories are rooted in the current international trade system. First, states differ as to their bankruptcy procedures, especially with regard to the nature of the bankruptcy itself, the remedies available to debtors and creditors, and the priorities of creditors over the debtor's assets.[28] Second, the differences among the various legal regimes generate competition between courts, which makes the prospect of an international treaty very difficult.[29] Finally, the present legal framework, or lack thereof, undermines the ultimate aim of bankruptcy proceedings, which is to efficiently allocate the social costs of market failures among creditors, while granting them equal treatment.[30] Efficiency and equality may scarcely be possible under a jurisdictional system with multiple venues, little cooperation and

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Model Treaty on Bankruptcy § 2, 1925, adopted by the 5th Conference on Private International Law, *reprinted in* 93 U. PENN. L. REV. 94 (1944). Another treaty, negotiated in the European area, attempted to establish a universal jurisdiction based on the "place where the debtor normally administers his main interests." *See* European Convention on Certain Aspects of Bankruptcy art. 4, June 6, 1990, Europ. T.S. No. 136; LYNN M. LOPUCKI, COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS 183-205 (2005); Muir Hunter, *The Draft EEC Bankruptcy Convention: A Further Examination*, 25 INT'L & COMP. L. QUART. 310, 315 (1976).

27. *See* Donald T. Trautman, Jay Lawrence Westbrook & Emmanuel Gaillard, *Four Models for International Bankruptcy*, 41 AM. J. COMP. L. 573, 574-75 (1993).

28. Significantly, "a . . . crucial aspect of any bankruptcy law is determining the relative priority of claimants to the debtor's assets. Countries have a wide array of interests that they prefer." Rasmussen, *supra* note 23, at 13-14. Indeed, "[t]he reality is that each national insolvency regime has a system of priorities." Jay Lawrence Westbrook, *Universal Priorities*, 33 TEX. INT'L L. J. 27, 30 (1998).

29. Actually, "[d]rafting of a convention acceptable to all, or most countries of the world, if not impossible, is apparently a very difficult undertaking." Kurt H. Nadelmann, *Bankruptcy Treaties*, 93 U. PENN. L. REV. 58, 86 (1944).

30. From this standpoint, "[b]ankruptcy laws are intended . . . to give to all creditors of equal rank an equal share in the debtor's property." Lowell, *supra* note 22, at 259. Moreover,

> bankruptcy proceedings aim primarily to the protection of creditors' interests. They protect the latter against their own egoism and for this purpose, domestic legislations provide the constitution of a creditors' mass, governed by the law of equality; they also provide for the suspension of all individual claims against the debtor's assets. At the same time, bankruptcy proceedings protect creditors against debtor's attempts to detour his positive assets.
>
> [la faillite tend premièrement à la protection des intérêts des créanciers. Elle les protège contre leur propre égoïsme et dans ce but les législations prévoient la constitution de la masse des créanciers, régie par la loi de l'égalité; elles prévoient aussi la suspension des poursuites individuelles contre les biens du débiteur. La faillite protège également les créanciers contre les agissements du débiteur tendant à détourner son actif.]

J.A. Pastor Ridruejo, *La faillite en droit international privé [Bankruptcy in Private International Law]*, 133 RECUEIL DES COURS 135, 158-59 (II-1971). *See also* Paul Volken, *Harmonisation du droit international privé de la faillite [The Harmonization of Private International Law in Bankruptcy Matters]*, 230 RECUEIL DES COURS 343, 376-77 (V-1991).

great competition at the transnational level.[31] Accordingly, a more efficient international trade system demands that there be a far-reaching international framework of cooperation between courts. To date, an international framework covering key aspects of transnational insolvency exists only on a very limited basis.

B. A Focus on the European Regulation

The earliest example of international regulation addressing the issue of transnational insolvency can be found in the UNCITRAL Model Law ("Model Law"), elaborated and enacted in 1997.[32] While the Model Law has no direct impact on national provisions unless enforced through an appropriate legal channel, a more effective instrument exists at the European level. This is the EC Regulation 1346/2000 ("EC Regulation"),[33] the first regional legal framework

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31. This conclusion applies to both universalism and territorialism. From the first theory's standpoint, universalism is more fair as to the global treatment of creditors. In fact, "[a] universalist system would be far more fair, and produce more equality of distribution among creditors. Because equality of distribution is a central principle of default management in every country, universalism would serve a global notion of fairness." *See* Westbrook, *supra* note 22, at 466. On the other hand, territorialism generally challenges creditors' equality. *See* Ridruejo, *supra* note 30, at 159 (under a territorial approach, "creditors' equality is seriously undermined" ["[l]'égalité des créanciers est ainsi sérieusement compromise."]); Trautman, Westbrook & Gaillard, *supra* note 27, at 575. However, the technical realization of universalism does depend on the individual states' procedural settings and tools, thus the intervention of the public powers are inevitably territorial. For this criticism, see Volken, *supra* note 30, at 381. Finally, territorialism tends to be exploited as means for enforcing the States' policies, and this explains why "territorialism is the dominant approach to transnational corporate bankruptcy as each country's universalist ambitions are halted at its own borders." Sefa M. Franken, *Three Principles of Transnational Corporate Bankruptcy Law: A Review*, 11 EUR. L. J. 232, 235 (2005). *Cf.* Horatia Muir Watt, *Aspects économique du droit international privé (Réflexions sur l'impact de la globalisation économique sur les fondements des conflits de lois et de juridictions) [Economic Aspects of Private International Law]*, 307 RECUEIL DES COURS 25, 165-72 (2004), and Bebchuck & Guzman, *supra* note 22, at 395.

32. UNCITRAL Model Law on Cross-Border Insolvency, May 30, 1997, 36 INT'L LEGAL MATERIALS 1386. As comments, see K. Anderson, *Testing the Model Soft Law Approach to International Harmonisation: A Case-Study Examining the UNCITRAL Model Law Cross-Border Insolvency*, 23 AUSTRALIAN Y.B. INT'L L. 1 (2004); S. Isham, *UNCITRAL's Model Law on Cross-Border Insolvency: A Workable Protection for Transnational Investment at Law*, 26 BR. J. INT'L L. 1177 (2001); A.J. Berends, *The UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview*, 6 TUL. J. INT'L & COMP. L. 309 (1998); Jenny Clift, *The UNCITRAL Model Law on Cross-border Insolvency – A Legislative Framework to Facilitate Coordination and Cooperation in Cross-border Insolvency*, 12 TUL. J. INT'L & COMP. L. 307, 309 (2004); C. Esplugues, *The UNCITRAL Model Law of 1997 on Cross Border Insolvency: An Approach*, DIRITTO DEL COMMERCIO INTERNAZIONALE 657 (1998); M.C. Gilreath, *Overview and Analysis of How the United Nations Model Law on Insolvency Would Affect United States Corporations Doing Business Abroad*, 16 BANKR. DEV. J. 399 (2000); R.J. Silverman, *Advances in Cross-Border Insolvency Cooperation: The UNCITRAL Model Law on Cross-Border Insolvency*, 6 ILSA JOURN. INT'L & COMP. L. 265 (2000).

33. Council Regulation 1346/2000, On Insolvency Proceedings, 2000 OJ (L160) 1 [hereinafter EC Regulation 1346]. On this regulation, see Roland Lechner, *Waking from the Jurisdictional Nightmare of Multinational Default: The European Council Regulation on Insolvency Proceedings*, 19 ARIZ. J. INT'L & COMP. L. 975, 985-1010 (2002), which is actually more a survey on the domestic

on issues related to jurisdiction and applicable law in transnational insolvencies. The EC Regulation aims to establish a legal basis for cooperation among EU member states in order to make "cross-border insolvency proceedings [. . .] operate efficiently and effectively."[34] It represents the culmination of a long process of negotiations involving the European countries and applies the modified universalism theory. Specifically, the EC Regulation establishes a proper statutory venue for bankruptcy proceedings in the internal market; creates a cooperative structure for recognizing the decisions of other member states' courts regarding the initiation of bankruptcy proceedings; sets up a hierarchy among competent courts; and finally, determines which law will be applicable to each of the issues faced by courts in the ongoing proceedings.[35]

Regarding the venue of bankruptcy, the crucial norm of the EC Regulation lies in article 3, providing that:

> [t]he courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary.[36]

Thus, the adjudication process is linked to the concept of the "centre of a debtor's main interests" ("COMI"), a rule that appears in the Model Law as well.[37] Where the COMI lies, so lies the competent court.[38] The EC Regulation designates the proceedings opened by the COMI's court as the "main proceedings"; any other proceedings are named "secondary proceedings."[39] Secondary proceedings have four characteristics. First, they may be opened in countries where the debtor has an "establishment."[40] Second, by definition, they exclusively deal with the assets present under the courts' jurisdiction, and do not extend to assets located abroad.[41] Third, once a main proceeding has been initiated, other courts may only interfere in debtor's insolvency through "secondary pro-

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and transnational regulatory regimes of bankruptcy than a specific criticism of the regulation; Francesco Duina, *Between Efficiency and Sovereignty: Transnational Actors, the European Union, and the Regulation of Bankruptcy*, 4 COMP. EUR. POLITICS 1 (2006).

34. EC Regulation 1346, *supra* note 33, at 2nd recital.

35. *Id.* at 23rd recital, art. 4.

36. *Id.* at 23rd recital, art. 3(1).

37. UNCITRAL Model Law, *supra* note 32, at art. 2(b).

38. EC Regulation 1346, *supra* note 33, at 12th recital ("This Regulation enables the main insolvency proceedings to be opened in the Member State where the debtor has the centre of his main interests. These proceedings have universal scope and aim at encompassing all the debtor's assets.").

39. *Id.* ("To protect the diversity of interests, this Regulation permits secondary proceedings to be opened to run in parallel with the main proceedings. Secondary proceedings may be opened in the Member State where the debtor has an establishment. The effects of secondary proceedings are limited to the assets located in that State. Mandatory rules of coordination with the main proceedings satisfy the need for unity in the Community.").

40. *Id.* at 12th recital, art. 3(2).

41. *Id.*

ceedings."[42] Finally, secondary proceedings must be limited to those involving liquidation procedure.[43] What clearly emerges from these provisions is that the courts of the states where the debtor owns some assets—but not an establishment, nor where the COMI is present—have no jurisdiction over the debtor's insolvency.

As mentioned above, the EC Regulation is a product of the modified universalism theory, which contains some elements of both universalism and territorialism. On the front of universalism, the EC Regulation adopts the unique jurisdiction criterion, such as "main proceedings," and determines jurisdiction through a unique test based on the concept of COMI. However, since the realm of transnational insolvencies still manifests the need "to protect the diversity of interests,"[44] to solve complex cases involving the debtor's estate,[45] and to settle any differences between the legal systems concerned,[46] secondary proceedings may be opened in other states, subject to the aforementioned requirements. Thus, the scheme of secondary proceedings resembles an application of territorialism. Indeed, since "[m]ain insolvency proceedings and secondary proceedings can [. . .] contribute to the effective realisation of the total assets only if all the concurrent proceedings pending are coordinated,"[47] and courts are accordingly required to cooperate closely, the EC Regulation seems to draw a line midway between universalism and territorialism.

As mentioned above, the universalist theory requires a precise criterion for determining the competent court's jurisdiction. The EC Regulation uses the

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42. *Id.* at 12th recital, art. 3(3) ("Where [main] insolvency proceedings have been opened . . . any proceedings opened subsequently under paragraph 2 shall be secondary proceedings.").

43. *Id.* (stating that the secondary proceedings "must be winding-up proceedings.").

44. *Id.* at 12th recital.

45. *Id.* at 19th recital.

46. *Id.* Moreover, under EC Law, the concept of "establishment" derives directly from the principle of free movement and establishment of persons, created by the EC Treaty and by a long-standing interpretation held by the European Court of Justice (ECJ). *See* Treaty Establishing the European Community, (consolidated version), 1997 O.J. (C340) 3 ("EC Treaty"), art. 43 [ex 52](freedom of establishment includes "the setting up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State [and] shall include the right to take up and pursue activities as self-employed persons, and to set up and manage undertakings, in particular companies or firms..."). Thus,

> [t]he concept of establishment within the meaning of the Treaty is therefore a very broad one, allowing a Community national to participate, on a stable and continuous basis, in the economic life of a Member State other than his State of origin and to profit therefrom, so contributing to economic and social interpenetration within the Community in the sphere of activities . . . .

Case C-55/94, Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano, 1995 E.C.R. I-4165, ¶ 25 (1995). Moreover, "[i]n the case of a company, the right of establishment is generally exercised by the setting-up of agencies, branches or subsidiaries . . . A company may also exercise its right of establishment by taking part in the incorporation of a company in another Member State . . . ." Case 81/87, The Queen v. H.M. Treasury and Commissioner of Inland Revenue, ex parte Daily Mail and General Trust PLC ("Daily Mail"), 1988 E.C.R. 5483, ¶ 17 (1988).

47. *Id.* at 20th recital.

COMI to determine this criterion. Thus, the most immediate problem relates to the definition of COMI. While the concept of "establishment" is not controversial in EC law,[48] the notion of COMI is highly questionable. Where, for instance, is the COMI of a single debtor? Or, where is the COMI of a multinational enterprise—a group of companies incorporated in different countries but all under the control of a common entity? Both questions give rise to very problematic issues. As to the former, article 3 of the EC Regulation expressly states that the COMI "should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties."[49] For legal persons, article 3 also presumes that the COMI be located in the state of incorporation.[50] However, that presumption is rebuttable where one party demonstrates that the company's COMI is located in a different state.

There are several other issues that the EC Regulation does not solve. The EC Regulation does not address the problem of mobility among controlling stocks, since a debtor could very easily incorporate in another state before filing for bankruptcy. With regard to the second issue, that of multinational enterprises, the EC Regulation patently ignores the problem. Multinational enterprises, of course, do not have a COMI. Universalists would consider the COMI of a multinational enterprise to be in the place where the controlling company is located; were all the group's companies actually under the jurisdiction of the courts of that place, the full enterprise's reorganization would be simpler. Yet, in this circumstance, companies without any link with the forum would be subjected to bankruptcy proceedings according to remedies and priorities which the creditors, and the debtor itself, would find difficult to predict. Finally, since the transfer of headquarters and controlling shares from country to country are very easy for single debtors, one could imagine how much easier it would be for multinationals: the enterprise's essential apparatus could shift from one company to another without changing its surface appearance, but nevertheless have implications for the legal framework related to future bankruptcy proceedings. These issues represent only a few examples of the problems that arise from transnational bankruptcy.

IV.
EUROFOOD AND THE EUROPEAN COURT OF JUSTICE

The time has come to apply the EC Regulation to the *Eurofood* case. As described above, Eurofood had been engaged in a winding-up procedure since January 27, 2004. The first court to act on Eurofood was the High Court of Dublin. Although the Italian government showed interest in the case a few days later, according to article 16 of the EC Regulation the Irish court took the earli-

48. *See id.* at 20th recital, art. 2(h) (defining "establishment" as "any place of operations where the debtor carries out a non-transitory economic activity with human means and goods.").

49. *Id.* at 13th recital.

50. *Id.* at 13th recital, art. 3(1).

est step.[51] Thus, following the judgment rendered by the High Court of Dublin, Eurofood's status was liquidation everywhere in the European Union. The question now is: did the Irish court have jurisdiction pursuant to article 3 of the EC Regulation? In other words, was Ireland the proper locus of Eurofood's COMI? Since Eurofood had been incorporated in Ireland, the presumption established by article 3 was satisfied. A different perspective leads to the following question: can Italian tribunals revise the Irish decision to determine that Eurofood had its COMI in Italy? Certainly, the answer is *no*. The recognition of the earlier liquidation decision is automatic, except under the strict circumstance of a manifest violation of the recognizing state's public policy,[52] which here is unquestionably not the case. Unless Italian courts find a violation of Italian public policy, they are obliged to give deference to Eurofood's liquidation status.

Although the pattern is clear, it did not seem to work properly. Despite the deference to the Irish court's statement imposed by the EC Regulation, Italian courts continued to assert their jurisdiction over Eurofood, and the extraordinary commissioner in Collecchio initiated the reorganization of the company as part of the broader restructuring task concerning Parmalat. This led to the Irish Supreme Court's request that the ECJ determine proper jurisdiction. On May 2, 2006, the ECJ rendered its verdict. It stated, first, that:

> [the COMI] must be identified by reference to criteria that are both objective and ascertainable by third parties. That objectivity and that possibility of ascertainment by third parties are necessary in order to ensure legal certainty and foreseeability concerning the determination of the court with jurisdiction to open main insolvency proceedings. That legal certainty and that foreseeability are all the more important in that, in accordance with Article 4(1) of the Regulation, determination of the court with jurisdiction entails determination of the law which is to apply.[53]

Given this, the ECJ emphasized, article 3's presumption

> can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which locating it at that registered office is deemed to reflect.[54]

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51. EC Regulation 1346, *supra* note 33, art. 16 ("Any judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3 shall be recognized in all the other Member States from the time that it becomes effective in the State of the opening of proceedings.").

52. EC Regulation 1346, *supra* note 33, art. 26 (recognition and enforcement are mandatory, unless "the effects of such recognition or enforcement would be manifestly contrary to that States's public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual.") Generally, conflict of law rules allow the State of recognition and enforcement of a foreign court decision to disregard its obligations, giving deference to the forum's public policy. *See* Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, signed at Brussels on September 27, 1968 [hereinafter "Brussels Convention"], art. 27(1), 1998 OJ C 027, ("A judgment shall not be recognized – if such recognition is contrary to public policy in the State in which recognition is sought.") The Convention has been recently replaced by the Council Regulation (EC) No. 44/2001 of December 22, 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 OJ L 12 (January 16, 2001).

53. Case C-341/04, *supra* note 15, ¶ 33.

54. *Id.* ¶ 34.

Accordingly, "the mere fact that [debtors'] economic choices are or can be controlled by a parent company in another Member State is not enough to rebut the presumption laid down by the EC Regulation."[55] In the Court's view, then, another company's control over the debtor is not sufficient to locate the debtor's COMI anywhere other than the country of incorporation. The only court entitled to open the main proceedings over Eurofood, therefore, was the Irish one, and Italian courts had no jurisdiction. Second, the Court clarified that once a court had been determined for the main proceedings, its decision was final and binding for all other member states pursuant to article 16 of the EC Regulation. The deference given to that court's decision must be complete: the principle of mutual trust precluded other states from reviewing the foreign court's earlier decision to open the main proceedings.[56] Finally, the Court established that the EC Regulation actually applies in this specific case.[57] The final ruling, therefore, was that Eurofood's winding-up procedure in Ireland had been lawfully initiated, and that the courts of all other member states lacked jurisdiction over the main proceedings.

The Italian Council of State [Consiglio di Stato, CdS] pursued this matter further in a recent decision on *Eurofood*, published on January 25, 2007. The CdS had been seized by Eurofood's provisional liquidator and BofA, who sought the annulment of the earlier Decree of 2004, which had opened the insolvency of Eurofood in Italy.[58] It concluded that the Italian Minister who involved Eurofood in the Parmalat reorganization procedure had acted in absence of jurisdiction (*détournement de pouvoir*).[59] The CdS's decision revoked the Decree

55. *Id.* ¶ 36.

56. *Id.* ¶¶ 41, 42 ("[i]t is inherent in that principle of mutual trust that the court of a Member State hearing an application for the opening of main insolvency proceedings check that it has jurisdiction having regard to Article 3(1) of the Regulation, that is examine whether the centre of the debtor's main interests is situated in that Member State."). Under the Brussels Convention, recognition and enforcement of other Member States' judicial decisions are automatic and do not require any formality or ascertainment by the courts of the State in which recognition and enforcement are sought. Brussels Convention, *supra* note 52, art. 26 ("A judgment given in a Contracting State shall be recognized in the other Contracting States without any special procedure being required.").

57. The question was whether the appointment of a provisional liquidator by the High Court of Dublin could be considered the "main proceedings" according to article 3 of the Regulation, and therefore follow the norms concerning recognition and enforcement of such a decision. The ECJ responded that "a decision to open insolvency proceedings" for the purposes of the Regulation must be regarded as including not only a decision which is formally described as an opening decision by the legislation of the Member State of the court that handed it down, but also a decision handed down following an application, based on the debtor's insolvency, seeking the opening of proceedings referred to in Annex A to the Regulation, where that decision involves divestment of the debtor and the appointment of a liquidator referred to in Annex C to the Regulation. Such divestment involves the debtor losing the powers of management which he has over his assets. In such a case, the two characteristic consequences of insolvency proceedings, namely the appointment of a liquidator referred to in Annex C and the divestment of the debtor, have taken effect, and thus all the elements constituting the definition of such proceedings, given in Article 1(1) of the Regulation, are present. *Id.* ¶ 54.

58. Decree of the Ministry of the Productive Activities, *supra* note 10.

59. Council of State [Cons. stato], 6th Session, 25 Jan. 2006, n. 296/2007, *available only in*

and annulled the previous decision by the Regional Administrative Tribunal, which asserted jurisdiction of Italian courts and government over Eurofood.[60] This outcome would not have been possible if not for the *Eurofood* ECJ verdict.[61]

V.
CONSTRUCTIVE CRITICISM

A. Right Question, Wrong Answer?

The response given by the ECJ in *Eurofood* creates new problems rather than resolving the complicated set of issues concerning transnational insolvencies. In large part, this is due to the fact that the ECJ addressed a very specific issue with very generalized reasoning. First, one must focus on the interests involved. As to this point, the question raised by the Irish Supreme Court was very specific: whether a subsidiary's relative degree of autonomy of control by the parent company constitutes appropriate criteria for determining the COMI.[62] The ECJ responded with only a general statement, relying upon the presumption contained in article 3 of the EC Regulation that the parent company's control is not a relevant factor in the assessment of the COMI of the subsidiary. The Court also vigorously reaffirmed that the legal persons' COMI is where their registered office is situated. However, this aspect of COMI is a flexible concept. Indeed, the concept of debtor's "interests" cannot be defined without emphasizing the relationships between the debtor and other subjects. In other words, "interest" is not something that may be defined objectively, but depends upon the debtor's interactions with the surrounding business world. Accordingly, the

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Italian at http://www.studiolegalelaw.it/new.asp?id=1276 [hereinafter Case no. 296/2007).

60. TAR del Lazio, *supra* note 12, at case no. 6998.

61. Case no. 296/2007, *supra* note 59, ¶ 14 ("[T]he here impugned Decree of the Ministry [concerning Eurofood] is unlawful because the Ministry omitted to verify the existence of jurisdiction on adopting the decision that opened the insolvency proceedings. More precisely, it implicitly stated that it had jurisdiction, that is contrary to the provisions of the applicable EC Regulation, as clarified by the *Eurofood* decision rendered by the ECJ; it did not abide by the ascertainments that the Regulation, expressly thorugh its provisions and the ECJ interpretation, conferred to the national authorities" ["il DM impugnato è illegittimo per non aver verificato la propria competenza ad adottare la decisione di apertura delle procedura in questione, o, più esattamente, per aver implicitamente ritenuto che tale competenza sussistesse, in violazione delle norme del regolamento comunitario qui in rilievo, così come chiarite dalla riportata decisione della CGE, senza compiere, cioè, le valutazioni che il regolamento, secondo le sue previsioni e l'interpretazione di esse fornite dalla CGE, demanda all'autorità nazionale."]).

62. Case 341/04, *supra* note 15, ¶ 24(4)(c). (denoting control as the situation in which "the subsidiary conducts the administration of its interests on a regular basis in a manner ascertainable by third parties and in complete and regular respect for its own corporate identity in the Member State where its registered office is situated," while in case of autonomy "the parent company is in a position, by virtue of its shareholding and power to appoint directors, to control and does in fact control the policy of the subsidiary.").

same debtor could potentially hold different "interests" regarding voluntary and involuntary creditors, employees, consumers, savers, the market, and the state. A single debtor could, hence, have more than one COMI.

Moreover, in the case of a multinational enterprise the problem of determining the relevant enterprise's "interests" is clearly broader since more subjects are involved. In multinational enterprises, every foreign subsidiary has "interests" not only with third parties, but also with the parent company. Indirectly, it also has "interests" with the parent company's creditors. Suppose a subsidiary has "interests" only with the parent company, and it has only one creditor that also is the major financial investor of the parent company. Why should it matter where the subsidiary has its registered office? Why should one enforce a rebuttable presumption when it is so clear that the subsidiary's COMI is in the parent's home country? Whatever the response is, control and autonomy are just third parties' "interests" in the same sense expressed with respect to the COMI.

Following this interest-based approach, according to the Court of Justice, the bankruptcy location must coincide with one which is predictable to third parties. The protection of predictability raises another problem. In fact, predictability is the reason why, when the presumption of the place of incorporation was not valid, the Court required evidence based on "factors which are both objective and ascertainable by third parties."[63] Now, is not the control by a foreign parent company such a factor? When negotiating with a company, creditors, especially sophisticated creditors like banks or financial institutions, are usually aware of the debtor's foreign control. Indeed, in most cases the debtor's affiliation with a multinational group of companies signifies certain contractual settlements concerning a debtor and his creditors. The very rationale of article 3 of the EC Regulation is not a theoretical treatment of the issue of the COMI's location. Rather, it is a very practical matter involving the arrangement of the concerned parties' interests and the effective placement of the debtor's own interests. In applying article 3, domestic courts are required to respect not only predictability and ascertainability, but also efficaciousness. They should not extend hyperprotection to third parties who do not deserve it. National courts, in sum, must base their analysis on an appropriate balance of interests that demands more than a simple, presumption-based, summary analysis.

B. Is the EC Regulation Actually Working?

The doubts raised with regard to article 3's application by the ECJ broadly affect the EC Regulation's effectiveness. The errors that might result from a summary analysis of the "interests" involved in a particular case are well illustrated by three different bankruptcy proceedings involving the same corporate group, *ISA Daisytek*. The U.S. parent company, which filed for bankruptcy in Texas, held stock in 16 subsidiaries in Europe. One of the 16, ISA-Daisytek

63. *Id.* ¶ 37.

Ltd., controlled all the other 15 other companies, three of which were incorporated in Germany and one in France. When Daisytek-ISA Ltd. filed for bankruptcy in England, the High Court of Justice in Leeds affirmed that the COMI for all 15 companies was located in England and included all of them in the proceedings.[64] This seems to be a common trend in England,[65] and has occurred elsewhere.[66] According to article 16 of the Regulation, such a decision had to be recognized and automatically enforced in all other member states' courts. Unsurprisingly, this did not happen, as the norm went largely ignored. In France, the *Tribunal de Commerce* in Clergy-Pontoise affirmed that the English Court was wrong to dictate that the COMI of the French Daisytek-ISA S.A. be in England.[67] In Germany, the District Court of Düsseldorf simply ignored the findings of the Court in Leeds and maintained that the COMI of the Daisytek-ISA German subsidiary was in Germany.[68] Both French[69] and German Courts of Appeals[70] reversed, resulting in a seemingly stabilized system, that is now in accordance with the EC Regulation.[71] However, the immediate lack of mutual trust among European courts patently signals an emerging nationalism in the adjudication of major bankruptcy cases.

First, *Eurofood* and *ISA Daisytek* demonstrate that domestic courts, disre-

64. *In re* Daisytek-ISA Ltd., [2003] B.C.C. 562, [2004] B.P.I.R. 30, 2003 WL 21353254, at *1.

65. In the case of the *Crisscross Telecommunication*, the group consisted of 14 companies, with its subsidiaries incorporated in several European countries. The High Court of Justice of England claimed jurisdiction over all of them, and some foreign courts gave deference to this decisions according to article 3 of the EC Regulation. *See* High Court of Justice, Chancery Division, Judgment of May 20, 2003, not published, and Tribunal of Milan, Prosecutor v. Criss Cross Communication S.r.l., March 18, 2004 (honoring the judgment of the High Court of Justice of May 25, 2003). One should wonder why the Milan Tribunal is so deferential to the EC Regulation, while the Parma Tribunal is not. Maybe *Criss Cross* was not such an important case as *Parmalat*?

66. In the case decided by the Tribunal of Rome, *In re* Cirio Finance Luxembourg SA, 26 Nov. 2003, [2004] FORO IT. I 1567, the judge held that the Luxembourg company, controlled at 95% by the Italian Cirio Finanziaria S.p.A., had its COMI in Italy. *See also* Trib. of Parma, *supra* note 11.

67. *See* Judgment of May 26, 2003, 8th Ch., trib. comm. Pontoise (Fr.).

68. *Daisytek/ISA/PAR/Supplies Team*, Mar. 3, 2004, AG Düsseldorf, 501 IN 126/03, at 1 (Ger.). It is noteworthy that "[a]pparently, as of June 6, 2003, the Düsseldorf court did not have a copy of the published opinion by the Leeds court issued on May 16, 2003." Samuel L. Bufford, *International Insolvency Case Venue in the European Union: The Parmalat and Daisytek Controversies*, at 463, http://www.iiiglobal.org/country/european_union/ (follow "1_Bufford_Case_Venue.PDF" hyperlink).

69. Klempka v. ISA Daisytek SAS, 2003 WL 22936778, [2004] I.L.Pr.6 (C d' A 2003) (Fr.). Eventually, the Court of Cassation dismissed the claim against the Court of Appeal's decision. Cour de Cassation [Court of Cassation], Ch. Comm., Judgment of June 27, 2006, Case no. 921 FS, *Klempka et al.*, (Fr.).

70. Order of the Court of Appeals of Düsseldorf, July 9, 2004, I-3 W 53/04 (not final; lower court: D.Ct. Düsseldorf). *See* Bufford, *supra* note 68, at 464.

71. As to the decision of the Court of Appeal of Versailles (*see* Klempka v. ISA Daisytek SAS, *supra* note 69), for instance, it represents "an excellent result and brings the French courts completely into line with the EC Regulation." Gabriel Moss, *The Triumph of "Fraternité:" ISA Daisytek SAS (Court of Appeal of Versailles, 4 September 2003)*, at 4, http://www.iiiglobal.org/country/european_union/ (follow "Daisytec_note.pdf" hyperlink).

garding the European legal framework, are competing in adjudicating big bankruptcy cases. As the EC Regulation states, the first court seized for the main proceedings becomes the COMI court and therefore the only one allowed to initiate these proceedings. Also, governments' jurisdiction to open restructuring programs for corporate groups is removed if a foreign court has been seized with the bankruptcy of a solvent subsidiary beforehand.[72] Despite this, the adjudication of transnational bankruptcy proceedings increasingly resembles a race against time in which creditors and debtors rush to choose the most favourable forum and courts compete to adjudicate the case. As it has been argued, "with billions of dollars at stake for bankruptcy professionals, competing courts cannot be counted on to determine fairly and in good faith whether they are the home court of multinationals that choose to file with them."[73] *Eurofood* indicated the actual status of the EC Regulation: that the lacunae of its regulatory framework runs so deep that future insolvency proceedings in Europe would scarcely be efficient.

Another fundamental issue arises from these cases. As illustrated in *Eurofood*, sometimes the restructuring of a multinational enterprise is a matter of State sovereignty. Italy, for instance, had a remarkable interest in renovating the entire Parmalat group, including Eurofood, as a matter of prestige in front of the international community. Is this not an important "interest" even when a compelling reason of mutual trust to other European courts is at stake?

Finally, one should focus on the negotiation of contracts among the debtor and its creditors. The latter count on the fact that they could enforce the secured contract against the debtor's assets and, eventually, initiate bankruptcy proceedings before a competent court, should the debtor be unable to repay its debts. Hence, the remedies available to creditors and their priorities are essential when negotiating secured contracts. What if the debtor could easily change the remedies and priorities merely by changing the venue of insolvency proceedings? The debtor's employees, creditors and shareholders, as well as the security holders and consumers, would watch their contractual framework transform itself from one day to the next. In this case, their only recourse would be to anticipate the costs of this harmful forum shopping.[74] An economic analysis of law demonstrates that creditors can internalize the risk of bankruptcy by asking the debtor for a higher guarantee. In a world of universal bankruptcies and competing courts, the guarantee system would be effectively broken, and the prices raised accordingly.[75] Once the insolvency procedure is initiated, creditors can only ap-

72. *See* Case 296/2007, *supra* note 59, ¶ 17.

73. LoPucki, *supra* note 26, at 209.

74. The predictability of bankruptcy rules is important in the negotiation process of the firm's contracts. In fact, "[i]f creditors do not know which set of insolvency rules apply, they will raise their interest rates to compensate for this uncertainty. This increase in interest rates without a corresponding benefit is a net social loss." Rasmussen, *supra* note 23, at 17.

75. Accordingly, "[t]he most important [aspect of transnational insolvency] is the inability to predict the results of default, which adds to the cost of every international transaction, especially

pear before the seized court. In order to avoid forum shopping on the part of the debtor, creditors should increase their monitoring of the debtor's behavior. This is unlikely, especially over the long term, and seems virtually impossible.

One of the aims of the EC Regulation is to ensure the proper functioning of the internal market by avoiding incentives for forum shopping.[76] However, forum shopping is unavoidable in a system where courts and professionals enjoy the prospect of having multinational enterprises, who hold billions of Euros in assets and are engaged in significant productive sectors, file for bankruptcy in their own countries. The combination of arrogant courts with the dilution of legal principles such as the COMI, based on broad notions like "interests," results in harm to creditors and market failure.

VI.
CONCLUSIONS

As a solution to the EC Regulation's initial failure, one prominent scholar proposes an international convention providing for a cooperative territoriality regime.[77] In his view, only territorially limited proceedings should exist, and liquidators in different countries should cooperate under the umbrella of a legally imposed framework.[78] Another author proposes a reform of the EC Regulation through the introduction of norms for corporate groups and mechanisms of review for any decisions regarding the COMI.[79] These proposals patently disregard the complex structure characterizing transnational debtors, especially when these debtors are multinational enterprises.

First, the essence of multinationals is control, and control has an economic value. The value of a complex multinational firm is therefore also determined by the degree of transnational control. Liquidating or reorganizing the single, distinct entities that comprise a corporate transnational group is very different from liquidating or reorganizing the entire group itself. What differs between the two situations is the question of what constitutes an adequate consideration of control. For these reasons, a transnational bankruptcy regime that failed to consider the complex structure of a multinational enterprise—such as the cooperative territorial solution—would perpetuate a market failure due to bankruptcy.

Second, control is an important component of the assessment made by

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international financings." Westbrook, *supra* note 22, at 460; moreover, "[transnational companies] need a stable and predictable regulatory environment." Duina, *supra* note 33, at 17.

76. *See* EC Regulation 1346, *supra* note 33 at 4th recital ("It is necessary for the proper functioning of the internal market to avoid incentives for the parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain the more favourable legal position (forum shopping).").

77. LoPucki, *supra* note 26, at 231.

78. *Id.* at 225, ("A cooperative territorial system is one in which each country's courts administer the assets located in the country and authorize a representative to cooperate with representatives appointed in foreign proceedings.").

79. Bufford, *supra* note 68, at 60-67.

creditors in their contracts with the firm. The presence of links to a parent company are essential for some creditors in order to negotiate with the subsidiary. Accordingly, one could argue that Eurofood, as an experiment in *haute finance* under the complete control of its parent company Parmalat, did not deserve the treatment granted by the ECJ. Eurofood's creditors, such as BofA, were perfectly aware that the company was only a means for transactions involving the Parmalat group. The benefits that they received from these transactions passed through Collecchio.

Finally, appropriate deference should be given to the national interest, as opposed to the mutual trust compelling strength. When governments have a strong interest in restructuring or liquidating an enterprise in default, this "interest" should be taken into account, when justified, in the outcome resulting from the EC Regulation's enforcement. If the EC Regulation's system of adjudication is linked with the concept of "interest," one could hardly see why both national and private parties' interests should not be enforced.

In conclusion, the future regime should interpret, or eventually reform, the EC Regulation to give greater importance to the factor of control, in a way that forces national judges to balance it with the other interests involved in the case, thus casting more attention to multinationals' structure. In addition, the specific "interests" should be solidified. A correct balance between these components might solve the problem. While control has received no attention by the EC legislator, the "interest" has been too flexible thus far. First, the EC Regulation, by some indications, should lead the judge's investigation about the existence of a link of control inside the multinational enterprise in default. From this standpoint, control is one of the most problematic issues in corporate law, both in the EU and in the Member States. Nevertheless, in some circumstances it should be given attention. Second, the COMI is a hyperflexible concept that must be reduced in order to discourage a schizophrenic race to the court by the parties involved in a transnational default, like in the cases described in this Article.

At any rate, one could be sure that a reform will not come soon. The European legislator is preoccupied with building strong cooperation among the Member States in civil and commercial matters, while insolvency remains off the calendar. In fact, European institutions are convinced that the issue has been settled, while in reality, much work has yet to be done.