

**IGNORING THE LESSONS OF THE PAST: THE CRISIS IN  
DARFUR AND THE CASE FOR HUMANITARIAN  
INTERVENTION**

Klinton W. Alexander, Ph.D., J.D.\*

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[L]et us, by what we do in one single minute, send a  
message – a message of remorse for the past, resolve to  
prevent such a tragedy from ever happening again – and  
let’s make it resound for years to come.<sup>1</sup>

International Day of Reflection on the Genocide in Rwanda  
April 7, 2004

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\* Dr. Alexander is a Senior Lecturer of Political Science at Vanderbilt University and an attorney who works on public and private international law matters.

1. U.N. Secretary-General Kofi Annan, International Day of Reflection on the Genocide in Rwanda (Apr. 7, 2004).

## I. INTRODUCTION

On January 9, 2005, the Islamic government of Sudan signed a peace agreement with a mostly Christian and animist rebel group in the south that called for an end to one of the world's longest running civil wars.<sup>2</sup> Since 1983, nearly two million people have died from starvation, disease and violence in Sudan and more than four million have been forced to leave their homes and villages.<sup>3</sup> Much of the violence was caused by the Arab-dominated government in Khartoum who orchestrated a campaign of mass murder, rape, and other war crimes against rebel groups in the southern and western portions of the country.<sup>4</sup> As a result of the peace deal, government and rebel forces are expected to put down their arms and allow refugees to return to their homes in the south.<sup>5</sup> However, there are still more than a million refugees in the western Darfur region of the country who are not part of the peace deal and who remain vulnerable to attacks.

A recent report authorized by the United Nations (UN) Security Council and produced for the UN Secretary-General by the International Commission of Inquiry in Darfur, details the atrocities that have been committed by the Sudanese military and the Jingaweit militia (the "Janjaweed") against civilians in Darfur.<sup>6</sup> Over the past two years, nearly 300,000 people in Darfur have been killed and close to two million have been forcibly expelled from the region. The Commission found that government forces and the Janjaweed conducted "indiscriminate attacks" against civilians throughout Darfur, including murder, rape and torture.<sup>7</sup> According to the report, "[t]hese acts were conducted on a widespread and systematic basis, and therefore may amount to crimes against humanity."<sup>8</sup> The Commission concluded that though the Government of Sudan has not pursued a policy of genocide in Darfur, crimes against humanity and war crimes have

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2. Marc Lacey, *Sudan and Southern Rebels Sign Pact to End Civil War*, N.Y. TIMES, Jan. 1, 2005, at A3.

3. *Id.*

4. *Id.*

5. *See id.* According to the United Nations, nearly 600,000 refugees and internally displaced people have returned to southern Sudan, and there is also evidence that the government in Khartoum has evicted southerners from northern camps, forcing them to go home. Guy Dinmore & El Fasher, *Zoellick Looks to Sudan's South for Blueprint to End Darfur's Conflict*, FIN. TIMES, Apr. 16, 2005, at 7.

6. *See* Int'l Comm'n of Inquiry on Darfur, *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General*, Jan. 25, 2005, available at [http://www.ohchr.org/english/docs/darfur\\_report.doc](http://www.ohchr.org/english/docs/darfur_report.doc) [hereinafter *Commission Report*].

7. *Id.* at 3.

8. *Id.*

been committed that “may be no less serious and heinous than genocide.”<sup>9</sup>

The international community has done little to stop the violence in Darfur. The Security Council has condemned the violence and handed over the names of suspected war crimes suspects to the chief prosecutor of the International Criminal Court, but no collective military action has been authorized to prevent violence and protect civilians. By refusing to authorize the use of force in Darfur, the Security Council has failed to live up to its obligations under international law. This failure is inconsistent with the pattern of humanitarian interventions supported by the UN during the 1990s and its moral commitment to ensure that the mass slaughter of civilians evident in Rwanda and Kosovo, where the UN failed to respond, never happens again.

It is true that the UN’s role in protecting human rights is a delicate one. The decision to violate the national sovereignty of a nation to protect basic human rights is a controversial issue in international law. The credibility of international law and the UN hinges on the willingness of nations to respect the sovereignty of all nations and the principle of nonintervention enshrined in Article 2 of the UN Charter.<sup>10</sup> This deference to national sovereignty is crucial to maintaining international support for the UN and transnational cooperation in other areas. At the same time, the UN Charter calls upon all Members to promote “universal respect for, and observance of, human rights” and to take action to achieve this purpose when necessary.<sup>11</sup> The humanitarian crisis in Darfur has called into question the importance of these principles. Should the international community intervene in Darfur to prevent human rights violations against civilians? Would infringing upon Sudan’s national sovereignty to protect civilians violate international law? Is the situation in Darfur a case for collective humanitarian intervention with or without Security Council approval under international law?

The purpose of this article is to examine the Darfur crisis and the legal basis for humanitarian intervention under international law. Specifically, this article will focus on the UN’s refusal to authorize collective military intervention in Darfur despite evidence of mass killing, rape, and torture, among other war crimes, by Sudanese forces and argue that the moral and legal imperative to intervene outweighs the political concern for

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9. *Id.* at 4.

10. *See* U.N. Charter, art. 2, para. 7.

11. *Id.* arts. 55(e), 56.

national sovereignty under the UN Charter. Part II will discuss the principles of national sovereignty and nonintervention incorporated in Article 2(7) of the UN Charter and the rare instances in which violating these principles can be justified under international law. Part III will examine the origins of the doctrine of humanitarian intervention and trace the application of this doctrine to justify military interventions to protect human rights during the Cold War period. Part IV will examine the major humanitarian crises of the post-Cold War period and show how the Security Council has become more proactive in authorizing the use of force to prevent governments from abusing their own people. Part V will discuss the current crisis in Darfur and explain how the UN has failed to live up to its legal obligations by refusing to authorize the use of force to prevent grave violations of human rights in this ongoing conflict. The 2005 Commission Report provides a strong case for humanitarian intervention in Darfur, even though there was no finding of genocide. The UN's failure to heed the lessons of the past and do more to prevent the violence is a major setback for human rights and, specifically, the doctrine of humanitarian intervention.

## II. NATIONAL SOVEREIGNTY AND NONINTERVENTION IN INTERNATIONAL LAW

### A. *The Origins of National Sovereignty and the Principle of Nonintervention*

The origins of national sovereignty date back to the Treaty of Westphalia in 1648.<sup>12</sup> At that time, a law of nations was forming out of the Grotian idea that states, like people, are basically rational entities capable of cooperating to achieve common goals under a system of international rules.<sup>13</sup> State sovereignty – the idea that states have exclusive control within their own borders – became the cornerstone of the European state system as each state recognized the other's right to govern all matters within its territorial jurisdiction.<sup>14</sup> The eventual convergence of the Westphalian and Grotian ideas of national sovereignty and the rule of law helped to establish the collective diplomacy of the

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12. KAREN A. MINGST & MARGARET P. KARNS, *THE UNITED NATIONS IN THE POST-COLD WAR ERA* 17 (George A. Lopez ed., 2000).

13. *See id.* at 16-17.

14. *Id.* at 17. Each state possesses plenary power over persons, territory and property within its borders.

Concert of Europe in 1815,<sup>15</sup> the legal mechanisms of the Hague system<sup>16</sup> and the principles of universality and equal treatment under the League of Nations Covenant and UN Charter.

Today, the idea of national sovereignty is well-established in international law. Professor Branimir Jankovic, of the Center for International Studies at the University of Belgrade, describes sovereignty as follows: “The sovereignty of a state means today its independence from external intervention. This is the supreme authority inherent in every independent state, limited only by the universally adopted and currently valid rules of international law.”<sup>17</sup> Black’s Law Dictionary defines “sovereignty” as “the supreme, absolute, and uncontrollable power by which any independent state is governed; . . . the international independence of a state, combined with the right and power of regulating its internal affairs without foreign dictation.”<sup>18</sup> In essence, a state possesses the exclusive right to the use of its territory and to exclude other states from interfering in its affairs without its consent.

Underpinning the concept of national sovereignty is the principle of nonintervention. Nonintervention “obliges other states . . . not to intervene in matters within the internal or domestic jurisdiction of a sovereign state.”<sup>19</sup> This principle is considered customary international law and is codified in a number of treaties.<sup>20</sup> Following World War I, the ideas of sovereignty and nonintervention were formalized in Article 10 of the Covenant of the League of Nations. Under Article 10, the Members of the League agreed to “respect and preserve as against external aggression the territorial integrity and existing political independence of all Members . . . .”<sup>21</sup> This agreement to prohibit

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15. Under the Concert of Europe, or Concert System, the major European powers came together in multilateral meetings to settle problems and coordinate actions. The European powers met more than thirty times between 1815 and 1879 and introduced some important practices, including multilateral consultation and collective diplomacy, which were later adopted by international organizations. *Id.* at 17-18.

16. The Hague Conferences of 1899 and 1907 led to the Convention for the Pacific Settlement of International Disputes and the Permanent Court of Arbitration, which still exists today. *Id.* at 18-19.

17. BRANIMIR M. JANKOVIC, *PUBLIC INTERNATIONAL LAW* (1983).

18. BLACK’S LAW DICTIONARY 1396 (6TH ED. 1990).

19. MINGST & KARNS, *Supra* note 12, AT 10.

20. See James B. Steinberg, *International Involvement in the Yugoslavia Conflict*, in *ENFORCING RESTRAINT: COLLECTIVE INTERVENTION IN INTERNAL CONFLICTS* 9 (Lori F. Damrosch ed., 1993).

21. LEAGUE OF NATIONS COVENANT part. 10, June 28, 1919. In 1918, President Woodrow Wilson gave his famous Fourteen Points speech to the U.S. Congress, calling for “a general association of nations . . . formed under specific covenants for the purpose of affording mutual guarantees of political independence and territorial integrity to great and small States alike.” F.P. WALTERS, *A HISTORY OF THE LEAGUE OF NATIONS* 20 (1952).

intervention in the affairs of other nations also was enshrined in the Kellogg Briand Pact of 1928, also known as the “Pact of Paris.”<sup>22</sup> The Pact of Paris sought to eliminate war as an instrument of national policy.<sup>23</sup>

The failure of the League of Nations to act decisively to counter acts of aggression during its existence undercut the legitimacy of international law and called into question the League’s ability to maintain international peace and security. Japan’s invasion of Manchuria in 1931,<sup>24</sup> Italy’s invasion of Ethiopia in 1935,<sup>25</sup> and Hitler’s annexation of Austria and Czechoslovakia in 1938<sup>26</sup> were potent reminders to the international community that covenants or pacts can only do so much to prevent aggression. Though the League could not prevent the outbreak of World War II, it still represented an important step in the development of international law and organizations. It laid the foundation for collective security and the incorporation of the principles of sovereignty and nonintervention in the UN Charter after the Second World War.

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22. See Treaty Between the United States and Other Powers Providing for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 46 Stat. 2343, T.S. 796, IV *Trenwith* 5130, 2 *Bevans* 732 (entered into force July 24, 1929).

23. *Id.*

24. China appealed to the League of Nations immediately after Japan invaded Manchuria in September 1931. The League delayed action while officials sailed to the Far East to investigate the invasion. In September of 1932, a report was issued recommending that Japan return Manchuria to China. Japan refused and withdrew from the League in protest. The League discussed sanctions but was powerless to act without U.S. involvement in the League and cooperation from the rest of the League’s members. See PAUL KENNEDY, *THE RISE AND FALL OF THE GREAT POWERS* 333-34 (1987); MARIUS B. JANSEN, *THE MAKING OF MODERN JAPAN* 584-85 (2000); R.H.P. MASON & J.G. CAIGER, *A HISTORY OF JAPAN* 334-37 (1997).

25. In 1934, Ethiopia (Abyssinia) was one of the few states not subject to European control. In December of 1934, a border war erupted between Ethiopia and Italian Somaliland which gave Benito Mussolini an excuse to intervene. The Italians invaded Ethiopia on Oct. 3, 1935. The Italo-Ethiopian War lasted nearly a year and resulted in Ethiopia’s subjection to Italian rule. Historically, Italy’s invasion of Ethiopia is seen as one of the crucial episodes that prepared the way for World War II. In addition to the Japanese invasion of Manchuria, the Italian invasion of Ethiopia demonstrated the ineffectiveness of the League of Nations when League efforts at collective security were not supported by the great powers. See KENNEDY, *supra* note 24, at 336; HARRY HEARDER, *ITALY: A SHORT HISTORY* 233-35 (2d ed. 2001).

26. On the morning of March 12, 1938, German troops entered Austria to assume power over the Austrian state. The next day, Hitler announced in Linz the legislation on the “Anschluss” (Annexation) of Austria into the German Reich. In the summer of 1938, Hitler demanded the Sudetenland from Czechoslovakian President Eduard Benes. Benes refused Hitler’s demands and asked Britain to intervene. But Prime Minister Neville Chamberlain sought to appease Hitler rather than stand up to Hitler’s demands. On March 15, 1939, German troops entered Prague and Czechoslovakia ceased to exist. See KENNEDY, *supra* note 24, at 338-39; IAN KERSHAW, *HITLER 1936-1945: NEMESIS* 64, 170-73 (2000).

*B. National Sovereignty and Nonintervention under the UN Charter*

Following the Second World War, the victorious allied powers were determined to create a permanent system of collective security. In view of the League's failure and the return to traditional balance of power politics in the 1930s, the framers of a new covenant sought to balance the goal of preserving state sovereignty with that of collective security. The UN Charter was established in 1945 to prevent states from using force against other states and to provide a legal framework for collective action when conflicts erupted.<sup>27</sup> The primary purposes of the UN are set forth in the Preamble to the Charter, which calls upon all peoples "to save succeeding generations from the scourge of war," to unite in maintaining international peace and security, and to promote social and economic progress as well as human rights for men and women of all nations large and small.<sup>28</sup>

The UN is first and foremost a club or league designed to protect the political integrity and territorial sovereignty of its individual member states. Article 2(1) of the Charter incorporates the principles of sovereignty, universality and equality, providing that the UN is based on "the sovereign equality of all its Members."<sup>29</sup> Sovereign equality is the basis for each member state having one vote in the General Assembly. Although the Charter accords special status to five of its Members – the United States, Russia, China, Great Britain and France – with respect to security,<sup>30</sup> the UN is still an instrument of its member states, directed and controlled by its Members, and created to serve the interests of its Members.<sup>31</sup>

Article 2(4) addresses aggression, stating that "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."<sup>32</sup> The inclusion of "threat" to use force, in

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27. The UN was officially established on October 24, 1945. The UN Charter was drawn up by representatives from fifty countries in San Francisco from April through June 1945. The chief aim of the Charter is to succeed where the League of Nations failed; that is to maintain international peace and security through the means of collective security. See THE CHARTER OF THE UNITED NATIONS: A COMMENTARY (Bruno Simma ed., 1994).

28. U.N. Charter, preamble.

29. *Id.* art. 2, para. 1.

30. *Id.* art. 23, para. 1.

31. *Id.* art. 24, para. 1. Under Article 24(1), the Security Council has primary responsibility for maintaining international peace and security and the authority to act on behalf of all Members of the U.N. See *id.*

32. *Id.* art. 2, para. 4.

addition to the “actual” use of force, under Article 2(4) is an innovative feature of the Charter which broadens the League Covenant’s prohibition against external intervention in the affairs of other states. Article 2(3) further provides that Member States “shall settle their international disputes by peaceful means.”<sup>33</sup>

The Charter also prohibits Members from intervening in the internal affairs of other Members. Article 2(7) provides:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.<sup>34</sup>

The inclusion of Article 2(7) in the Charter was essential to gaining the support of nations, such as the United States, who were concerned about the loss of sovereignty and the emergence of a powerful transnational organization to oversee global security. The U.S. Senate refused to ratify the League of Nations Covenant due in part to its concern over the loss of sovereignty in security matters.<sup>35</sup> However, it is important to note that the reference to “enforcement measures under Chapter VII” at the end of Article 2(7) was included to provide the UN with some flexibility to intervene in the internal affairs of a Member State in certain circumstances.

Chapter VI of the Charter provides for the peaceful settlement of disputes among the member states. The Security Council, under Article 34, is authorized to “investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security.”<sup>36</sup> Since the creation of the Charter, the Security Council has relied on the authority granted to it under Chapter VI to facilitate the peaceful settlement of numerous international disputes.

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33. *Id.* art. 2, para. 3.

34. *Id.* art. 2, para. 7.

35. See JIM POWELL, WILSON’S WAR 152 (2005). Several senators feared that joining the League would compromise U.S. sovereignty and possibly draw the United States into future wars. See *id.*

36. U.N. Charter, art. 34.



Chapter VII of the Charter provides the enforcement authority for the UN to carry out its mission. Chapter VII permits the Security Council to take any measures necessary, including the use of force, to “maintain or restore international peace and security.”<sup>37</sup> Article 39 grants the Security Council discretion to determine when a breach, or threat to breach, of the peace occurs in international relations.<sup>38</sup> If a breach of the peace is determined to have occurred, the Security Council may authorize member states to impose sanctions under Article 41 or the use of force under Article 42 against a state.<sup>39</sup> In authorizing the use of force under Article 42, the Security Council may call upon all Members to furnish “armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.”<sup>40</sup> The Security Council also may call upon regional groups, such as the North Atlantic Treaty Organization (NATO) or the Organization of American States (OAS), to use force to maintain international peace and security under Article 42. Article 42 has been invoked on rare occasions in the Charter’s history, but increasingly since the end of the Cold War.<sup>41</sup>

The inherent right of self-defense is embodied in Article 51 of the Charter. Article 51 provides that “[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”<sup>42</sup> The threshold for the right to use force in self-defense is the presence of an armed attack or a threat of immediate or imminent harm to the state. The latter is covered under the doctrine of “anticipatory self defense,” or in more modern parlance, the “pre-emptive strike”

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37. *Id.* art. 42.

38. *See id.* art. 39.

39. *See id.* arts. 41, 42.

40. *Id.* art. 43, para. 1.

41. Between 1945 and 1990, the Security Council authorized the use of force on three occasions: (1) the Korean War (resolution 83), (2) the 1961 Belgian intervention in the Congo (resolution 161), and (3) to enforce the 1966 oil embargo of Rhodesia (Resolution 221). U.N. SCOR, 5th Sess., 474th mtg. at 5, U.N. Doc. S/RES/83 (June 27, 1950); U.N. SCOR, 16th Sess., 942d mtg. at 2, U.N. Doc. S/RES/161 (Feb. 21, 1961) [hereinafter S.C. RES. 161]; U.N. SCOR, 21st Sess., 1277th mtg. at 5, U.N. Doc. S/RES/221 (April 9, 1966). After the Cold War ended, the Security Council authorized the use of force in Iraq, Somalia, Haiti, Yugoslavia, and east Timor, among other countries. U.N. SCOR, 45th Sess., 2963d mtg. at 27-28, U.N. Doc. S/RES/678 (Nov. 29, 1990); U.N. SCOR, 47th Sess., 3145th mtg. at 2, U.N. Doc. S/RES/794 (Dec. 3, 1992); U.N. SCOR, 49th Sess., 3413th mtg. at 2, U.N. Doc. S/RES/940 (July 31, 1994); U.N. SCOR 47th Sess., 3106th mtg. at 2, U.N. Doc. S/RES/770 (Aug. 13, 1992); S.C. RES. 1264, U.N. SCOR 54th Sess., 4045th mtg. at 2, U.N. Doc. S/RES/1264 (1999).

42. U.N. Charter, art. 51.

doctrine.<sup>43</sup> The International Court of Justice has stated that a state may only use "self-defence . . . measures which are proportional to the armed attack and necessary to respond to it."<sup>44</sup> This exception to the prohibition against the use of force is well-established under customary international law.

### III. HUMANITARIAN INTERVENTION DURING THE COLD WAR

Two areas of UN law have emerged since the founding of the Charter to deal with the management of interstate behavior: (1) the law of peace and security and (2) the law of human rights.<sup>45</sup> The former, according to Oscar Schachter, has been the "raison d'être of the UN Charter" from its birth.<sup>46</sup> Maintaining international peace and security was, and still is, the primary purpose of the United Nations. The law of human rights was not a major focus in the early years of the UN Charter: however it has emerged in importance over the years alongside the global human rights movement. Since 1945, the international human rights movement, which includes NGOs, corporations and individuals, has influenced governments to adopt human rights norms and conventions and to recognize the obligation to defend human rights.<sup>47</sup> Today, the idea that governments should protect basic human rights, an idea that knows no political or territorial boundaries, challenges certain long-standing principles of international law, particularly the notions of national sovereignty and nonintervention.

#### A. *The Role of the UN in Promoting Human Rights*

The legal basis for collective action in defense of basic human rights can be found in the human rights clauses of the UN Charter, the 1948 Universal Declaration of Human Rights (the "Declaration")<sup>48</sup> and the 1948 Convention on the Prevention and

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43. In 1842, the conditions required to trigger the right of "anticipatory" self-defense were set forth by U.S. Secretary of State Daniel Webster in a diplomatic note to Lord Ashburton of Britain following the infamous Caroline incident. Letter from Daniel Webster, U.S. Secretary of State, to Lord Ashburton, British Plenipotentiary (Aug. 6, 1842), in 2 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 412 (1906). Webster wrote that self-defense "must be confined to cases in which the necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation." *Id.*

44. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 94 (June 27).

45. Oscar Schachter, *United Nations Law*, 88 AM. J. INT'L L. 1, 17 (1994).

46. *Id.* at 16-23.

47. MINGST & KARNS, *supra* note 12, at 159.

48. See U.N. GAOR, 3d Sess., 67th plen. mtg. U.N. Doc. A/810 (Dec. 10, 1948) [hereinafter *Universal Declaration*].

Punishment of the Crime of Genocide (the “Genocide Convention”),<sup>49</sup> among other sources of international law. The Charter makes reference to the phrase “human rights” in several places, indicating its salience in the post-war international legal framework.<sup>50</sup> The Preamble to the Charter calls upon all Members to reaffirm their “faith in fundamental human rights,”<sup>51</sup> and Article 1(3) highlights the importance of “promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.”<sup>52</sup> Article 55(c) also provides that the United Nations shall promote “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”<sup>53</sup> This article is followed by Article 56 which states that Members “pledge themselves to take joint and separate action” to achieve that respect.<sup>54</sup>

Although the term “human rights” is not specifically defined in the Charter, Members are expected to promote such human rights norms that are established by the Commission on Human Rights and widely accepted by the international community.<sup>55</sup> The Commission on Human Rights is responsible for drafting the Universal Declaration on Human Rights (the “Declaration”), which was adopted by the UN General Assembly in 1948.<sup>56</sup> The Preamble to the Declaration states that “it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.”<sup>57</sup> The Declaration enumerates several basic rights, including “the right to life, liberty and security of person” (Art. 3),<sup>58</sup> “the right to recognition . . . as a person before the law” (Art. 6),<sup>59</sup> the right to “full equality” and to a “fair and public hearing” under the law (Art. 10),<sup>60</sup> the “right to freedom of movement” and to leave and return to one’s country

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49. See Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter *Genocide Convention*].

50. Mingst & Karns point out that the *League of Nations Covenant* made little mention of human rights other than a provision for the protection of “minorities, women, children, and dependent peoples.” See MINGST & KARNS, *supra* note 12, at 159.

51. U.N. Charter, preamble.

52. *Id.* art. 1, para. 3.

53. *Id.* art. 55, para. c.

54. *Id.* art. 56.

55. See MINGST & KARNS, *supra* note 12, at 160.

56. See *id.* at 160-61.

57. *Universal Declaration*, *supra* note 48, preamble.

58. *Id.* art. 3.

59. *Id.* art. 6.

60. *Id.* art. 10.

(Art. 13),<sup>61</sup> “the right to freedom of thought, conscience and religion” (Art. 18),<sup>62</sup> among other affirmative rights. The Declaration also guards against numerous forms of government abuse, including degrading or inhumane treatment (Art. 5),<sup>63</sup> discrimination (Art. 7),<sup>64</sup> arbitrary arrest and detention (Art. 9),<sup>65</sup> arbitrary interference with or attacks on one’s privacy, family, home or reputation (Art. 12),<sup>66</sup> and “destruction of any of the rights and freedoms set forth” in the Declaration (Art. 30).<sup>67</sup> These rights and guarantees are not binding on signatories to the Declaration, but do serve as principles or “aspirations” for governments to respect and promote.

The Genocide Convention is the result of UN efforts to prohibit the worst form of human rights violations and establish beyond a doubt that genocide is a matter of international concern. The Convention characterizes genocide as an international crime and requires a number of specific objective and subjective elements.<sup>68</sup> The objective or *actus reas* elements are twofold. First, the act or offense must take the form of (a) killing; (b) “causing serious bodily or mental harm;” (c) “inflicting on the group conditions of life calculated to bring about its physical destruction;” (d) “[i]mposing measures intended to prevent births within the group;” or (e) “[f]orcibly transferring children of the group to another group.”<sup>69</sup> The second objective element provides that the above acts must be directed or targeted at “a national, ethnical, racial or religious group.”<sup>70</sup>

The subjective or *mens rea* elements of genocide also contain two prongs. First, there must be a criminal intent required for the underlying offense (killing, causing serious bodily or mental harm, etc.).<sup>71</sup> Second, there must be the “intent to destroy, in whole or in part,” the group as such.<sup>72</sup> The intent to destroy the group “in part” requires the intention to destroy a considerable number of individuals or a substantial part, but not necessarily an important part of the group.<sup>73</sup> Examples of genocide in the historical

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61. *Id.* art. 13

62. *Id.* art. 18.

63. *Id.* art. 5.

64. *Id.* art. 7.

65. *Id.* art. 9.

66. *Id.* art. 12.

67. *Id.* art. 30.

68. *Genocide Convention*, *supra* note 49, art. 1.

69. *Id.* art. 2.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

literature include the Nazi intent to destroy all the Jews in Europe during the Second World War and the Turkish Government's attempt to destroy all the Armenians in Turkey during World War I.<sup>74</sup>

The obligation imposed upon Member States in the UN Charter to respect human rights and "take joint and separate action" to achieve that respect<sup>75</sup> often comes into conflict with the Charter's affirmation of the principles of sovereignty and nonintervention contained in Article 2(7). Not all states recognize the same human rights norms, and many are unwilling to have their human rights records investigated.<sup>76</sup> For example, the principle of equal treatment of women before the law is not recognized in many Islamic countries, but it is enshrined in Article 55(c) of the Charter.<sup>77</sup> Does this mean that western nations can "take joint and separate action" pursuant to Article 56 to achieve respect for this principle by intervening in the internal affairs of Islamic countries? The framers of the Charter did not envision Members interfering in the internal affairs of other Members to prevent human rights violations short of genocide. The principles of sovereignty and nonintervention were deemed to be inviolable and essential to encourage state support for the UN system. However, as human rights have emerged as a major issue in world politics over the years, international law has evolved to accommodate exceptions to the principles of national sovereignty and nonintervention in international law. The next section describes the evolution of one of these exceptions, the doctrine of humanitarian intervention, and the idea that states should not be allowed to hide behind the veil of sovereignty when committing grave violations of human rights.

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74. See WILLIAM A. SCHABAS, *GENOCIDE IN INTERNATIONAL LAW* (2000). During World War II, more than six million Jews and Romans were murdered by the Nazis in an attempt to wipe out the Jewish race and other minorities in Europe. In 1915, 1.5 million Armenians were slaughtered by the Ottoman Turks in what western governments regard as one of the worst "genocides" in history. The Turkish Government to this day denies the charge of "genocide" as western "spin" and argues instead that the death toll was far less than 1.5 million and the result of "civil war, starvation and deportation." Vincent Boland, *Turkey Challenges 'Genocide Fraud'*, FIN. TIMES, Apr. 22, 2005, at 8.

75. U.N. Charter, art. 56.

76. Many governments in developing countries fear major power interference in their affairs and therefore oppose arguments tending to legitimize intervention. See John Alan Cohan, *The Bush Doctrine and the Emerging Norm of Anticipatory Self-Defense in Customary International Law*, 15 PACE INT'L L. REV. 283, 290 (2003).

77. U.N. Charter, art. 55(c).

B. *The Doctrine of Humanitarian Intervention and the Cold War*

Humanitarian intervention involves the unilateral or collective use of military force across national borders to protect individuals from violence or the threat of imminent harm. The express purposes of humanitarian intervention include (1) rescuing the population at large or (2) rescuing hostages or those trapped in an internal conflict who possess the nationality of the intervening state. There is no specific provision in the Charter authorizing a state to intervene in the internal affairs of another state to prevent a humanitarian tragedy. However, it is arguable that a right to intervene in the internal affairs of a state to prevent grave human rights violations now exists under customary international law. The road to recognition of such a right under customary international law has been controversial and paved with the blood of millions of innocent civilians.

1. *The 1961 Belgian Action in the Congo*

The first humanitarian intervention involving the UN did not occur until more than fifteen years after the creation of the Charter. In 1961, the Security Council authorized Belgium to intervene militarily in the Republic of the Congo to protect Belgian nationals from the Congolese army. The former Belgian colony had just won its independence and the Congolese army had been attacking Belgian civilians and looting their homes and businesses. A year earlier, the Security Council authorized the UN Secretary-General “to provide the [Congolese] Government with such military assistance” to help remove Belgian troops from Congolese soil.<sup>78</sup> By 1961, however, internal violence in the Congo had reached an alarming level, and the Security Council approved Resolution 161 authorizing the United Nations to take all appropriate measures, including “the use of force,” to restore control over the Congolese army and stem the “systematic violations of human rights” in the Congo.<sup>79</sup> The Congolese Government claimed that the Belgian intervention constituted an act of aggression and a violation of its national sovereignty.<sup>80</sup>

The Belgian intervention was justified under Article 51 – the self-defense doctrine – of the Charter.<sup>81</sup> The purpose of the

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78. U.N. SCOR, 15th Sess., 873d mtg. at 5, U.N. Doc. S/RES/143 (July 14, 1960).

79. S.C. RES. 161, *supra* note 42.

80. See Michael J. Mattler, *The Distinction Between Civil Wars and International Wars and Its Legal Implications*, 26 N.Y.U. J. INT'L L. & POL. 655, 661 (1994).

81. U.N. Charter, art. 51.

intervention was to rescue Belgian nationals from a volatile political situation and the possibility of being killed or injured.<sup>82</sup> Though the mission was never defined as a “humanitarian intervention,” the Belgian government interpreted the doctrine of self-defense rather loosely to include the protection of nationals who were located within the territorial jurisdiction of the Congo.<sup>83</sup> This was the first time since the adoption of the Charter that the Security Council authorized the use of military force to intervene in the internal affairs of a member state to prevent serious human rights violations.<sup>84</sup>

Other than the 1961 Belgian action in the Congo, there were no further actions taken by the Security Council under its Chapter VII enforcement powers to protect human rights during the Cold War period. The veto dilemma pitted the two most powerful Members of the Security Council against one another in a way that severely limited the Council’s ability to respond to humanitarian crises.<sup>85</sup> Thus, from a legal standpoint, the Belgian intervention in the Congo was not a violation of the Congo’s sovereignty because it took place with the Security Council’s approval and in compliance with the Charter’s provision for self-defense. Subsequent humanitarian interventions would not have the blessing of the Security Council until the wall separating East and West was dismantled.

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82. See S.C. RES. 161, *supra* note 42.79.

83. See Louis Henkin, *Use of Force: Law and U.S. Policy*, in *RIGHT V. MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE* 37, 41-42 (1991) [hereinafter Henkin, *Use of Force*].

84. Prior to the Belgian intervention in the Congo, the Security Council had only authorized the use of force on one previous occasion. In 1950, the USSR temporarily boycotted Security Council meetings over the issue of the People’s Republic of China’s (mainland China’s) failed bid to occupy the “China” seat on the Council rather than the Republic of China (the Nationalist government that had fled to Formosa in the wake of Mao’s successful communist revolution on the mainland) which then had the seat. The historic absence of the USSR from the Security Council allowed the Council to vote in favor of the use of force to counter North Korea’s invasion of South Korea that same year under the direction of a U.S. military command. The Security Council recommended that Members “furnish such assistance as may be necessary to repel the armed attack” from North Korea. This more than likely would not have happened if the Soviet representative had been present for the vote. See MICHAEL HICKEY, *THE KOREAN WAR: THE WEST CONFRONTS OF COMMUNISM* 38 (1999).

85. The Security Council incorporates both permanent and nonpermanent members. U.N. Charter art. 23. The five permanent members – the United States, Great Britain, France, Russia, and the Peoples Republic of China (which replaced the Republic of China in 1971) – have the most influence since each possesses veto power. See *id.* Any one of these five could block Security Council action by exercising its right to veto a proposed action. See *id.* art. 27. The ten nonpermanent members, originally six in number but expanded to ten in 1965, do not have veto power and may not serve successive terms. See *id.* arts. 23, 27.

## 2. *The 1971 Indian Action in East Pakistan*

In December of 1971, the East Pakistani Army slaughtered thousands of civilians in Bangladesh during a government crackdown. Nearly a million Pakistanis died or were forced to flee their homes during the crisis.<sup>86</sup> The Security Council failed to authorize military intervention to prevent the crisis. The Indian army eventually intervened to prevent further killings and to stem the flow of refugees across its border with East Pakistan. During the Indian invasion of East Pakistan, no Pakistani territory was taken nor was the Government of East Pakistan removed from power.<sup>87</sup> The International Commission of Jurists concluded that India's actions were justified under the doctrine of humanitarian intervention.<sup>88</sup> The Indian invasion of East Pakistan was the first unilateral military intervention on behalf of non-nationals since the birth of the Charter.

## 3. *The 1976 "Entebbe Incident" in Uganda*

The first unilateral military intervention to protect one's own nationals in the absence of Security Council approval occurred in 1976 and involved the State of Israel. In July of 1976, an Air France commercial airliner carrying Israeli passengers was hijacked and forced to land at Entebbe Airport in Uganda.<sup>89</sup> The Israeli Government, having failed to obtain the required consent from the government of Idi Amin to intervene, sent Israeli special forces to Uganda in a clandestine effort to rescue the hostages.<sup>90</sup> Israeli special forces flew all the way to Entebbe Airport under Ugandan radar, where they forcibly boarded the hijacked plane and rescued the hostages.<sup>91</sup> During the rescue, three hostages died

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86. See generally Byron F. Burmester, *On Humanitarian Intervention: The New World Order and Wars to Preserve Human Rights*, 1994 UTAH L. REV. 269, 286 (1994) (reviewing the doctrine of humanitarian intervention using the events of Bangladesh, Cambodia and Uganda as case studies).

87. See *id.* at 288.

88. See RICHARD B. LILICH & FRANK C. NEWMAN, *INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW & POLICY* 495 (1979) (concluding that in view of UN reluctance to become involved in the Pakistani violence and the fact that Indian military involvement was limited in scope, resulting in the acquisition of no territory, the invasion did appear to be underscored primarily by a humanitarian purpose). The Indian intervention was also justified under the doctrine of self-defense, given the fact that Pakistan had launched a preemptive strike against Indian airfields. See *id.* at 486, 495.

89. See Eleanor C. McDowell, *Introductory Note, United Nations: Security Council Debate and Draft Resolutions Concerning the Operation to Rescue Hijacked Hostages at the Entebbe Airport*, 15 I.L.M. 1224, 1224 (1976).

90. See *id.* at 1224-29.

91. See *id.* at 1224.



in the brief exchange of fire aboard the plane.<sup>92</sup> The Israeli rescue operation was a success, but it came at great cost to those civilians who lost their lives.

Israel's unilateral military intervention at Entebbe was a clear violation of Uganda's sovereignty and the principle of nonintervention under Article 2(7) of the Charter. The Israeli Government claimed that the inherent right of self-defense embodied in Article 51 of the Charter extended to the protection of nationals being held hostage within another country's borders.<sup>93</sup> There is no mentioning in the Charter, however, as to whether Article 51 includes the protection of one's own nationals in a hostage situation.<sup>94</sup> In what would later become known as the "Entebbe Principle," the Israeli Government maintained that there may be a limited right of self-defense in hostage situations where the territorial state cannot or will not act to save the hostages.<sup>95</sup> This exception to the principle of nonintervention is recognized today under customary international law.

#### 4. *The Cambodian Genocide and Vietnam's Intervention*

The Vietnamese invasion of Cambodia in 1978 was another example of unilateral humanitarian intervention in the absence of Security Council approval. In the late-1970s, the Khmer Rouge, led by Pol Pot, orchestrated a campaign of genocide against the Cambodian people. More than a million people died of starvation, disease or execution.<sup>96</sup> The Cambodian genocide was one of the worst episodes of systematic mass murder in human history. Similar to the crisis in East Pakistan, the Security Council failed to act to prevent the killing of innocent civilians. In response to the violence, the Vietnamese Army invaded Cambodia and overthrew Pol Pot and the Khmer Rouge in 1978.<sup>97</sup> Vietnam installed a puppet government that remained in power for several years.

Vietnam's invasion of Cambodia was controversial at the time. The United States opposed the invasion as a violation of Cambodia's sovereignty.<sup>98</sup> Other nations were willing to overlook

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92. *See id.*

93. *See id.* at 1229.

94. *See* Henkin, *Use of Force*, *supra* note 83, at 39.

95. *See id.* at 41-42.

96. Seth Mydans, *Skulls Haunt Cambodia, Demanding Belated Justice*, N.Y. TIMES, Mar. 20, 2005, at A4. According to the most recent statistics, 1.7 million people died during the Khmer Rouge era, from 1975-1979. *Id.*

97. Burmester, *supra* note 86, at 293.

98. *See* Richard A. Falk, *What Future for the UN Charter System of War Prevention?*, 97 AM. J. INT'L L. 590, 597 n. 24 (2003). "Most Americans greeted the news that Vietnam

the obvious violations of Articles 2(4) and 2(7) of the UN Charter on the grounds that the invasion saved the lives of countless civilians who were headed for the Khmer Rouge “Killing Fields.” Andrew Young, the U.S. Ambassador to the UN, described the uncertainty over the issue at the time:

I almost always think it's always wrong for a country to transgress the borders of another country, but in the case of Cambodia I'm not terribly upset .... It is a country that has killed so many of its own people, I don't know if any American can have a clear opinion of it .... It's such a terribly ambiguous moral situation.<sup>99</sup>

In the end, the Vietnamese invasion of Cambodia was not viewed by the international community as a violation of Cambodia's national sovereignty because of the numerous atrocities committed by the Khmer Rouge. This is evidenced by the fact that several Security Council resolutions denouncing the invasion were never implemented.<sup>100</sup> Even though the Khmer Rouge eventually returned to power in Cambodia, the Vietnamese effort to halt the genocide in the absence of Security Council approval was a progressive step in the evolution of humanitarian intervention as an exception to the principle of nonintervention.<sup>101</sup>

##### 5. *The 1979 Tanzanian Overthrow of Ugandan Leader Idi Amin*

Another milestone in the development of humanitarian intervention was the Tanzanian invasion of Uganda in 1979. At the time, Uganda had been ruled by Idi Amin, a ruthless dictator who ordered the systematic slaughter of more than 300,000 people during his seven year reign of terror.<sup>102</sup> Again, the Security Council failed to authorize the use of force to prevent mass

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had invaded Cambodia with distress, hearing only that an enemy of America had invaded another country.” SAMANTHA POWER, *A PROBLEM FROM HELL, AMERICA AND THE AGE OF GENOCIDE* 146 (2002).

99. POWER, *supra* note 98, at 146; *see also* Naomi Kaplan, *A Failure of Perspective: Moral Assumptions and Genocide*, 23 B.C. THIRD WORLD L.J. 359, 360 n.9 (2003).

100. *See Democratic Kampuchea and Vietnam*, 1979 ANN. REV. U.N. AFF. 72-73 (citing U.N. Docs. S/13022, S/13027, and S/13162).

101. In 2003, after years of negotiations and delays, the UN agreed to establish an international tribunal in Cambodia to try members of the Khmer Rouge responsible for the genocide. Pol Pot died in 1998, but the skulls remain today as tangible proof of the mass killings. *See Mydans, supra* note 96.

102. *See Burmester, supra* note 86, at 289-90.

murder.<sup>103</sup> However, the Government of Tanzania ordered its troops to intervene in Uganda to prevent further bloodshed and to drive Amin from power.<sup>104</sup> During the intervention, Tanzanian forces forcibly removed Amin from power, but caused only limited destruction in Uganda.<sup>105</sup> Tanzania's motives were primarily humanitarian in nature. With the overthrow of Amin, the Tanzanian intervention further legitimized the use of force to protect non-nationals from abusive regimes.

#### 6. *The U.S. Invasions of Grenada and Panama*

The decision to unilaterally intervene in the internal affairs of a sovereign state to prevent serious human rights violations was taken by the United States on two occasions during the Cold War period. In 1983, a multinational invasion was launched against the People's Revolutionary Army ("PRA") of Grenada to protect U.S. citizens from political violence.<sup>106</sup> The PRA had imposed a curfew on the island and warned that "[a]nyone who seeks to demonstrate or disturb the peace . . . will be shot."<sup>107</sup> The United States responded by sending in troops without UN approval. The Reagan Administration reasoned that it was legal to intervene in the internal affairs of another state to protect American citizens from the imminent threat of harm.<sup>108</sup> The international community, however, condemned the U.S. invasion as a blatant violation of Grenada's sovereignty and Articles 2(4) and 2(7) of the UN Charter.<sup>109</sup>

In 1989, the United States invaded Panama to capture Manuel Noriega, a brutal dictator and drug trafficker who had taken control of the country by overthrowing the democratically-elected government of President Guillermo Endara. Noriega declared war on U.S. forces in Panama and was responsible for numerous violent acts against American troops stationed in the Panama

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103. See *id.* at 290.

104. *Id.*

105. See *id.* at 290-91.

106. See Christopher C. Joyner, *The United States Action in Grenada, Reflections on the Lawfulness of Invasion*, 78 AM. J. INT'L L. 131, 131-33 (1984).

107. Robert J. Beck, *International Law and the Decision to Invade Grenada: A Ten-Year Retrospective*, 33 VA. J. INT'L L. 765, 776 (1993) (quoting Mary Grieves et al., *The Grenada Document: The Bitter, Epic Struggle for the Isle of Spice*, NATION (Barbados), Feb. 1984, at 25).

108. See Kenneth Regensberg, *Refugee Law Reconsidered: Reconciling Humanitarian Objectives with the Protectionist Agendas of Western Europe and the United States*, 29 CORNELL INT'L L.J. 225, 248-50 (documenting the invasions of Panama and Grenada).

109. See Joyner, *supra* note 106, at 141. See also Burns H. Weston, *The Reagan Administration Versus International Law*, 19 CASE W. RES. INT'L L. 295, 296 (1987) (the invasion of Grenada probably violated international law).

Canal Zone.<sup>110</sup> The alleged purpose of the U.S. invasion was to protect American military personnel and their families and defend the integrity of U.S. rights under the Panama Canal Treaties.<sup>111</sup> The U.S. Government claimed that it had a right to intervene militarily in Panama under Article 51 of the UN Charter.<sup>112</sup> Professor Louis Henkin argued that the claim of self-defense used by the U.S. Government to justify its military intervention in Panama was misplaced because Article 51 of the Charter requires that an armed attack occur against the intervening state.<sup>113</sup>

International legal experts have long debated the question of whether a state can use force to intervene in the internal affairs of another state to protect the intervening state's nationals. The Belgian action in the Congo, the "Entebbe Incident" in Uganda, and the U.S. invasions of Grenada and Panama were based on the theory that a state has a right under the self-defense doctrine to protect its nationals from imminent harm. However, Oxford legal scholar Ian Brownlie wrote that "intervention to protect nationals has no legal basis under international law."<sup>114</sup> To permit a state to intervene militarily in another state's internal affairs under the pretext of protecting one's own nationals would create great uncertainty in the law and likely dismantle the pillars, or those core principles of nonintervention and national sovereignty, upon which the UN Charter stands. Perhaps recognizing this problem, neither Belgium, Israel, nor the United States claimed the doctrine of humanitarian intervention to justify acting on behalf of their own nationals.

However, the Vietnamese invasion of Cambodia in 1978 and the Tanzanian invasion of Uganda in 1979 are instructive in examining the emergence of the doctrine of humanitarian intervention in international law. These interventions, unlike the interventions to protect one's own nationals, involved the

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110. See Regensberg, *supra* note 108, at 250-51 (reporting that forces under Noriega shot and killed one American serviceman, wounded another, brutally beat a third, and threatened sexual abuse against the wife of another serviceman during a brutal interrogation).

111. See Marian Nash Leich, *Contemporary Practice of the United States Relating to International Law*, 84 AM. J. INT'L L. 536, 546 (1990).

112. See *id.* at 548.

113. Louis Henkin, *The Invasion of Panama Under International Law: A Gross Violation*, 29 COLUM. J. TRANSNAT'L L. 293, 305-06 (1991). Professor Henkin also points out that the ousted President of Panama Guillermo Endara welcomed or consented to the American military action in Panama and, therefore, to the extent that the democratically-elected government of Panama was, in fact, the legitimate government of Panama under international law, such consent would have made the question of whether the U.S. military intervention violated Panama's sovereignty a moot point. *Id.* at 294.

114. IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 298-301 (1963).

protection of countless non-nationals who were threatened by regimes engaged in murder, rape, torture, pillaging and enforced displacement, on a widespread and systematic basis. By the end of Pol Pot's reign, more than a million people had been murdered in Cambodia.<sup>115</sup> Idi Amin, too, had orchestrated the slaughter of more than 300,000 people.<sup>116</sup> The intentional, systematic murder of so many people was a stark reminder of the Holocaust in Europe and the Nanjing massacre in China during World War II.<sup>117</sup> The brutal dictators in Cambodia and Uganda attempted to hide behind the principles of national sovereignty and nonintervention enshrined in the UN Charter to avoid being held accountable for their actions. But they underestimated the political will of some states to risk violating the Charter to protect human rights.

#### IV. HUMANITARIAN INTERVENTION AND THE POST-COLD WAR ERA

The end of the Cold War marked an important turning point for human rights around the world. The number of free nations doubled and individuals who were once treated as pawns in an ideological chess game were now allowed to vote and determine their own destinies. Moreover, the UN gained legitimacy and increased its role in conflict management. As a consequence, collective military interventions on behalf of human rights were more common during the 1990s, and the UN Security Council was less inhibited in authorizing the use of force to prevent humanitarian crises. In several instances, the Security Council authorized the use of force to prevent brutal dictators or military regimes from committing violence against their own people. However, not all humanitarian interventions since the end of the Cold War have been approved by the Security Council. This chapter examines the increasing legitimacy of humanitarian intervention over the past fifteen years and the simultaneous erosion of the principles of national sovereignty and nonintervention in international law.

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115. Mydans, *supra* note 96, at 4.

116. Burmester, *supra* note 86, at 289-90.

117. In December 1937, the Japanese Imperial Army conquered Nanjing. The Japanese then massacred more than three hundred thousand people, mostly civilians and POWs. "Over twenty thousand cases of rape were reported. Many of the victims were gang raped and then killed." Several thousand more rape victims were sent to army brothels on the front lines (the so-called "comfort stations"). *WWW Memorial Hall of the Victims in the Nanjing Massacre*, at <http://www.arts.cuhk.edu.hk/NanjingMassacre/NM.html>.

### A. UN Authorized Humanitarian Intervention

Since the end of the Cold War, there have been four episodes where the Security Council has authorized the use of force to intervene in the internal affairs of a sovereign nation without that nation's consent. Of those four episodes, only two have been for purely humanitarian objectives, while the other two have been motivated also by a desire to restore international peace and security under Chapter VII of the UN Charter.

#### 1. UN Intervention in Iraq

In 1990, the Security Council passed Resolution 678 authorizing the collective use of force against Iraq in response to Iraq's invasion of Kuwait.<sup>118</sup> The Security Council determined that Iraq's invasion of Kuwait violated Article 2(4) of the UN Charter,<sup>119</sup> which prohibits the "threat or use of force against the territorial integrity or political independence" of any state.<sup>120</sup> The decision to use force against Iraq was taken on the basis of collective self-defense pursuant to Articles 39 and 40 of the Charter.<sup>121</sup> A coalition of nations led by the United States forced the Iraqi army out of Kuwait, but they refused to remove the Iraqi regime from power. The passage of Resolution 678 was the first time that the Security Council had authorized the use of force against a member state in twenty-five years.

Immediately following the Gulf War, coalition forces, led by the United States, sought the legal authority from the UN to protect the Kurdish minority in the northern part of the country who had suffered under the brutal regime of Saddam Hussein. Security Council Resolution 688 authorized the United States and its allies to use force within Iraq to protect the Kurds.<sup>122</sup> The Security Council claimed to act on the basis of international security concerns, describing the resulting flood of Kurdish refugees into Turkey and Iran as a threat to international peace and security in the region.<sup>123</sup> Referring to Article 39 of the Charter, the Security Council called for measures to prevent further breaches of the

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118. See U.N. SCOR, 45th Sess., 2963d mtg. at 27-28, U.N. Doc. S/RES/678 (Nov. 29, 1990) (authorizing member states to use all necessary means to of force against Iraq as a result of the invasion of Kuwait).

119. See *id.*

120. U.N. Charter art. 2, para. 4.

121. U.N. SCOR, 45th Sess., 2932d mtg. at 19, U.N. Doc. S/RES/660 (Aug. 2, 1990).

122. See U.N. SCOR, 46th Sess., 2982d mtg. at 31-32, U.N. Doc. S/RES/688 (Apr. 5, 1991).

123. *Id.*

peace by Iraq or acts of aggression against the Kurdish people.<sup>124</sup> Iraq claimed that Resolution 688 was a violation of its sovereignty.<sup>125</sup>

The Security Council's approval of the use of force to protect the Kurds was unprecedented in international law. For the first time since the creation of the Charter, the goal of preventing the slaughter of non-nationals within a sovereign state's borders trumped that state's claim to sovereignty and nonintervention. Although international security concerns in the border area between Iraq and Turkey were at the forefront of the Security Council's thinking, the self-defense doctrine was not invoked by the Council in making its decision to authorize the use of force after the Gulf war had ended. Thus, a new precedent had been established in international law: that forcible humanitarian intervention could be justified if the human rights violations occurring within a state amounted to a threat to international peace and security in the region. Though the new rule did not provide for humanitarian intervention in all circumstances, it did send a powerful signal to brutal dictators that they could no longer hide behind claims of sovereignty and nonintervention to avoid responsibility for abusing their own people. But what if there was no threat to international peace and security in the region? Would the Security Council be justified in authorizing the use of force to protect non-nationals in a purely internal conflict?

## 2. *UN Intervention in Somalia*

In 1991, violent conflict erupted between warring clans in Somalia following a severe drought and the collapse of the government.<sup>126</sup> Thousands of people died or fled the country during the crisis, and close to a million were forced to the brink of starvation before the UN intervened.<sup>127</sup> The Security Council, acting under Article 41 of the Charter, called for an arms embargo against Somalia to prevent the warlords from obtaining needed

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124. *Id.*

125. See Michael J. Reppas, *The Lawfulness of Humanitarian Intervention*, 9 ST. THOMAS L. REV. 463, 475-76 (1997) (citing Marc M. Boutin, *Somalia: The Legality of U.N. Forcible Humanitarian Intervention*, 17 SUFFOLK TRANSNAT'L L. REV. 138, 148-49 (1994)).

126. See Neil Henry, *Evacuees Tell of Somalia's Chaos, Carnage; Bodies Said to Litter Capital After Week of Fighting Between Rebels, Troops*, WASH. POST, Jan. 7, 1991, at A17.

127. See Keith B. Reichburg, *Diseases Sweep Somalis, Kill More than Famine*, WASH. POST, Oct. 2, 1992, at A1. The Security Council was slow to respond because it took the position that it needed the consent of the Somali warlords to provide humanitarian assistance. *Id.*

supplies to carry on their internal war.<sup>128</sup> The warring clans responded by raiding UN warehouses where food and medicine were stored and preventing aid from being distributed to the people. As the death toll continued to rise throughout the country, the Security Council deployed a small contingent of “blue helmets” to assist in the delivery of aid.<sup>129</sup>

With no end to the violence in sight, the UN Secretary-General notified the Security Council that the situation in Somalia had “deteriorated beyond the point at which it is susceptible to the peace-keeping treatment.”<sup>130</sup> The UN Chief requested that the Security Council use more “forceful measures” to facilitate the delivery of aid to the starving masses.<sup>131</sup> On December 3, 1992, the Security Council authorized a U.S.-led military intervention – the Unified Task Force (UNITAF) – under Article 42 of the Charter to assist with humanitarian relief efforts.<sup>132</sup> U.S. Marines guarded aid convoys and negotiated with clan leaders. They also were targeted for attack by forces loyal to one of the clan leaders, General Mohammed Farah Aideed. During one episode, eighteen U.S. Marines were killed in Mogadishu during a gunfight, and one U.S. soldier’s body was dragged through the streets in an act of defiance by armed gangs. The violence was captured on CNN and led to a public outcry against American involvement in Somalia back in the United States.<sup>133</sup> In May of 2003, U.S. troops withdrew from Somalia and the UN took over the peacekeeping mission.<sup>134</sup>

Despite the controversy surrounding the American casualties, the intervention in Somalia was an important milestone in international law. Unlike the intervention in Iraq a year earlier, the Security Council’s decision to intervene in Somalia was made for predominantly humanitarian reasons. The internal civil war in Somalia did not amount to a breach of the peace or threat to

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128. See U.N. SCOR, 47th Sess., 3039th mtg. at 55, U.N. Doc. S/RES733 (Jan. 23, 1992).

129. Approximately 500 lightly armed Pakistani troops were deployed in August 1992 to protect relief workers. The operation was called UNOSOM I. See U.N., *Somalia: UNOSOM I Background*, [http://www.un.org/Depts/dpko/dpko/co\\_mission/unosom1backgr2.html](http://www.un.org/Depts/dpko/dpko/co_mission/unosom1backgr2.html).

130. Letter, Security Council, Letter from the Secretary-General Addressed to the President of the Security Council, U.N. Doc. S/24868 (Nov. 30, 1992).

131. See Don Oberdorfer & John Lancaster, *U.N. Chief Weighs Use of U.S. Troops in Somalia; Security Council to Consider Options for Protecting Relief Supply Lines*, WASH. POST, Nov. 27, 1992, at A1.

132. See U.N. SCOR, 47th Sess., 3145th mtg. at 1-4, U.N. Doc. S/RES/794 (Dec. 3, 1992); *Marines Land in Peace, Forces Hold Firm in Face of Pesky Press*, ST. LOUIS POST-DISPATCH, Dec. 9, 1992, at A1.

133. See generally MARK BOWDEN, *BLACK HAWK DOWN; A STORY OF MODERN WAR* (1999).

134. See Keith B. Richburg, *U.N. Takes Command of Troops in Somalia; U.S. General Departs, Replaced by Turk*, WASH. POST, May 5, 1993, at A23.



international peace and security under the Charter, though an argument can be made that the mass exodus of refugees into neighboring Kenya may have constituted such a threat. Moreover, it was a significant development for the UN to authorize a unilateral humanitarian operation to protect non-nationals, immediately followed by collective action to quell the civil unrest and ensure the flow of relief supplies to the Somali people. The joint U.S.-UN operation proved that the Charter could adapt to crises without compromising the principles of collective security and multilateralism. It further showed that humanitarian considerations can prevail over concerns about national sovereignty when governments collapse and fail to protect their own people.

### 3. *UN Intervention in Yugoslavia*

In 1991, tensions between Serbs, Croats and Muslims in the Balkans escalated when Croatia and Slovenia declared independence from Yugoslavia. The Balkan “powder-keg” had been fairly quiet during the Cold War, but the lifting of the Iron Curtain prompted calls for democracy and autonomy within the region. The ensuing war caused the deaths of thousands of innocent civilians and forced hundreds of thousands of people to flee their homes and villages. The atrocities committed by all sides during the Balkan conflict were so widespread that the UN was compelled to intervene.

The UN’s involvement in the internal affairs of the former Republic of Yugoslavia (FRY) increased rapidly over a short period of time. In 1991, the Security Council imposed a general weapons embargo against the former Yugoslavia.<sup>135</sup> In February of 1992, the Security Council established a United Nations Protection Force (UNPROFOR) to be deployed to Bosnia-Herzegovina for peacekeeping purposes.<sup>136</sup> In May that same year, the Security Council took the unprecedented step of recognizing Croatia, Slovenia, Bosnia-Herzegovina, and the Former Yugoslav Republic of Macedonia as independent states.<sup>137</sup> The Security Council also

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135. See U.N. SCOR, 46th Sess., 3009th mtg. at 43, U.N. Doc. S/RES/713 (Sep. 25, 1991).

136. See U.N. SCOR, 47th Sess., 3055th mtg. at 9, U.N. Doc. S/RES/743 (Feb. 21, 1992).

137. See U.N. SCOR, 47th Sess., 3076th mtg. at 115, U.N. Doc. S/RES/753 (May 18, 1992) (recommending that Croatia be recognized as an independent state); U.N. SCOR, 47th Sess., 3077th mtg. at 115, U.N. Doc. S/RES/754 (1992) (recommending that Slovenia be recognized as an independent state); U.N. SCOR, 47th Sess., 3079th mtg. at 1, U.N. Doc. S/RES/755 (May 20, 1992) (recommending that Bosnia and Herzegovina be recognized as independent states); U.N. SCOR, 47th Sess., 3196th mtg. at 1, U.N. Doc. S/RES/817 (Apr. 7,

expanded UNPROFOR's mandate to regulate the flow of refugees during the war.<sup>138</sup> Despite these efforts, the humanitarian crisis grew worse as Serbian forces intensified their campaign of ethnic cleansing in Bosnia.

In August of 1992, the Security Council authorized NATO under Articles 42 and 53(1) to take "all measures necessary" to facilitate the delivery of humanitarian assistance to Bosnia.<sup>139</sup> A "no-fly" zone was established over Bosnia to protect humanitarian supply convoys.<sup>140</sup> NATO was responsible for enforcing the ban on flights within the zone.<sup>141</sup> In addition, safe havens were established in several Bosnian cities to protect civilians from the violence.<sup>142</sup> NATO members contributed to the protection of human rights through their participation in the NATO-led Implementation Force (IFOR) and its successor Stabilization Force (SFOR). Intervention in Bosnia was NATO's first major military challenge since the end of the Cold War, and it eventually led to the signing of the Dayton Peace Accords in 1995.

NATO's intervention in the Balkan was a significant development in international law. This was the first time that a regional military organization was given the authority by the Security Council to use force against a UN member state. The UN helped pave the way for the intervention by recognizing Croatia, Slovenia, Bosnia-Herzegovina, and the former Yugoslav Republic of Macedonia as independent states. Without such recognition, the legal case for violating Yugoslavia's sovereignty would have been much weaker under the Charter. In the end, the decision to intervene was justified on humanitarian grounds, and the effect of this intervention was to save countless lives. This precedent would serve as the basis for NATO's intervention in Kosovo in the absence of Security Council approval six years later.

#### 4. *UN Intervention in Haiti*

In 1993, the UN and the U.S. were confronted with another humanitarian crisis stemming from the overthrow of the

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1993) (recommending that the Former Yugoslav Republic of Macedonia be recognized as an independent state).

138. U.N. SCOR, 47th Sess., 3104th mtg. at 1, U.N. Doc. S/RES/769 (Aug. 7, 1992).

139. U.N. SCOR, 47th Sess., 3106th mtg. at 2, U.N. Doc. S/RES/770 (Aug. 13, 1992).

140. See U.N. SCOR, 47th Sess., 3122d mtg. at 2, U.N. Doc. S/RES/781 (Oct. 9, 1992).

141. See U.N. SCOR, 47th Sess., 3191st mtg. at 1-2, U.N. Doc. S/RES/816 (Mar. 31, 1993).

142. See U.N. SCOR, 48th Sess., 3199th mtg. at 2, U.N. Doc. S/RES/819 (Apr. 16, 1993) (establishing a safe area around Srebrenica); U.N. SCOR, 48th Sess., 3208th mtg. at 2, U.N. Doc. S/RES/824 (May 6, 1993) (establishing safe areas around Tuzla, Zepa, Gorazde, and Bihac).

democratically-elected government of Jean Bertrand Aristide in Haiti. Following the ouster of Aristide in 1991, the military-backed regime of Raul Cedras had launched a campaign of violence against Aristide supporters, forcing thousands to flee in make-shift rafts and boats across the Florida straits.<sup>143</sup> Fearing a flood of refugees on its shores, the U.S. requested authority from the Security Council to intervene militarily in Haiti. The U.S. argued that the flood of refugees constituted “a threat to international peace and security in the region” and, therefore, the Security Council should act under its Chapter VII enforcement powers to restore order.

Initially, the UN imposed economic sanctions against Haiti to persuade the military government to refrain from violating human rights.<sup>144</sup> On July 31, 1994, the Security Council authorized the U.S. to “use all necessary means to facilitate the departure from Haiti of the military leadership . . . and the restoration of the legitimate authorities of the Government of Haiti” under Article 42 of the UN Charter.<sup>145</sup> This was the first time that the Security Council ever used its Chapter VII enforcement authority to restore democracy to a country. Prior to sending troops to Haiti, President Clinton authorized former President Jimmy Carter to try and resolve the crisis peacefully.<sup>146</sup> Carter succeeded in reaching an agreement with Haiti’s military officials which called for the peaceful return of Aristide to power in exchange for amnesty for those involved in the coup.<sup>147</sup> Subsequently, the U.S. deployed 20,000 troops to Haiti to restore order and secure the return of Aristide to power.

The intervention in Haiti was motivated by the desire of the U.S. to restore international peace and security in its zone of influence. Though the effect of the intervention was to quell the violence and save thousands of lives, the chief aim of the mission was not humanitarian in nature. Similar to the intervention in Iraq, the Security Council interpreted Article 39 of the Charter broadly to conclude that the mass exodus of refugees from Haiti constituted a “threat to peace” and “breach of the peace” in the region. Nonetheless, the effect of the Security Council’s decision

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143. See Barbara Crossette, *135 Feared Lost as Haitian Boat Sinks Off Cuba*, N.Y. TIMES, Nov. 22, 1991, at A1.

144. See U.N. SCOR, 48th Sess., 3238th mtg. at 2-3, U.N. Doc. S/RES/841 (June 16, 1993). Economic sanctions were imposed to supplement the limited sanctions imposed against Haiti by the Organization of American States (OAS).

145. See U.N. SCOR, 49th Sess., 3413th mtg. at 2, U.N. Doc. S/RES/940 (July 31, 1994).

146. See Douglas Jehl, *Showdown with Haiti: Overview; Holding Off, Clinton Sends Carter, Nunn and Powell to Haitian Junta*, N.Y. TIMES, Sept. 16, 1994, at A1.

147. See *Mission to Haiti: Text of Agreement Averting U.S. Invasion of Haiti*, N.Y. TIMES, Sept. 20, 1994, at A12.

was to save lives and restore order on the ground in Haiti. Refugees were permitted to return to their homes and food and medicine were provided to victims of the violence. It is arguable whether the resolution of the Haitian crisis can be classified as a success story for “humanitarian intervention” on behalf of non-nationals. The crisis was resolved through negotiations just prior to the deployment of U.S. troops to the area. Nevertheless, the fact that the Security Council authorized the U.S. to use force to restore order sent a powerful signal to the rest of the world that the UN would not tolerate regimes who abuse their own people. The UN’s role had changed dramatically from the Cold War era, and UN-authorized military intervention to protect human rights had become much more acceptable under international law.

*B. Humanitarian Intervention in the Absence of Security Council Approval*

This chapter has focused primarily on the development of UN-approved humanitarian intervention as a rare exception to the principles of national sovereignty and nonintervention enshrined in Article 2(7) of the UN Charter. However, the UN did not respond to every humanitarian crisis during the 1990s in the same fashion. In Rwanda and Kosovo, for example, the Security Council failed to act to prevent genocide and ethnic cleansing, prompting individual states such as France and the United States to intervene to prevent grave violations of human rights.

1. *The Rwandan Genocide*

The Rwandan tragedy of 1994 had its origins in the long-standing ethnic feud between the majority Hutu and minority Tutsi populations.<sup>148</sup> Following Rwanda’s independence from Belgium in 1962, intermittent fighting between Hutus and Tutsis has resulted in killings and large-scale migrations of civilians in and out of the country. In June of 1993, the Security Council authorized the establishment of the United Nations Observer Mission Uganda-Rwanda to oversee peace negotiations between the Hutu-dominated government of President Juvenal Habyarimana and the Tutsi rebel group, the Rwandan Patriotic

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148. The conflict between Hutus and Tutsis dates back to colonial times when German and Belgian rulers favored the Tutsis over the Hutus. *See generally* LT. GEN. ROMEO DALLAIRE, *SHAKE HANDS WITH THE DEVIL: THE FAILURE OF HUMANITY IN RWANDA* (2003).

Front (RPF).<sup>149</sup> In August, a peace agreement was reached in Arusha committing the parties to a cease-fire and a national power-sharing arrangement. Subsequently, the Security Council established “the United Nations Assistance Mission in Rwanda (UNAMIR) to assist the parties in the implementation of the Arusha Peace Accords.”<sup>150</sup>

The peace agreement, however, unraveled when President Habyarimana’s plane was shot down near the Kigali airport on April 6, 1994, killing everyone on board.<sup>151</sup> Immediately following President Habyarimana’s death, a wave of violence erupted across Rwanda between Hutus and Tutsis.<sup>152</sup> Over the next two months, approximately 750,000 Tutsis were killed or maimed by Hutus armed with machetes, and more than one million people fled the country.<sup>153</sup> In response to the genocide, the RPF launched a major offensive against Hutu forces which resulted in the overthrow of the Hutu regime.<sup>154</sup> Order was restored to parts of the country, and relief organizations were permitted access to assist victims of the tragic violence.

In the early weeks of the crisis, the UN refused to intervene. “Unable to cope with the violence, the Security Council” ordered most of its peacekeepers to withdraw from Rwanda.<sup>155</sup> France unilaterally intervened, but was accused of exploiting the chaos in its former colony for political gain.<sup>156</sup> More than two months after the genocide began, the Security Council finally agreed to provide humanitarian assistance. Acting under its Chapter VII enforcement powers, the Security Council authorized UN member states to intervene to protect refugees and civilians at risk in Rwanda.<sup>157</sup> As they had done in Somalia, UN peacekeepers provided security for relief workers and assisted with the reconstruction of roads, bridges and other infrastructure destroyed during the war. A safety zone also was established in southwestern Rwanda to provide food, shelter, and protection.<sup>158</sup> Following the establishment of the safety zone, France withdrew

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149. See U.N. SCOR, 48th Sess., 3244th mtg. at 1, U.N. Doc. S/RES/846 (June 22, 1993).

150. Yogesh K. Tyagi, *The Concept of Humanitarian Intervention Revisited*, 16 MICH. J. INT’L L. 883, 904 (1995).

151. The president of Burundi also died in the plane crash.

152. See Tyagi, *supra* note 150, at 904.

153. The prime minister and several Belgian peacekeepers also were killed during the crisis.

154. See Tyagi, *supra* note 150, at 904.

155. *Id.* The Security Council voted to reduce UNAMIR’s strength from 2,539 to 270.

156. See *id.* at 904-06.

157. U.N. SCOR, 49th Sess., 3392d mtg. at 1, U.N. Doc. S/RES/929 (June 22, 1994).

158. See Tyagi, *supra* note 150, at 904. The purpose of the safe zone was to prevent RPF reprisals against Hutus.

from Rwanda, leaving UNAMIR in charge of restoring order to the battered nation.<sup>159</sup> Subsequently, the Security Council established an International Criminal Tribunal for Rwanda (ICTR) to prosecute those persons responsible for serious human rights violations.<sup>160</sup>

“[T]he Security Council determined that it was within its chartered powers to authorize the creation of the ad hoc tribunal as a means to maintain or restore international peace and security.”<sup>161</sup>

The Rwandan genocide was one of the worst humanitarian tragedies in history. One-seventh of the Tutsi population was slaughtered while the international community stood by and observed. The magnitude of the violence and the speed in which it was carried out was unprecedented, thus making it more difficult for the international community to react in time to protect civilians. The failure of the UN to respond in time to prevent the genocide was a low point for international law. A coalition of states had been prepared to act in defense of the Tutsi population, but they did not receive prompt Security Council authorization. According to Secretary-General Kofi Annan, “the genocide in Rwanda will define for our generation the consequences of inaction in the face of mass murder.”<sup>162</sup> Ashamed of such inaction, Annan resolved to “never again” fail to protect “a civilian population from genocide or mass slaughter.”<sup>163</sup>

## 2. NATO's Intervention in Kosovo

The most recent example of the collective use of force applied in the name of humanitarian intervention was NATO's bombing of Yugoslavia in 1999. The decision by NATO to intervene in Yugoslavia was prompted by the outbreak of violence in March of 1998 between Serbian forces and the Kosovo Liberation Army (KLA). Serbian forces were engaged in a campaign of “ethnic

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159. *See id.* at 905.

160. U.N. SCOR, 49th Sess., 3453d mtg. at 1, U.N. Doc. S/RES/955 (Nov. 8, 1994). Jurisdiction “for the ad hoc tribunals included grave breaches of the Geneva Conventions, violations of the laws and customs of war, crimes against humanity, and genocide.” John R. Worth, *Globalization and the Myth of Absolute Sovereignty: Reconsidering the “Un-Signing of the Rome Statute and the Legacy of Senator Bricker*, 79 IND. L.J. 245, 252 (2004).

161. Worth, *supra* note 160, at 252.

162. Press Release, Secretary-General Presents His Annual Report to General Assembly, U.N. Doc. SG/SM/7136, GA/9596 (Sept. 20, 1999).

163. *See* Press Release, Kofi Annan Emphasizes Commitment to Enabling UN Never Again to Fail in Protecting Civilian Population from Genocide or Mass Slaughter, U.N. Doc. SG/SM/7263, AFR/196 (Dec. 16, 1999) [hereinafter *Annan Emphasizes Commitment*]; *see also* Joseph Betz, *America's 2003 War of Aggression Against Iraq*, 9 NEXUS 145, 151 (2004).

cleansing” against Kosovo’s Albanian population resulting in murder, rape, and the forced expulsion of ethnic Albanian civilians from their homes.<sup>164</sup> By May of 1998, nearly five thousand ethnic Albanians in Kosovo had been reported killed, over one million had been driven from their homes, and more than five hundred villages had been destroyed.<sup>165</sup> The objective of the NATO bombing campaign was to prevent further atrocities and destroy the ability of Serbian police units and soldiers to wage war against Kosovo’s civilian population. NATO’s decision to intervene militarily was made in the absence of Security Council approval.

The NATO allies contended that the Security Council did authorize the use of NATO military power to enforce a cease-fire agreement and to protect civilians in Kosovo. The cease-fire was reached on October 13, 1998 when NATO threatened to bomb Serbian positions following the discovery of mass graves west of Kosovo’s capital, Pristina.<sup>166</sup> Two weeks after Yugoslavian President Slobodan Milosevic announced the cease-fire, the Security Council passed Resolution 1203, which called for the protection of unarmed monitors on the ground in Kosovo.<sup>167</sup> Resolution 1203 did not authorize NATO to use military force in Kosovo other than for the purposes of protecting unarmed monitors on the ground.<sup>168</sup> Nevertheless, when the cease-fire broke down in December, NATO officials took an expansive view of Resolution 1203 to authorize the use of air strikes against Serbian positions. According to A. Peter Burleigh, former acting head of the U.S. delegation to the United Nations, “[t]he NATO allies, in agreeing on Oct[ober] 13 to the use of force, made clear that they had the authority and the means to resolve this issue.”<sup>169</sup>

The NATO bombing campaign was the largest military intervention in Europe since the Second World War. It began on March 24, 1999 and lasted for more than two months. U.S. President Bill Clinton declared that “[i]f Milosevic is not willing to make peace, we are willing to limit his ability to make war on the

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164. See Jack Kelley, *Serbs Raping Women, Girls, Witnesses Say ‘The Violence is Increasing: This is Only the Beginning,’* USA TODAY, Apr. 14, 1999, at 3A.

165. See John Kifner, *Crisis in the Balkans: Horror by Design - The Ravaging of Kosovo*, N.Y. TIMES, May 29, 1999, at A1.

166. NATO members warned the Serbs that the alliance would conduct air strikes if Serbian forces in Kosovo did not comply with UN demands.

167. See U.N. SCOR, 53d Sess., 3937th mtg. at 1, U.N. Doc. S/RES/1203 (Oct. 24, 1998) (stating that threats of intervention have been made under an earlier Security Council Resolution, which the United States interpreted as permitting airstrikes if Serbian forces remain in Kosovo and continue attacks on ethnic Albanian villages).

168. See *id.*

169. John M. Goshko, *U.N. Council Backs Kosovo Pact, Clears Way for NATO Intervention*, WASH. POST, Oct. 25, 1998, at A28.

Kosovars.”<sup>170</sup> During the campaign, allied planes destroyed Serbian military installations, planes, bridges, and communications facilities, while allied ground troops built tent cities across the border in neighboring Macedonia to provide refuge for thousands of ethnic Albanian civilians.<sup>171</sup> After seventy-eight days of intense bombing, Serbian troops withdrew from Kosovo and 50,000 UN peacekeeping troops were deployed to stabilize the situation on the ground.<sup>172</sup>

Although NATO’s intervention in Kosovo was successful from a military standpoint, the legality of the intervention under the Charter remains in dispute to this day. Strict constructionists, or restrictionists,<sup>173</sup> contend that the use of force under the Charter can only be justified in two circumstances: (1) in self-defense, or (2) with the approval of the Security Council.<sup>174</sup> Neither of these circumstances existed during the Kosovo conflict. Human rights advocates argue that in the presence of genocide or serious violations of human rights, the right of states to counter such violence has turned into a legal and moral obligation.<sup>175</sup> From this more liberal perspective, the doctrine of humanitarian intervention has become a strict norm of international law based in state practice and *opinio juris*.<sup>176</sup> The Security Council’s refusal to authorize the use of force, therefore, constituted a moment of weakness for the UN and a failure of the body to live up to its moral and legal obligations. NATO’s decision to step in fulfilled these obligations.

The Kosovo crisis was a special case under international law. It was the first conflict to involve collective intervention by a regional military organization to prevent “ethnic cleansing.” During the conflict, Serbian forces intentionally created an atmosphere of fear and oppression through the use of force, threats of force, and acts of violence in order to drive out Kosovo’s majority

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170. Jane Perlez, *Conflict in the Balkans: The Overview; NATO Authorizes Bomb Strikes; Primakov, in Air, Skips U.S. Visit*, N.Y. TIMES, Mar. 24, 1999, at A1.

171. See General Wesley K. Clark, *Effectiveness and Determination*, at <http://usembassy-australia.state.gov/hyper/WF990528/epf508.htm>; see also William Drozdiak, *NATO Strengthens Presence in Albania and Macedonia*, WASH. POST, Apr. 10, 1999, at A15.

172. See R. Jeffrey Smith & Molly Moore, *Kosovo Pullout Set to Start Today; NATO-led Contingent to Enter Province*, WASH. POST, June 10, 1999, at A1; see also U.N. SCOR, 54th Sess., 4011th mtg. at 1-2, U.N. Doc. S/RES/1244 (June 10, 1999).

173. See ANTHONY CLARK AREND & ROBERT J. BECK, *INTERNATIONAL LAW AND THE USE OF FORCE: BEYOND THE U.N. CHARTER PARADIGM* 131-36 (1993).

174. See U.N. CHARTER art. 51.

175. See Dieter Kastrup, *From Nuremberg to Rome and Beyond: The Fight Against Genocide, War Crimes, and Crimes Against Humanity*, 23 FORDHAM INT’L L.J. 404, 412 (1999).

176. See Cohan, *supra* note 76, at 349.



ethnic Albanian population. More than one million ethnic Albanians fled the country to escape harm. NATO allies determined that the doctrine of humanitarian intervention should take precedence over the principles of sovereignty and nonintervention even in the absence of Security Council approval. Accordingly, NATO's intervention in Kosovo established a dangerous precedent for future humanitarian interventions.<sup>177</sup>

#### V. THE DARFUR CRISIS AND THE CASE FOR HUMANITARIAN INTERVENTION

During the past year, the conflict in the western Darfur region of the Sudan has captured the attention of the international community. Sudanese Government forces and the Janjaweed have been carrying out attacks against black African tribes suspected of harboring rebels resulting in the deaths of more than 300,000 people and the forced removal of two million more from their homes and villages.<sup>178</sup> The United States has been in the forefront of calls for humanitarian intervention in Darfur, however the UN has yet to respond with decisive action.<sup>179</sup> In January of 2005, a UN-appointed international commission of inquiry submitted its report on the situation in Darfur to the Security Council, identifying numerous human rights violations over the past eighteen months and the perpetrators who committed such violations.<sup>180</sup> This chapter will examine the Commission's findings, the legal basis for humanitarian intervention in Darfur and the implications of the Security Council's failure to intervene in that conflict. It is arguable that the UN has failed to fulfill its obligations under the UN Charter and customary international law by refusing to intervene in the Sudan to prevent ethnic cleansing and grave violations of human rights.

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177. See Klinton W. Alexander, *NATO's Intervention in Kosovo: The Legal Case for Violating Yugoslavia's National Sovereignty In the Absence of Security Council Approval*, 22 HOUS. J. INT'L L. 403, 439 (2000).

178. See Warren Hoge, *10,000 Peacekeepers Sought BY U.S. for Southern Sudan*, N.Y. TIMES, Feb. 15, 2005, at A3 [hereinafter *10,000 Peacekeepers*].

179. See Warren Hoge, *France Asking U.N. to Refer Darfur to International Court*, N.Y. TIMES, Mar. 24, 2005, at A3 [hereinafter *France Asking UN*].

180. See *Commission Report*, *supra* note 6.

### A. *The Conflict in Darfur*

#### 1. *The Sudanese Civil War*

In order to understand the current crisis in Darfur, it is important to place the situation there within a broader historical and political context. Sudan is one of the largest countries in Africa with an estimated population of 35 million people.<sup>181</sup> The Sudanese people gained their independence from British-Egyptian rule in 1956 and, since then, have endured a series of regime changes.<sup>182</sup> The country is divided along religious lines and is ruled from the Islamic north where the capital, Khartoum, is located.<sup>183</sup> The south is mainly Christian with some animists and other non-Muslims.<sup>184</sup> Over the years, an Islamic-African-Arab culture has emerged in northern Sudan, where a multitude of tribes speaking a variety of languages have settled.<sup>185</sup>

Following the discovery of oil in the south during the early 1980s, the government of Colonel Gaafar Mohamed Al-Nimeiri implemented measures to tie the oil-rich areas of the south closer to the north. For example, Nimieri cancelled the 1973 Addis Ababa Agreement, which provided the south with autonomy, and instituted Sharia rule despite the fact that the south was predominantly non-Muslim.<sup>186</sup> These measures provoked a backlash in the south which ultimately led to civil war in 1983. Since then, the Sudanese civil war has been the longest running conflict in Africa. More than two million people have been killed and nearly 4.5 million persons have been forcibly displaced from their homes.

On January 9, 2005, a Comprehensive Peace Agreement (CPA) was reached between the Arab-dominated central government in Khartoum and the Christian and animist rebel group in the south calling for an end to the civil war.<sup>187</sup> Under the agreement, Islamic

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181. BUREAU OF DEMOCRACY, U.S. DEPT OF STATE, SUDAN, INTERNATIONAL RELIGIOUS FREEDOM REPORT 2003 1, 6 (2003), available at <http://www.state.gov/g/drl/rls/irf/2003/23755.htm>.

182. *See id.*

183. *See id.*

184. *See id.* at 2.

185. *See id.*

186. Under Shari'a, conversion by a Muslim to another religion is considered apostasy and is punishable by death if the accused refuses to recant. For more on Shari'a law, *see* BUREAU OF DEMOCRACY, U.S. DEPT OF STATE, SAUDI ARABIA, INTERNATIONAL RELIGIOUS FREEDOM REPORT 2003 1 (2003), available at <http://www.state.gov/g/drl/rls/irf/2003/24461.htm>; *see generally* DORE GOLD, HATRED'S KINGDOM 17 (2003); BERNARD LEWIS, THE ARABS IN HISTORY 176-77 (1993).

187. *See* Lacey, *supra* note 2. A two year peace process culminated on January 9, 2005 when First Vice-President Taha and Chairman John Garang of the Sudan People's

law is to apply only in the north and Sudan's oil revenues are to be shared between north and south.<sup>188</sup> Moreover, government and rebel forces are required to disarm and respect a north-south boundary line drawn up in 1956, which will be monitored and enforced by an international peacekeeping force under UN auspices.<sup>189</sup> The CPA marks the end of two decades of civil war and calls for a six year interim period, which will end with a referendum on the right to self-determination in southern Sudan. President Omar al Bashir hailed the peace deal as the beginning of a "new Sudan."<sup>190</sup>

## 2. *The Crisis in Darfur: A Humanitarian Tragedy Ignored*

Despite the achievement of a peace accord between the government in Khartoum and the rebels in the south, ethnic violence continues in the western Darfur region of the country. Darfur, which borders Libya, Chad, and the Central African Republic, is part of the Great Sahara region consisting of six million people living mostly in small villages and hamlets.<sup>191</sup> Darfur's inhabitants are divided into tribal groups who are predominantly Islamic and have depended on the land over the centuries for subsistence.<sup>192</sup> Drought, desertification, and ethnic violence have been persistent problems for the people in this part of Africa, forcing many tribes to uproot and migrate to and from the more fertile areas of Darfur.<sup>193</sup> Inter-tribal conflict has been exacerbated by the arms trade in the region as a consequence of the Sudanese civil war and Libyan-inspired efforts to pour arms into the region to fuel rebellions in neighboring Chad.<sup>194</sup>

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Liberation Movement/Army signed the CPA during an official ceremony, which incorporated all previously signed documents and cease-fire protocols.

188. *Id.* The agreement calls for a six year transition period involving shared government and use of natural resources, including oil, to ease the combatants toward peace. A referendum will be held at the expiration of the six year period among the Christian and animist minorities in the south to determine whether they wish to remain part of a unified Sudan.

189. *Id.*

190. Lydia Polgreen, *Sudan Peace Deal Allows Displaced to Go Home at Last*, N.Y. TIMES, Jan. 17, 2005, A3.

191. *Commission Report*, *supra* note 6, at 20. Most of the Darfur region is arid desert land though the area around the Jebel Marrah plateau is somewhat fertile. *Id.* at 21.

192. *Id.* at 20. Some of the tribes, including the Fur, the Barni, the Tama, the Jebel, the Aranga and the Masaalit, are agriculturalist and depend on crop production for survival. The Rhezeghat and Zaghawa are sedentary cattle herders. The Taaysha, the Habaneya, the Ben Helba, the Mahameed and others are mostly nomadic tribes and can be found herding cattle and camels in Darfur. *See generally* J.D. FAGE & W. TORDOFF, *A HISTORY OF AFRICA*, 4th ed. (2002).

193. *See Commission Report*, *supra* note 6, at 21.

194. *Id.* at 22.

The current conflict in Darfur was initiated by two rebel groups, the Sudan Liberation Movement/Army (SLM/A) and the Justice and Equality Movement (JEM), who blame the central government in Khartoum for many of the region's problems.<sup>195</sup> These groups claim that Darfuris have been consistently marginalized and not allowed to participate in high positions of government.<sup>196</sup> In March 2003, while the peace negotiations were taking place between the central government and the southern rebels, the Darfuri rebels attacked local police offices, government installations in Kutum and Tine, and the airport in El Fashir, where they looted government property and weapons.<sup>197</sup> Many soldiers were killed during the attacks and several military aircraft were destroyed.<sup>198</sup> In response to the uprising, the government in Khartoum withdrew its troops from the rural areas of Darfur and called upon local tribes to assist in the fighting against the rebels.<sup>199</sup> Several nomadic tribes, known as the Janjaweed, who were competing for land in the region responded favorably to the government's call.<sup>200</sup>

In the spring of 2003, the Sudanese Government launched an aggressive military offensive in Darfur to quell the insurgency. Since then, government forces and the Janjaweed have conducted indiscriminate attacks on villages, including killing of civilians, torture, enforced disappearances, rape, pillaging, and forced displacement.<sup>201</sup> The attacks have resulted in the deaths of nearly 300,000 people and forced more than two million more to flee their homes.<sup>202</sup> Widespread and systematic rape has resulted in the spread of disease and unwanted pregnancy.<sup>203</sup> The Sudanese Government has alleged that any attacks carried out by Government armed forces in Darfur were for counter-insurgency

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195. *Id.* at 22-23. The rebel groups primarily consist of members of three tribes: the Fur, the Massalit, and the Zaghawa. *Id.* at 23.

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.* at 23-24.

200. *Id.* at 24. The Sudanese government paid tribal leaders with grants and gifts on the basis of their recruitment efforts and how many persons they were able to recruit. The new recruits are referred to as the Janjaweed, a Darfurian term that means "armed bandit" or "outlaw on a horse or camel." *See id.*

201. *Id.* at 25. In the summer of 2004, the Sudanese government armed the Janjaweed and set it to work terrorizing black Africans in Darfur. *See Shuffling Paper While Africans Die*, *ECONOMIST*, Aug. 7, 2004, at 10 [hereinafter *Shuffling Paper*].

202. The vast majority of the victims have been from the Fur, Zaghawa, Massalit, Jebel and the Aranga tribes. *See Commission Report*, *supra* note 6, at 3.

203. In March 2004, 150 soldiers and Janjaweed abducted and raped 16 girls in Kutum. It has been reported that girls as young as ten years old have been raped during the conflict. *See Lydia Polgreen, Darfur's Babies of Rape Are on Trial from Birth*, *N.Y. TIMES*, at A1 [hereinafter *Darfur's Babies*].

purposes only and were conducted on the basis of military necessity.<sup>204</sup>

In 2004, the UN Security Council, acting under its Chapter VII enforcement authority, adopted Resolution 1564 requesting the Secretary-General of the United Nations to “rapidly establish an international commission of inquiry” to investigate human rights violations in Darfur.<sup>205</sup> The Commission visited the Darfur region in November 2004 and January 2005 and held extensive meetings with UN and government officials, members of the armed forces, and police, rebel leaders, internally displaced persons, and victims and witnesses of atrocities.<sup>206</sup> The Commission submitted its findings to the Secretary-General on January 31, 2005.<sup>207</sup>

The Commission’s findings were similar to the reported massacres in Rwanda and Kosovo. The Commission found that most attacks by the Sudanese Government and the Janjaweed were deliberately and indiscriminately directed against black Africans.<sup>208</sup> The attacks often began in the early morning, just before sunrise, when villagers were still asleep or at prayer.<sup>209</sup> “[T]he attacks involved the killing of civilians, including women and children, [looting], the burning of houses, schools and other civilian structures, as well as the destruction of wells, hospitals and shops.”<sup>210</sup> According to witnesses, the attackers made statements such as “we are here to eradicate blacks” and “the Fur are slaves, we will kill them.”<sup>211</sup> Several incidents involved aerial bombardment of civilians and civilian structures within villages followed by ground attacks aimed at terrorizing civilians on the run.<sup>212</sup> Moreover, rape and other forms of sexual violence by the

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204. *See Commission Report, supra* note 6, at 3.

205. U.N. SCOR, 60th Sess., 5040th mtg. at 3, U.N. Doc. S/RES/1564 (Sep. 8, 2004). The Commission assembled in Geneva and began its work on October 25, 2004. *Commission Report, supra* note 6, at 2.

206. *Commission Report, supra* note 6, at 2. The Commission visited the Sudan from November 7-21, 2004 and January 9-16, 2005, including travel to the capital and three Darfur states. *See id.* at 3.

207. *See* BUREAU OF INFORMATION PROGRAMS, U.S. DEPT OF STATE RELEASE, Judy Aita, *United Nations Finds War Crimes Committed In Darfur*, Feb. 1, 2005, at 1.

208. In a majority of cases, the victims of the attacks belonged to African tribes, in particular the Fur, Masaalit, and Zaghawa tribes. *See Commission Report, supra* note 6, at 65.

209. *Id.* at 64. In many cases, the attacks lasted for several hours and some villages were attacked repeatedly. *See id.*

210. *See id.*

211. *Id.* at 65.

212. *Id.* According to the report, the fact that aerial bombardment and ground attacks were in sync was an indication of the level of coordination between the Sudanese Government and the Janjaweed. *See id.*

Janjaweed and government troops occurred during the attacks.<sup>213</sup> According to the Commission's report, "[t]hese acts were conducted on a widespread and systematic basis, and therefore may amount to crimes against humanity."<sup>214</sup>

The Commission, however, did not find that the Sudanese Government had engaged in a policy of genocide.<sup>215</sup> The report states that the "policy of attacking, killing and forcibly displacing members of some tribes does not evince a specific intent to annihilate, in whole or in part, a group distinguished on racial, ethnic, national or religious grounds."<sup>216</sup> This finding is at odds with the U.S. Government's position on the Darfur conflict, which declared the attacks on black African villagers to be "genocide."<sup>217</sup> U.S. State Department spokesman "Richard Boucher told reporters in reaction to the report, '[w]e stand by the conclusion that we reached that genocide had been occurring in Darfur . . . Nothing has happened to change those conclusions.'" <sup>218</sup> The Commission did conclude that though the Sudanese Government has not pursued a policy of genocide in Darfur, crimes against humanity and war crimes have been committed that may be "no less serious or heinous than genocide."<sup>219</sup>

The international community has done little to prevent the violence in Darfur. In August of 2004, the Security Council passed a resolution giving the Sudanese Government thirty days to disarm the Janjaweed or face sanctions.<sup>220</sup> "The Sudanese army called the resolution a 'declaration of war' and vowed to fight any 'crusader' army that sets an impious foot on Sudanese soil."<sup>221</sup> In the end, the threat was ignored. Subsequently, the African Union

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213. *Id.* at 66. Some women have reported that their attackers used racial epithets and declared that they wanted to make more Arab babies, leading some to conclude that the use of rape is part of a campaign of ethnic cleansing. See *Darfur's Babies*, *supra* note 203.

214. *Commission Report*, *supra* note 6, at 3.

215. *Id.* at 160.

216. *Id.* at 4.

217. On July 22, 2004, the U.S. Senate and House of Representatives passed a resolution declaring that the Sudanese and Janjaweed attacks on black African Darfuris constituted "genocide." See Mikael Nabati, *The UN Responds to the Crisis in Darfur: Security Council Resolution 1556*, ASIL INSIGHTS, Aug. 2004, at 1. The United States was the first to characterize the violence in Darfur as genocide and the first to name potential perpetrators and call for punishment. See also Samantha Power, *Court of First Resort*, N.Y. TIMES, Feb. 10, 2005, at A25. Former Secretary of State Colin Powell also described the violence in Darfur as "genocide" during a recent visit to Darfur, but he and other American officials have downplayed the crisis in view of the recent peace agreement between the central government in Khartoum and the rebel Sudanese Liberation Movement/Army. See also Lacey, *supra* note 2.

218. See Hal Lindsey, *The Incredibly Irrelevant United Nations*, WORLDNETDAILY, Feb. 3, 2005, at 3, [http://worldnetdaily.com/news/article.asp?ARTICLE\\_ID=42684](http://worldnetdaily.com/news/article.asp?ARTICLE_ID=42684).

219. *Commission Report*, *supra* note 6, at 4.

220. *Shuffling Paper*, *supra* note 201.

221. *Id.*

demanded that the Sudanese Government stop the hostilities by December 18, 2004 “or face having the matter go to the United Nations Security Council” for consideration of enforcement measures.<sup>222</sup> The day after the Security Council’s deadline expired, Sudanese air strikes again were reported in southern Darfur.<sup>223</sup> Former U.S. Ambassador to the UN John Danforth exclaimed that “[t]he outside world’s efforts to end the killing in the Darfur region ‘are getting nowhere.’”<sup>224</sup>

On March 31, 2005, the Security Council took its first significant step to stop the violence by adopting a resolution assigning war crimes trials to the International Criminal Court (ICC) in the Hague.<sup>225</sup> The resolution was passed after much haggling with the Bush Administration who insisted that Americans be exempted from prosecution in the court.<sup>226</sup> Following the resolution’s adoption, a list of 51 suspects in the ethnic cleansing campaign in Darfur were handed over to the chief prosecutor of the ICC, opening the way for war crimes trials in the Hague.<sup>227</sup> Several of these suspects are senior Sudanese Government officials and army officers.<sup>228</sup> The Sudanese Government responded that it will refuse to hand over any of its citizens to face trial abroad.<sup>229</sup>

In addition to prosecuting war criminals, the UN, NATO and the EU agreed recently to increase funding to expand the African Union (AU) peacekeeping force in Darfur from 3,300 to 7,700 troops.<sup>230</sup> The AU is the only international body to have deployed troops in Darfur and it is considering increasing its force to 12,500 by the end of 2005 if the situation there does not improve.

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222. *Troops Attack in Darfur as a Deadline Passes*, N.Y. TIMES, Dec. 20, 2004, at A11.

223. *Id.* One Sudanese general had informed the African Union that the Sudanese government was complying with the deadline and that it would immediately and unconditionally cease hostilities in Darfur. Those fleeing the violence said that government forces and Arab militiamen had attacked their villages and were setting up bases there. *See id.*

224. *The Refugees Prepare to Return Home: Southern Sudan*, ECONOMIST, Dec. 11, 2004, at 45.

225. *See* U.N. SCOR, 60th Sess., 5158th mtg. at 1, U.N. Doc. S/RES/1593 (Mar. 31, 2005); *see also* Warren Hoge, *International War-Crimes Prosecutor Gets List of 51 Sudan Suspects*, N.Y. TIMES, Apr. 6, 2005, at A6 [hereinafter *International War-Crimes*].

226. *See 10,000 Peacekeepers*, *supra* note 178. The United States “lobbied hard for referring the cases to a new tribunal to be run by the African Union and the United Nations and to be based at the war crimes court in Arusha, Tanzania.” *Id.*

227. *See International War-Crimes*, *supra* note 225.

228. *Id.* The Commission of Inquiry concluded that “a number of senior Government officials and military commanders who may be responsible, under the notion of superior (or command) responsibility, for knowingly failing to prevent or repress the perpetration of crimes.” *Commission Report*, *supra* note 6, at 5.

229. *See 10,000 Peacekeepers*, *supra* note 178.

230. *See* Andrew England & Daniel Dombey, *Donors give boost to aid mission in Darfur*, FIN. TIMES, May 27, 2005, at 5.

Moreover, UN members recently pledged \$4.5 billion in aid to help rebuild Sudan.<sup>231</sup> The money is expected to pay for additional relief workers, food and supplies in the southern and western parts of the country and to help Sudan undergo the transition from war to peace. More than three million people displaced by the violence are expected to return to their homes over the next year and two million of them are in need of food aid.<sup>232</sup> Secretary-General Kofi Annan recently called upon all nations pledging aid to do so immediately in order to prevent starvation and the unraveling of the peace deal between the Sudanese Government and the rebels in the south.<sup>233</sup>

In July of 2005, peace talks were held in Nigeria between the Sudanese Government and two groups of Darfur rebels, which produced a declaration of principles for peace but no comprehensive settlement of the conflict.<sup>234</sup> Shortly after the declaration of principles was signed, the leader of the southern Sudanese rebel movement and newly named vice-president of Sudan, John Garang, was killed in a helicopter crash, prompting rioting and violence in Khartoum and its surrounding areas.<sup>235</sup> Several dozen people were killed during the rioting as Sudanese Government troops engaged in retaliatory attacks against rebels in the suburbs.<sup>236</sup> Thus, despite progress towards peace in recent months, the violence in Sudan continues, preventing Darfuris and others from returning to their homes and villages.

### *B. Humanitarian Intervention in Darfur: A Legal and Moral Imperative*

#### *1. The Humanitarian Argument in the Absence of 'Genocide'*

The failure to authorize collective military intervene in Darfur has been the subject of controversy within the UN. This controversy, in part, stems from the refusal of the UN to recognize the Sudanese Government's actions in Darfur as "genocide." The Commission concluded in its report to the Secretary-General that

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231. See Kofi A. Annan, *Billions of Promises to Keep*, N.Y. TIMES, Apr. 13, 2005, at A29 [hereinafter *Billions of Promises to Keep*].

232. *Id.*

233. See *id.*; see also Annan Calls on World Not to Repeat Errors of Bosnia, Rwanda, Cambodia, UN NEWS SERVICE, Apr. 14, 2005, at <http://www.reliefweb.int/rw/RWB.NSF/db900SID/HMYT-6BFLJM?OpenDocument>.

234. See Mark Lacey, *One Time Enemies Join Forces to Lead Sudan on a Road to Peace Filled with Obstacles*, N.Y. TIMES, July 10, 2005, at A11.

235. See Andrew England, *Dozens Die as Clashes Continue in Khartoum*, FIN. TIMES, Aug. 4, 2005, at 3.

236. *Id.*



the “Government of Sudan has not pursued a policy of genocide” in Darfur because one element of the definition of genocide was missing, genocidal intent.<sup>237</sup> According to the Commission, the two *actus reus* elements of genocide were satisfied: (1) “killing, or causing serious bodily or mental harm,” and (2) “the existence of a protected group being targeted by the authors of [the] criminal conduct.”<sup>238</sup> However, the Commission noted that the requisite *mens rea* elements did not exist due to the fact that government troops sometimes spared the lives of members of targeted groups during attacks or simply drove them from their homes, rather than “annihilate” them.<sup>239</sup> According to the report:

[T]he intention was to murder all those men they considered as rebels, as well as forcibly expel the whole population so as to vacate the villages and prevent rebels from hiding among, or getting support from, the local population. . . the populations surviving attacks on villages are not killed outright, so as to eradicate the group; they are rather forced to abandon their homes and live together in areas selected by the Government.<sup>240</sup>

The Commission concluded that such attacks were orchestrated “primarily for purposes of counter-insurgency warfare,” not genocide.<sup>241</sup>

It is indisputable that the crime of genocide carries a special status in international law. Historical examples of genocide include the intent to kill all Tutsis in Rwanda, Muslims in Bosnia-Herzegovina, or the Jews in Europe during World War II.<sup>242</sup> The UN was created, in part, for the express purpose of preventing the Holocaust from ever happening again. Since then, genocide has attained *jus cogens* status and it has become widely recognized that humanitarian intervention is justified to prevent it.

However, the UN has been cautious in defining large-scale massacres as genocide. During the Rwandan and Kosovo conflicts, the UN reached different conclusions as to whether genocide occurred even though both conflicts involved the intentional mass slaughter of civilians by government-led forces. In Rwanda, the massacre of Tutsis by Hutus, at first glance, did not satisfy the

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237. *Commission Report*, *supra* note 6, at 131-32.

238. *Id.*

239. *See id.* at 131.

240. *Id.*

241. *See id.* at 132.

242. *See* SCHABAS, *supra* note 74, at 235.

objective elements of genocide because the Tutsis and Hutus shared the same language, culture and religion, as well as the same physical traits. Notwithstanding these shared characteristics, the UN determined that the violence in Rwanda was genocidal in nature because the Tutsis perceived themselves as a “protected group” vulnerable to an intentional campaign of annihilation conducted by the Hutu majority.<sup>243</sup>

During the Kosovo conflict in the late 1990s, the massacre of ethnic Albanians by Serbian forces was not treated as genocide by the international community, but rather as “ethnic cleansing.” In a Memorandum drafted by the Government of Canada dated March 30, 1999, it was noted that the intent of the killings and forced expulsions in Kosovo was different from an “intent to destroy” or “annihilate” under the definition of genocide.<sup>244</sup> According to the Memorandum, “[e]thnic Albanians are being killed and injured in order to drive them from their homes, not in order to destroy them as a group, in whole or in part.”<sup>245</sup> Nevertheless, U.S. President Bill Clinton described NATO’s intervention in Kosovo as a “moral imperative” based on the need to protect human rights at the most basic level.<sup>246</sup>

It is debatable whether serious crimes other than genocide may justify humanitarian intervention under international law. The massacre of civilians in Iraq, Somalia, Haiti, and Yugoslavia did not amount to genocide, but the Security Council promptly responded to these crises by authorizing military intervention to prevent further atrocities. As a result of these UN actions, international law has come to recognize the legitimacy of UN-authorized military intervention for the purpose of preventing serious human rights violations. However, international law is less clear as to the legality of humanitarian intervention to prevent serious human rights abuses in the absence of Security Council approval. During the Rwandan genocide, the Security Council failed to authorize military intervention until it was too late and actually withdrew its troops from the danger zone when

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243. See *Prosecutor v. Akayesu*, Judgment, ICTR Trial Chamber, Case No. ICTR-96-4T (Sept. 2, 1998). In 1998, the International Criminal Tribunal for Rwanda sentenced former mayor Jean-Paul Akayesu to three life sentences for genocide and crimes against humanity and to 80 years for other violations including rape and encouraging widespread sexual violence.

244. See Memorandum of March 30, 1999, 37 CANADIAN YEARBOOK OF INTERNATIONAL LAW 1999, at 328.

245. *Id.*

246. President Bill Clinton, Address to the Nation on the Conflict in Kosovo (June 10, 1999), in WASH. POST, June 11, 1999, at A31.

the violence began.<sup>247</sup> In Kosovo, the Security failed to authorize military intervention to protect ethnic Albanians from ethnic cleansing. If it were not for NATO's willingness to intervene in Kosovo, the civilian death toll could have been much worse. According to one legal scholar, Kosovo may have been "the crucial stage in the emergence of a clear doctrine of humanitarian intervention."<sup>248</sup>

The Darfur crisis represents the latest failure of the Security Council to live up to its legal and moral obligations to protect basic human rights. It is estimated that nearly 300,000 Darfuris have lost their lives and more than two million have been forcibly removed from their homes.<sup>249</sup> The Commission found that Sudanese Government forces and the Janjaweed were responsible for war crimes and crimes against humanity "conducted on a widespread and systematic basis."<sup>250</sup> Though the Commission concluded that "the policy of attacking, killing and forcibly displacing members of some tribes does not evince a specific intent to annihilate, in whole or in part, a group distinguished on racial, ethnic, national or religious grounds," such violence was targeted mainly at black Africans of certain tribes in Darfur and meant to drive them from their homes.<sup>251</sup> International offences such as these were identical to the indiscriminate murder and forced expulsion of Tutsi civilians in Rwanda and ethnic Albanians in Kosovo.

Due to the ongoing nature of the conflict, the case for humanitarian intervention in Darfur is just as pressing today as it was when the violence first erupted. At present, Sudanese Government forces and the Janjaweed continue to attack certain tribes. The death toll continues to rise and refugee camps are overflowing with civilians fleeing the violence. According to Secretary-General Kofi Annan, "it is vital that the international community move speedily . . . to protect civilians from recurring violence in Darfur."<sup>252</sup> Moreover, the fear of renewed attacks by the Janjaweed in rural, unsecured areas is preventing many

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247. The Security Council eventually recognized a de facto unilateral French intervention by authorizing the establishment of French safe havens to protect the internally displaced in Rwanda. See Elizabeth E. Ruddle, *The Continuing Constraint of Sovereignty: International Law, International Protection, and the Internally Displaced*, 77 B.U. L. REV. 429, 478 (1997).

248. Anthony Clark Arend, *International Law and Rogue States: The Failure of the Charter Framework*, 36 NEW ENG. L. REV. 735, 749 (2002).

249. See *France Asking UN*, *supra* note 179.

250. See *Commission Report*, *supra* note 6, at 3.

251. *Id.* at 4.

252. *Billions of Promises to Keep*, *supra* note 231.

Darfuris from returning to their farms.<sup>253</sup> Because farmers have been afraid to go into their fields for fear of the Janjaweed, “only half as much land has been cultivated in Darfur as [compared to] a normal year.”<sup>254</sup> Consequently, a disastrous crop failure and an increase in starvation is expected for 2005 and 2006.<sup>255</sup> The UN World Food Program estimates that it will have to feed approximately three million Darfuris to prevent a humanitarian catastrophe.<sup>256</sup> According to the *Economist*, “[t]he bad news is that the worst is still to come in Darfur.”<sup>257</sup>

## 2. *The Refugee Problem*

The mass exodus of refugees is an unfortunate consequence of most civil wars. Violence against civilians inevitably causes displacement and cross-border migrations of people seeking refuge from danger. Those neighboring countries who are forced to absorb a massive influx of people are confronted with a moral choice to accept or reject those fleeing the violence. For those governments willing to open the door to refugees, the price of their generosity can be high. The added economic and social burdens can strain a state’s resources and cause tension between the local population and the new arrivals. Such tension can threaten peace and stability in the region and result in violence.

Since the end of the Cold War, the UN has become more proactive in dealing with refugee crises caused by internal civil conflicts. The conflicts in Iraq, Haiti and Bosnia, for example, involved the forcible expulsion of large numbers of civilians from their homeland. The Security Council in each case determined that intervention was required to stem the flow of refugees to neighboring states. During the Iraq war, the fleeing of Kurds into neighboring Turkey and Iran was determined to be a threat to international peace and security and grounds for intervention.<sup>258</sup> In Haiti, too, the Security Council authorized the United States “to use all necessary means” to forcibly remove the military regime in power on the grounds that the exodus of refugees constituted “a

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253. The Janjaweed have been squatting on farm land owned by those fleeing the violence in the hope that a unique squatters law, which grants squatters title to property after one year, will eventually support their exclusive claim to the land.

254. See *The Worst is Yet to Come*, *ECONOMIST*, Nov. 27, 2004, at 47 [hereinafter *Worst is Yet to Come*].

255. See *id.*

256. The UN World Food Program, which fed approximately 1.4 million people in March 2005, warns that it will probably have to feed three million people by the end of the year. See Dinmore & Fasher, *supra* note 5.

257. See *Worst is Yet to Come*, *supra* note 254.

258. See U.N. SCOR, 46th Sess., 2982d mtg. at 1-2, U.N. Doc. S/RES/688 (Apr. 5, 1991).

threat to peace and security in the region.”<sup>259</sup> Furthermore, the outpouring of refugees from Croatia into Hungary and other central European states during the Balkan conflict was deemed to be a threat to regional peace and security,<sup>260</sup> requiring UNPROFOR to expand its mandate to include immigration and customs functions.<sup>261</sup> Each of these episodes established an important precedent for UN involvement in a state’s internal affairs to deal with refugee problems.

Similarly, humanitarian intervention in Darfur can be justified on the grounds that the refugee crisis constitutes a threat to international peace and security in the region. Over the past two years, Sudanese Government forces and the Janjaweed have driven more than 200,000 people from their homes into refugee camps in neighboring Chad to the east of Sudan.<sup>262</sup> The flood of refugees has imposed enormous burdens on impoverished communities and the Chadian Government who are unequipped to handle the sudden influx of people.<sup>263</sup> Food shortages in several villages pose potential health risks for the population and security problems for the government.<sup>264</sup> Moreover, hospitals have been overflowing, education has come to a standstill and roads are being damaged by the constant pounding of trucks carrying relief supplies.<sup>265</sup> According to the UN World Food Program Chadian Director Stefano Poretti, “[t]he people of eastern Chad displayed a remarkable humanitarian spirit in doing what they could to help the refugees when they first crossed from Darfur.”<sup>266</sup> “Time has

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259. U.N. SCOR, 49th Sess., 3413th mtg. at 2, U.N. Doc. S/RES/940 (July 31, 1994); see also Kenneth Regensburg, *Refugee Law Reconsidered: Reconciling Humanitarian Objectives With the Protectionist Agendas of Western Europe and the United States*, 29 CORNELL INT’L L.J. 225, 244 (1996).

260. See U.N. SCOR, 46th Sess., 3009th mtg. at 4, U.N. Doc. S/RES/713 (Sep. 25, 1991); U.N. SCOR, 47th Sess., 3104th mtg. at 1, U.N. Doc. S/RES/769 (Aug. 7, 1992).

261. See *id.*

262. The Office of the United Nations High Commissioner for Refugees (UNHCR) reported that 203,051 persons from the Darfur region were living in eleven camps and other locations as refugees in eastern Chad. See UNHCR data, <http://www.unhcr.ch/cgi-bin/texis/vtx/publ/openssl.pdf?tbl=MEDIA&id=401159eca&page=publ>.

263. Initially, the refugees were welcomed in Chad by villagers from the same ethnic group. However, tensions have been increasing as locals compete with the new arrivals for food and water.

264. Chad has one of the world’s most hostile climates and the country has received scarce rainfall over the past year, which has had a devastating impact on its harvest. In addition to the poor rainfall, locusts have devoured pasture land and crops in the central cereal-producing areas, forcing nomadic herders and others to move to the east where the Darfur refugees are lodged in camps. See *Impoverished Chad Asks World to ‘Share the Burden’ of Darfur Refugees*, SUDAN TRIBUNE, Sept. 23, 2004, at 2, [http://www.sudantribune.com/article Impr.php3?id\\_article=5604](http://www.sudantribune.com/article Impr.php3?id_article=5604).

265. See *id.*

266. UN World Food Program, *Darfur Refugees in Chad Urgently Need Food Stocks Before Rainy Season*, Apr. 12, 2005, [http://www.wfp.org/newsroom/subsections/preview.asp?content\\_it](http://www.wfp.org/newsroom/subsections/preview.asp?content_it).

taken its toll, however, and it is now clear that [the local population is] just as critically in need of our help as those in the [refugee] camps.”<sup>267</sup>

In addition to Chad, refugees are pouring into Ghana as well.<sup>268</sup> Since January 2005, several hundred refugees from Darfur have traveled across several international borders to seek asylum in Ghana, the home of Secretary-General Kofi Annan.<sup>269</sup> Most have made their way from crowded refugee camps in Chad, where food and water are in short supply. Ghana already hosts nearly 48,000 refugees from the conflict in Liberia.<sup>270</sup> Ghana’s Refugee Board recently announced that its financial resources are being depleted and that help is needed from the international community to prevent a security crisis.<sup>271</sup>

In terms of international law, the conditions exist for the Security Council to authorize the use of force under Chapter VII to prevent a refugee crisis from becoming worse in the Darfur region. The refugee problems in Chad and Ghana are threatening to undermine stability and security in these states and international relief organizations are struggling to keep pace with the growing need for food, water and supplies. The Security Council already has determined in two prior resolutions that the situation in Darfur constitutes a threat to international peace and security in the region.<sup>272</sup> As discussed above, one of the primary justifications advanced by the Security Council in authorizing humanitarian intervention in Iraq, Haiti, and Bosnia was the “threat to international peace and security” in the region posed by the flood of refugees. This same threat is present today in the Darfur region and is expected to worsen in the future. During a recent visit to Chad, Secretary-General Annan told reporters “[w]e must find a political solution as soon as possible, or we could experience a regional tragedy.”<sup>273</sup>

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267. *Id.*

268. See Kwaku Sakyi-Addo, *Hundreds of Darfur Refugees Arrive in Ghana*, REUTERS, Apr. 14, 2005, at 1, <http://www.alertnet.org/thenews/newsdesk/L14320925.htm>.

269. *Id.* From the eastern border of Chad to Ghana’s capital, where the refugees have been arriving, is 1,640 miles cutting across Chad, Cameroon, Nigeria, Benin and Togo. See *id.*

270. Thousands of Liberians have returned home from Ghana since the Liberian civil war ended in 2003. See *id.*

271. See *id.*

272. See U.N. SCOR, 60th Sess., 3413th mtg. at 2, U.N. Doc. S/RES/1556 (July 30, 2004); U.N. SCOR, 60th Sess., 5151th mtg. at 3, U.N. Doc. S/RES/1590 (Mar. 25, 2005).

273. *Annan Urges Political Solution for Sudan’s Darfur ‘As Soon As Possible,’* [http://www.darfurinformation.com/ic\\_annan\\_urges.shtml](http://www.darfurinformation.com/ic_annan_urges.shtml).

## VI. CONCLUSION

The situation in Darfur has been described as “one of the worst humanitarian crises in the world.”<sup>274</sup> Since the beginning of the conflict in 2003, human rights groups estimate that the Sudanese army and the Janjaweed have killed more than 300,000 people. Over two million Darfuris have been forced from their homes and have fled to refugee camps in southern Sudan and eastern Chad, among other neighboring states. Thousands of women and young girls have been raped, and entire villages have been destroyed to prevent certain targeted tribes from returning home. According to the UN World Food Program, nearly three million refugees are in urgent need of food, medicine and shelter as the rainy season approaches and the violence continues. Furthermore, the Darfur crisis has been exacerbated by the Sudanese Government’s refusal to allow unrestricted humanitarian access to Darfur.

The legal basis for intervening in Darfur to prevent grave violations of human rights is well-established under international law. The doctrine of humanitarian intervention permits the UN or its members to circumvent Article 2(7) of the UN Charter when either “genocide” or serious human rights violations are being committed. Prior UN Security Council resolutions authorizing the use of force to protect human rights in Iraq, Haiti, Somalia and Yugoslavia served as important precedents for the legality of humanitarian intervention under conditions similar to those in Darfur. Moreover, unilateral humanitarian intervention in the absence of Security Council approval has been justified on more than one occasion to prevent brutal regimes from slaughtering their own people and to restore international peace and security. Although such interventions occurred without the consent of the host governments, the moral imperative of preventing serious human rights violations was deemed to outweigh claims of sovereignty and nonintervention under the UN Charter.

It remains to be seen whether the UN, or one of its members, will take appropriate military action to prevent further violence against civilians in Darfur. The International Crisis Group, a conflict prevention organization, has already called for NATO to consider sending its own troops to Darfur, because of widespread fears that the AU will not be able to find enough soldiers to pacify

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274. *WFP Confirms Massive Humanitarian Crisis in Darfur, and Calls the Plight of Sudanese Refugees ‘Tragic.’* Statement by the UN World Food Program Executive Director James Morris, May 4, 2004, available at <http://www.wfp.org/index.asp?section=2>.

the region.<sup>275</sup> The international community's *modus operandi* at present tends to favor nonintervention, or limited humanitarian involvement, in order to allow the recently signed peace agreement between the Sudanese Government and the southern rebels to take effect. However, as it discovered during the Rwanda and Kosovo conflicts, the UN cannot afford to ignore its obligations to prevent abusive regimes from intimidating their own people. The UN's failure to timely act in those conflicts, and others, has damaged its credibility as the world's collective police organ and prompted some scholars and commentators to question its relevance in international affairs.<sup>276</sup>

Once again, the credibility of the UN is at stake in Darfur. The legal and moral case for humanitarian intervention is strong, but the political will to act is lacking. The continued failure of the UN, or its members, to intervene militarily in Darfur could cost more lives, undermine years of legal precedent in favor of humanitarian intervention and spell disaster for future generations having to live under brutal, dictatorial regimes. In the words of Secretary-General Annan, "[o]ur collective failure to provide a much larger force [in Darfur] is as pitiful and inexcusable as the consequences are grave for the tens of thousands of families who are left unprotected."<sup>277</sup> Ignoring the lessons of the past has already taken its toll on the civilian population in Darfur. Will the UN live up to its commitment to "never again" fail to protect a civilian population from genocide or mass slaughter?<sup>278</sup> Only time will tell.

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275. See Ralph Atkins, *NATO defends deal on Darfur airlift*, FIN. TIMES, June 10, 2005, at 3.

276. See, e.g., Henry Lamb, *The U.N.'s Crisis of Relevance*, WORLDNETDAILY.COM, Oct. 14, 2004, at [http://www.worldnetdaily.com/news/article.asp?ARTICLE\\_ID=40920](http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=40920); W. Andy Knight, *The Crisis of Relevance at the UN*, EDMONTON JOURNAL, March 3, 2003; Michael Glennon, *The UN's Irrelevant Relevance*, FRANKFURTER ALLEGEMEINE ZEITUNG, July 2, 2003; Editorial, *The UN's Relevance*, NATION, Mar. 31, 2003, <http://www.thenation.com/oc.mhtml?i=20030331&s=editors>; Hazem Biqeen, *UN 'Relevance' a Sham*, FREE ARAB VOICE, <http://www.freearabvoice.org/articles/UNRelevanceASham.htm>; Muqtedar Khan, *The U.S. and the UN: Risking Relevance*, FOREIGN POLICY IN FOCUS, Feb. 13, 2003, at [http://www.fpif.org/pdf/gac/0302\\_relevance.pdf](http://www.fpif.org/pdf/gac/0302_relevance.pdf).

277. *Billions of Promises to Keep*, *supra* note 231.

278. *Annan Emphasizes Commitment*, *supra* note 163.



**RICHARD LILLICH MEMORIAL LECTURE: PROMOTING  
THE ACCOUNTABILITY OF MEMBERS OF THE NEW UN  
HUMAN RIGHTS COUNCIL**

Philip Alston\*

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\* John Norton Pomeroy Professor of Law and Faculty Director of the New York University Law School's Center for Human Rights and Global Justice. The author wishes to thank Professors Donna Christie and Frederick Abbott for their fine hospitality at Florida State University in connection with the presentation of the Lillich lecture. Thanks also to Jonathan Horowitz for his research assistance in the preparation of this article. Work on this Article was also supported by a grant from the Max Greenberg and Filomen D'Agostino Research Funds at the NYU School of Law.

Richard Lillich was a pioneer among United States scholars writing in the field of international human rights law. He combined his prodigious scholarly output on this and other fields<sup>1</sup> with a strong and highly productive engagement with the practice of human rights law. It is a privilege to be invited to give this Second Annual Lillich Lecture, named in his honor.

## I. INTRODUCTION

The concept of accountability provides the overarching rationale for the establishment of an international human rights regime. The essential objectives of that regime are twofold. The first is to persuade, cajole and pressure governments to acknowledge their accountability to their own citizens and to establish ways and means by which those citizens can hold them to account. The second is to ensure that governments can be held to account by the international community for violations of human rights for which they are deemed to be responsible and in relation to which domestic accountability mechanisms have failed. But while participants in human rights discourse invoke the principle of accountability with almost reckless abandon, there have been all too few attempts to unpack the concept in meaningful ways or to explore the ways in which it might apply to some of those involved in human rights endeavors at the international level. In particular, there have been very few efforts to acknowledge that the custodians who are in the front line of holding others accountable must themselves be held to account in certain ways.

This article begins by noting some of the broad legitimacy and democracy-based critiques of international law and of international organizations that have been made in recent years and which provide a broad backdrop against which the more narrowly focused debates in the human rights domain are taking place. It then recounts one current set of efforts to ensure some degree of accountability, at least on the part of those governments in whom the principal responsibility is vested for holding their peers to account for human rights violations. These efforts have been played out in the context of a debate over the possible establishment of criteria for membership by governments of the new Human Rights Council which is to be set up, probably as from 2006.<sup>2</sup>

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1. For a systematic presentation of Professor Lillich's writings see Samuel Pyeatt Menefee, *A Bibliography of the Legal Publications of Professor Richard B. Lillich (1933-1996)*, 38 VA. J. INT'L L. 85 (1997).

2. At the World Summit meeting held at the beginning of the UN General Assembly meeting in September 2005 the assembled Heads of State and Government resolved to cre-

Its principal focus, however, is on the creation of a particular index which would facilitate the task of promoting at least a basic form of procedural accountability on the part of those governments which are elected to the new Council. This would be achieved through the adoption of a human rights accountability index. This index is designed to enable a broad-based and systematically derived indicator of governmental accountability to be taken into account in the election process. In brief, the index would seek to measure the extent to which governments participate in the key international procedures designed to measure their accountability in matters of human rights. It could act as an incentive for reluctant governments to participate more actively and would provide a reasonably objective standard on the basis of which some governments could legitimately be preferred for election over others.

It should be acknowledged at the outset that such a proposal is no more than a starting point in efforts to encourage a more sustained and deeper focus on the issue of the accountability and legitimacy of the techniques employed by the UN Commission on Human Rights, most of which seem likely to be transposed to the new Human Rights Council. An accountability index would be strictly procedural and in itself would be neither an indication that a country receiving a favorable rating has a good human rights record nor would it go very far towards answering the broader critiques as to the legitimacy of the working methods or composition of the Commission/Council. It would, nevertheless, be an important starting point in moving down the road to an ethic of accountability in the attitudes of the Council.

## II. THE DEMOCRATIC LEGITIMACY CRITIQUE OF INTERNATIONAL ORGANIZATIONS

A vast literature has emerged, partly in response to the anti-globalization campaigns of the late 1990s, alleging that many of the key international organizations are unaccountable and that the legitimacy of the power they exercise is therefore suspect at

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ate a Human Rights Council (World Summit Outcome, UN doc. A/60/L.1, 15 September 2005, para. 157, available at <http://www.ohchr.org/english/bodies/chr/docs/wsoutcome2005.pdf> (last visited Oct. 10, 2005)), with a mandate "to address situations of violations of human rights, including gross and systematic violations, and make recommendations thereon. It should also promote effective coordination and the mainstreaming of human rights within the United Nations system." *Id.* para. 159. Accordingly they requested "the President of the General Assembly to conduct open, transparent and inclusive negotiations, to be completed as soon as possible during the sixtieth session [which ends in September 2006], with the aim of establishing the mandate, modalities, functions, size, composition, membership, working methods and procedures of the Council." *Id.* para. 160.

best.<sup>3</sup> Amongst the most frequently cited (or, rather, indicted) in this regard are the World Trade Organization, the World Bank, and the International Monetary Fund. While a review of these critiques, let alone a response to them, is well beyond the scope of the present analysis, it is pertinent to note that the argument that international organizations suffer from a critical democracy deficit has been applied, although not systematically or with particular emphasis, to the United Nations itself.

It is important to explore some of these critiques in order to set the scene for considering the question of the accountability of the UN Commission on Human Rights and, more pertinently now, that of its successor, the Human Rights Council. Three different examples illustrate: (i) the types of critiques that have been made; (ii) their provenance; and (iii) the sort of prescriptions that have generally been put forward.

The first example comes from a defense by Professor Jed Rubinfeld of the unilateralist tendencies of the United States.<sup>4</sup> His analysis is based to a significant extent on the perceived democracy deficit inherent in international law in general and in the United Nations in particular and provides a reasonably representative account of neo-conservative thinking within the United States.<sup>5</sup> He argues that international law is not just undemocratic, but is actively “antidemocratic.”<sup>6</sup> In Exhibit A of his prosecutorial statement, are the assumptions which he considers to underpin most forms of international human rights discourse. In such discourse, “the views of democratic majorities . . . will be said to be ‘simply irrelevant’ to the validity and authority of international law.”<sup>7</sup> For Rubinfeld, the notion that internationally agreed human rights standards should be promoted reflects a fundamentally “antidemocratic worldview.”<sup>8</sup>

It is hardly surprising then that he also singles out for criticism institutions such as the United Nations which are charged with

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3. The single most important exception concerns the role accorded in the UN Charter to, and the role played in recent years by, the Security Council. *See generally* David D. Caron, *The Legitimacy of the Collective Authority of the Security Council*, 87 AM. J. INT'L L. 552 (1993); Bardo Fassbender, *Quis judicabit? The Security Council, Its Powers and Its Legal Control*, 11 EUR. J. INT'L L. 219 (2000); Tetsuo Sato, *The Legitimacy of Security Council Activities under Chapter VII of the UN Charter after the End of the Cold War*, in THE LEGITIMACY OF INTERNATIONAL ORGANIZATIONS (Jean-Marc Coicaud & Veijo Heiskanen, eds., 2001) 309; and Jarrett Taubman, *Towards a Theory of Democratic Compliance: Security Council Legitimacy and Effectiveness after Iraq*, 37 N.Y.U. J. INT'L L. & POL. 161 (2005).

4. Jed Rubinfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971 (2004).

5. *Id.*

6. *Id.* at 2017.

7. *Id.* at 2019.

8. *Id.* at 2018.

implementing many of the international community's governance functions. They are said to be "famous for their undemocratic opacity, remoteness from popular or representative politics, elitism, and unaccountability. International governance institutions and their officers tend to be bureaucratic, diplomatic, technocratic - everything but democratic."<sup>9</sup>

Rubinfeld is quick to rebut one of the standard responses of those who seek to defend current versions of multilateralism by pointing to the increasingly important role accorded to non-governmental organizations (NGOs).<sup>10</sup> They naively do so, in his view, "as if these equally unaccountable, self-appointed, unrepresentative NGOs somehow exemplified world public opinion, and as if the antidemocratic nature of international governance were a kind of small accountability hole that these NGOs could plug."<sup>11</sup> Without endorsing his characterization of the legitimacy of the role played by NGOs, it is true that in relation to human rights institutions the participatory opportunities accorded to some NGOs are invoked much too readily as though this were a sufficient answer to critiques focusing on the unaccountable, non-transparent, and undemocratic elements of the roles played by some of these organizations.

The problem is that for Rubinfeld there is only one answer. That is the nation-state. Since elections are a *sine qua non*, no other polity can be democratic. As a result, he concludes that international law frequently conflicts with democracy.<sup>12</sup> This version of the unaccountability critique seems to leave little if any space for non-electoral forms of accountability designed to enhance the democratic legitimacy of international governance. Since it is fundamentally flawed, any palliative measures will be inadequate.

The second example reflects a more mainstream approach which has been developed in a recent book by Michael Barnett and Martha Finnemore.<sup>13</sup> They focus on a cross-section of international institutions, do not indict international law per se, and explore the means by which the perceived deficiencies might be over-

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9. *Id.* at 2017-18.

10. See Menno T. Kamminga, *The Evolving Status of NGOs Under International Law: A Threat to the Inter-State System?*, in NON-STATE ACTORS AND HUMAN RIGHTS 93 (Philip Alston ed., 2005).

11. Rubinfeld, *supra* note 4, at 2018. For similar criticisms see Kenneth Anderson, *The Ottawa Convention Banning Landmines, the Role of International Non-governmental Organizations and the Idea of International Civil Society*, 11 EUR. J. INT'L L. 91 (2000).

12. "The brute fact is that there is no world democratic polity today; the largest entities in which democracy exists are nation-states. As a result, international law can and does frequently conflict with democracy." Rubinfeld, *supra* note 4, at 2018.

13. MICHAEL BARNETT AND MARTHA FINNEMORE, *RULES FOR THE WORLD: INTERNATIONAL ORGANIZATIONS IN GLOBAL POLITICS* (2004).

come or at least mitigated.<sup>14</sup> They too are concerned about issues of accountability in relation to international governance but adopt a very different tone and approach from that of Rubinfeld. Their principal concern is with the bureaucratization involved in the deepening of many global governance arrangements. They warn of the “[l]ack of transparency and the growing prominence and power of international organizations” and emphasize that these developments “raise concerns regarding their accountability.”<sup>15</sup>

It is true that their main preoccupation is with the unaccountable power of the bureaucrats called upon to implement policies and programs shaped by inter-governmental groups such as the governing boards of the International Monetary Fund (IMF) and the Office of the United Nations High Commissioner for Refugees (UNHCR). But the critique applies with almost equal force to the activities of the governing bodies themselves. Barnett and Finemore also highlight the irony that it is precisely in an effort to promote liberal values such as human rights that international organizations use undemocratic procedures, thus creating what they term “undemocratic liberalism” in global governance.<sup>16</sup> But, unlike Rubinfeld, they do not set a standard which international organizations are, by definition, unable to meet. Rather they emphasize the need for “procedures that, if not democratic, at least provide some accountability and representation.”<sup>17</sup>

In order to refute any suggestion that such concerns about institutional accountability emanate only from academics, or from those who are hostile to the very notion of multilateralism, it is useful to turn to the third strand of democracy critiques. This is best represented by the *Human Development Report*, published annually by the United Nations Development Program. The Report has a very high circulation, is published in a range of languages, and has been very influential in debates about the challenges of development and the global responses to them. In 2002, the report was devoted entirely to the theme of “deepening democracy in a fragmented world.”<sup>18</sup> A significant part of the analysis focused explicitly on the key agents of global governance – the United Nations (especially the Security Council), the WTO, the IMF, and the World Bank – and on the ways in which their functioning could better be informed by democratic processes. But

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14. *Id.*

15. *Id.* at 170.

16. *Id.* at 172.

17. *Id.*

18. U.N. Human Dev. Programme, Human Dev. Report Office, *Human Development Report 2002* (2002) [hereinafter *Human Development Report 2002*].

while much play is given to the buzzwords of “representation,” “transparency” and “accountability,” the Report’s substantive critiques and prescriptions focus mainly on the need for more adequate representation of developing countries’ governments in the halls of power of the respective organizations, and on according a more significant role to civil society actors.<sup>19</sup> While these notions are put forward within the confines of a report devoted to deepening democracy at the international level, it is clear that the mechanisms proposed are essentially compensatory and do not even seek to address the deeper critique implicit in the arguments of critics like Rubinfeld who are calling for some form of representative democracy if an international organization is to be able to assert its democratic legitimacy.

On the basis of this survey of different contributions to the current debate, it is clear that there is justifiable concern to ensure that the main organs of international governance act in accountable and transparent ways and that they respond to an appropriately tailored version of the democracy deficit critique, one which takes account of the functions they perform, the powers they exercise, and the degree of intrusiveness into the domestic sphere which is reflected in their work. Political scientists and international lawyers have both responded, in different but nonetheless compatible ways, although both have essentially rejected any quest for democracy,<sup>20</sup> properly so called, and have instead proceeded under the rubric of accountability. In a political science framework, Grant and Keohane have attempted to synthesize these concerns in relation to international governance in general by identifying seven different mechanisms by which accountability might be exacted in world politics, all of which have applicability in relation to international organizations.<sup>21</sup> Their synthesis includes: hierarchical, supervisory, fiscal, legal, market, peer, and public reputational mechanisms.<sup>22</sup>

In the international law context, a group of distinguished experts working within the framework of a “Committee on Account-

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19. These recommendations are encapsulated in the following conclusion: “Achieving deeper democracy globally will require expanding political space for a range of civil society actors and including developing countries more deeply in the decision-making of international institutions.” *Id.* at 122.

20. Grant and Keohane, for example, observe that “multilateral organizations are in fact accountable – indeed, more accountable in many respects than powerful states – but in ways quite different from those envisaged by observers who equate accountability with participation,” or, they might have added, with democracy. Ruth W. Grant and Robert O. Keohane, *Accountability and Abuses of Power in World Politics*, 99 AM. POL. SCI. REV. 29 (2005).

21. *Id.* at 36.

22. *Id.*

ability of International Organizations,” set up in 1996 by the International Law Association (ILA), have taken up the same challenge in their final report presented in 2002.<sup>23</sup> Their basic premise is not rooted in any particular theory of democracy or participatory legitimacy. They content themselves instead by starting with the proposition that “[p]ower entails accountability, that is the duty to account for its exercise.”<sup>24</sup> Thus, to the extent that an international organization or treaty-based organ exercises power, it is obligated to make itself accountable. This is to be achieved through compliance with a body of rules and practices which apply to both the institutional and operational activities of the body. The most important of these are the principles of: good governance, good faith, constitutionality and institutional balance, supervision and control, stating the reasons for decisions or a particular course of action, procedural regularity, objectivity and impartiality, due diligence, and promoting justice.<sup>25</sup> While each of the stated principles is convincing in its own right, the list as a whole is a somewhat curious amalgam of broad over-arching principles of democratic legitimacy, narrower rules rooted in administrative law traditions, and specific concepts taken from international legal doctrine. It is nonetheless an important and timely reminder of the fact that international organizations are subject to more general demands of accountability.

For present purposes it is noteworthy that the Commission on Human Rights does not rate a mention in either the analysis by Grant and Keohane, nor in the report of the ILA Committee. Perhaps more surprisingly, it is also not addressed in any way in the UNDP report, despite its focus on UN agencies and organs. It is worth reflecting on the reasons which might explain its omission in the latter context, since that is one in relation to which its relevance would seem most obvious. One is that the focus of the report is on international economic institutions, but this does not deter the authors from addressing the Security Council because of its predominant role within the UN. A second might be that human rights institutions are considered to be marginal to discussions of development and even global democracy, although this is surely highly debateable. And a third is that the Commission’s impact on the real world is so minimal that its functioning does not give rise

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23. International Law Association, New Delhi Conference, Committee on Accountability of International Organizations, *Third Report Consolidated, Revised and Enlarged Version of Recommended Rules and Practices (“RRP-S”)* (2002), available at [http://www.ila-hq.org/html/layout\\_committee.htm](http://www.ila-hq.org/html/layout_committee.htm).

24. *Id.* at 2.

25. *Id.* at 2-7.



to concern about democracy. As the report notes, the pressure to extend democratic principles applies especially to those organizations which have become “deeply involved in national economic, political and social policies.”<sup>26</sup> But, it is precisely by this standard that the Commission should feature in such analyses.

For the purposes of the present analysis, several conclusions emerge from this brief review of the literature on accountability. The first is that there is considerable pressure on international organizations to be made accountable in various ways. Second, there is no reason why the Commission/Council should not be subject to such demands. Third, the ways in which the Commission/Council are or should be held accountable are complex and a full review of both existing and potential measures is well beyond the scope of this article. Fourth, it is clear that the conditions for membership of an oversight group such as the Commission/Council are important factors in determining their credibility in the eyes of their various constituencies and perhaps even the extent to which they are perceived to possess the requisite legitimacy.<sup>27</sup>

It is against this background that the debate over the setting of criteria to be met by States which aspire to be elected as members of the Commission/Council must be considered. Somewhat surprisingly, very little attention has been given to the various other dimensions of accountability which arise in relation to the methods of work and functions performed by the Commission/Council. While the remainder of this article focuses solely on the question of membership standards, it must be emphasized that a major research agenda on the different forms of accountability which are or should be applicable in this context needs to be undertaken.

### III. THE ORIGINS OF THE MEMBERSHIP CRITERIA DEBATE

The fact that governments with demonstrably poor human rights records served as members of the Commission on Human Rights<sup>28</sup> was taken for granted for many years. During the long

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26. *Human Development Report 2002*, *supra* note 18, at 8.

27. See generally Thomas Franck, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990).

28. The establishment of the Commission on Human Rights was mandated by Article 68 of the United Nations Charter, and it originally consisted of 18 members. It has grown in size over the years and now consists of 53 governments, elected on a rotating basis for three-year terms by the Economic and Social Council [hereinafter ECOSOC]. A recent United Nations report describes its functions in the following terms: “[It] is entrusted with promoting respect for human rights globally, fostering international cooperation in human rights, responding to violations in specific countries and assisting countries in building their human rights capacity.” *A MORE SECURE WORLD: OUR SHARED RESPONSIBILITY: REPORT OF THE HIGH-LEVEL PANEL ON THREATS, CHALLENGES AND CHANGE*, U.N. Doc. A/59/565, para. 282 (New York, United Nations, 2004) [hereinafter *REPORT OF THE HIGH-LEVEL PANEL*]. For

decades of the Cold War, one side's human rights violators were the other side's champions of resistance. The side on which they found themselves, and thus the issue of whether they were championed by the United States or the Soviet Union, depended on whether they claimed to be resisting capitalist or communist efforts to undermine them. There was thus an unstated but widely shared tolerance for the presence of human rights violators in many of the decision-making fora of the United Nations.

The end of the Cold War made possible a reconsideration of this policy and, as the principles of economic liberalism and political democracy spread, it became feasible to contemplate the option of establishing some sort of criteria for membership. After all, the Council of Europe had long required applicant states to sign on to a statement of democratic principles and more specifically to adhere to the European Convention on Human Rights. With the collapse of communism in eastern Europe a considerable number of states began to seek membership of the European Union, a process which not only required membership of the Council of Europe but compliance with a more extensive array of human rights standards which formed an integral part of the legal *acquis* of the Union.

Various scholars have suggested that international human rights bodies might be composed exclusively of states whose records are such that they can be considered democratic or committed to the rule of law.<sup>29</sup> But for the most part it was considered impractical, and in some respects undesirable, to seek to exclude states categorized as human rights violators from the regime. This was certainly true of the regime as a whole and various commentators, including the present author,<sup>30</sup> argued that it was not only infeasible but potentially counter-productive to create an exclusionist system which would put many countries completely beyond the purview of the regime and would definitively undermine the formal universalist claims of human rights law.<sup>31</sup> But these argu-

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a detailed history of the Commission see Philip Alston, *The Commission on Human Rights, in THE UNITED NATIONS AND HUMAN RIGHTS* (Philip Alston, ed., 1992); Jean-Bernard Marie, *LA COMMISSION DES DROITS DE L'HOMME DE L' O.N.U.* (1975); HOWARD TOLLEY, *THE U.N. COMMISSION ON HUMAN RIGHTS* (1987).

29. See, e.g., Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 *EUR J. INT'L L.* 503 (1995); but cf. Jose Alvarez, *Do Liberal States Behave Better: A Critique of Slaughter's Liberal Theory*, 12 *EUR J. INT'L L.* 183 (2001); see also Anne F. Bayefsky, *The UN Human Rights Regime: Is it Effective?*, 91 *PROC. ANN. MTG AM. SOC'Y INT'L L.* 1997 (1998), at 460.

30. Philip Alston, *Beyond "Them and Us": Putting Treaty Body Reform into Appropriate Perspective*, in *THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING*, 499 (Philip Alston & James Crawford, eds., 2000).

31. It would not necessarily have undermined the broader philosophical aspirations of human rights law to represent or reflect universal values. The argument would have been that the excluded states were violating those universal norms, not that they had put their legitimacy into doubt by rejecting them in principle.

ments were made in the context of the international treaty regime rather than of a body which was by definition limited in size and elected on the basis of certain criteria (even if those criteria were rarely specified in any meaningful way).<sup>32</sup> It is arguably a different issue as to whether such substantive standards could or should be applied in the latter context.

Despite occasional grumbling about the participation of certain “pariah” states in the deliberations of the Commission, the matter did not come to a head until the United States was presented with a powerful incentive to consider the matter of criteria for membership. That incentive was its own failure in May 2001 to win reelection, for the first time since the Commission had been established in 1946. The response of then National Security Adviser Condoleezza Rice was fairly typical. She condemned the vote and lamented the sad fact “that the country that has been the beacon for those fleeing tyranny for 200 years is not on this commission, and Sudan is. . . . It’s very bad for those people who are suffering under tyranny around the world. And it is an outrage.”<sup>33</sup> A rather different approach was taken by China. Its official Xinhua News Agency which said the US lost because it had “undermined the atmosphere for dialogue” and had used “human rights... as a tool to pursue its power politics and hegemon[y] in the world.”<sup>34</sup>

But while the rhetoric of United States’ officials was one of outrage, cooler reflection pointed to the fact that the U.S. would be unlikely to succeed in insisting on membership on the basis of its size or power, or because of its unequalled human rights record. A more productive approach, which sought to capitalize on its perception of its own role as a beacon of freedom, was to focus on the criteria of respect for democracy and human rights as prerequisites for membership of the Commission. It expressed this position at the Commission’s 2004 session by insisting that “[t]his important body should not be allowed to become a protected sanctuary for human rights violators who aim to pervert and distort its work.” Its proposed solution was to ensure that only “real democracies” should enjoy the privilege of membership.<sup>35</sup>

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32. In other words, considerations such as the ability of the state to contribute to the work of the Commission, and its acceptance in principle of human rights standards, would have figured in most analyses of why a particular state should be elected to the Commission (had such analyses or calculations been undertaken).

33. Public Broadcast Service, Online NewsHour: Backlash, May 9, 2001, [http://www.pbs.org/newshour/bb/international/jan-june01/un\\_5-9.html](http://www.pbs.org/newshour/bb/international/jan-june01/un_5-9.html).

34. *Opinion: Vote for Justice, Embarrassment for U.S.*, PEOPLE’S DAILY, May 4, 2001, available at [http://english.people.com.cn/english/200105/04/eng20010504\\_69258.html](http://english.people.com.cn/english/200105/04/eng20010504_69258.html).

35. Statement by Ambassador Richard S. Williamson, ‘Item 4: Report of the United Nations High Commissioner for Human Rights and follow-up to the World Conference on

This approach was driven by the fact that a number of states which the United States government considered to be major violators of human rights were regularly elected to membership of the Commission and thus played an active part in all its deliberations as well as voting on all resolutions. Thus, for example, one human rights group singled out the membership of states such as China, Cuba, Nepal, Russia, Sudan, Zimbabwe and Saudi Arabia to highlight the need for qualitative membership criteria. Tellingly, however, the same group suggested that any such list would be incomplete without the addition of the United States and the United Kingdom.<sup>36</sup> While that comment came primarily in response to the coalition invasion of Iraq in 2003, it served to highlight the complex nature of determining which nations should be considered to be democratic and rights-respecting for purposes of election.

This complexity encouraged human rights groups to refine their criteria in an effort to become more specific, to focus on long term elements, and to make the tests more objective. The only criteria which had ever previously been acknowledged in determining the composition of the Commission were representation of different cultures and a more precisely formulated geographical balance reflecting the five regional groupings into which the United Nations is divided for most purposes when it comes to elections.<sup>37</sup> Criteria such as relative economic strength, the ability to contribute to the effective implementation of relevant resolutions, compliance with particular standards, or membership of specific treaty regimes were never seriously contemplated. It should be added, however, that there was a presumption during the years of the Cold War that each of the five permanent members of the Security Council should always be members.

In the context of the twenty-first century debates over membership, Human Rights Watch reflected most of the criteria that had been identified by those involved in the debate when it proposed in 2003 that “as a prerequisite for membership of the Commission, governments should have ratified core human rights treaties, complied with their reporting obligations, issued open invitations to U.N. human rights experts and not have been condemned recently by the Commission for human rights violations.”<sup>38</sup> We shall examine what each of these criteria involve and the impact

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Human Rights,’ March 19, 2004, available at <http://www.humanrights-usa.net/statements/0319Williamson.htm> (last visited Aug. 18, 2004).

36. Asian Centre for Human Rights, ACHR Review No.57, 26 Jan. 2005.

37. See Eye on the UN, <http://www.eyeontheun.org/view.asp?p=55&l=11>.

38. Human Rights Watch, U.N. Rights Body In Serious Decline, April 25, 2003, available at <http://hrw.org/english/docs/2003/04/25/global5796.htm>. It should be noted that Human Rights Watch subsequently changed its position and moved away from endorsing formal criteria for membership. See *infra* note 60 and accompanying text.

they would have if used in drawing up a list of countries eligible to be elected to the new Human Rights Council in 2006.<sup>39</sup>

### A. *Ratification of Core Human Rights Treaties*

The term “core human rights treaties” is generally considered to refer to ratification of the six “core” human rights treaties adopted by the United Nations between 1965 and 1989, each of which has garnered a very significant number of ratifications.<sup>40</sup> Application of the criterion by requiring a state to have ratified all six treaties would have made only 136 countries eligible for election, and among those excluded as a result would have been Cuba, Saudi Arabia, Sudan, Zimbabwe, and fifty-five other States.<sup>41</sup> While this outcome is not inconceivable it certainly raises questions as to whether treaty ratification per se is an appropriate standard to apply in relation to Council membership.

39. The classification of States is based upon the situation in terms of treaty ratification, reporting, etc. as of October 1, 2005.

40. The treaties, in chronological order, are: the International Convention on the Elimination of All Forms of Racial Discrimination, G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195, entered into force Jan. 4, 1969 [hereinafter ICERD] (170 States Parties as of June 3, 2005); the International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force Jan. 3, 1976 [hereinafter ICESCR] (152 parties); the International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976 [hereinafter ICCPR] (154 parties); the Convention on the Elimination of All Forms of Discrimination Against Women, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, entered into force Sept. 3, 1981 [hereinafter CEDAW] (180 parties); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], entered into force June 26, 1987 [hereinafter CAT] (139 parties); and the Convention on the Rights of the Child, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force Sept. 2 1990 [hereinafter CRC] (192 parties). See Office of UN High Comm’r for Human Rights, *Status of Ratifications of the Principal International Human Rights Treaties*, as of 03 June 2005, available at <http://www.ohchr.org/english/bodies/docs/RatificationStatus.pdf> (last visited Nov. 5, 2005) [hereinafter OHCHR *Status of Ratifications*]. It should be noted, however, that the Office of the High Commissioner for Human Rights (OHCHR) has opted to include the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families in the list of core treaties, thus making a total of seven such treaties. See Office of UN High Comm’r for Human Rights, *The Core International Human Rights Instruments and Their Monitoring Bodies*, available at <http://www.ohchr.org/english/law/index.htm> (last visited Nov. 5, 2005). Despite having been adopted in 1990, that Convention had only 19 States Parties as of June 3, 2005. This raises the question as to what constitutes a “core” treaty. In my view it is not the fact that the treaty has its own monitoring body, which would seem to be the criterion applied by the OHCHR, but whether participation in the relevant treaty regime is sufficiently broad as to establish the treaty as a “core” element in any list of treaties which should be considered as absolute priorities for any state wishing to establish its clear human rights bona fides in terms of the international regime.

41. OHCHR *Status of Ratification*, *supra* note 40. A total of 59 countries would be excluded from eligibility for election to Council membership under this criterion. *Id.*

A less demanding approach, which takes the main United Nations human rights treaties as its starting point, is to require only acceptance of the two cornerstone treaties which, together with the Universal Declaration of Human Rights, make up the International Bill of Rights, a commitment to the preparation of which emerged from the process of drafting the UN Charter<sup>42</sup> and was the principal item listed in the terms of reference given to the first Commission on Human Rights in 1946.<sup>43</sup> This would mean requiring that a State eligible for election to the Council should be a party to both the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR).<sup>44</sup> If this minimalist criterion is applied, neither China nor the United States, among others, would be ineligible for election to the new Council.

### B. Compliance with Reporting Obligations

This criterion is more complex than it might seem at first. Under most of the core treaties, States Parties are required to make an initial report within 2 years and then to provide additional or "periodic" reports every four or five years thereafter.<sup>45</sup> Compliance with the obligation to report is central to the accountability mechanisms established under these treaties. In general, the monitoring process in relation to a given country is only triggered by the submission of a report, so that failure to report or very late reporting significantly undermines the system. Measurement of non-compliance is, however, made difficult by virtue of the fact that a widespread practise has emerged whereby States habitually, and without apology or regret, submit their reports long after they are due. The situation is best summed up by the following analysis:

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42. See LOUIS B. SOHN AND THOMAS BUERGENTHAL, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 514 (1973).

43. See Egon Schwelb and Philip Alston, *The Principal Institutions and Other Bodies Founded under the Charter*, in THE INTERNATIONAL DIMENSIONS OF HUMAN RIGHTS 231, 244 (Karel Vasak and Philip Alston, eds., 1982).

44. See *supra* note 40 and accompanying text.

45. For a more precise overview of information relating to the reporting schedules under the different treaties see Office of the U.N. High Comm'r for Human Rts., Monitoring Implementation of the International Human Rights Instruments: An Overview of the Current Treaty Body System, Fifth Session of the Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities, U.N. doc. A/AC.265/2005/CRP/2 (Jan. 24 - Feb. 4, 2005), available at <http://www.un.org/esa/socdev/enable/rights/ahc5ohchr.doc> (last visited Nov. 5, 2005).

[Many States] have fallen seriously behind in submission of their reports. At the beginning of 2005, a total of 1.490 reports, including 273 initial reports, were overdue. Of these, 648 have been overdue for more than five years. As a consequence, the average State party to a treaty with reporting requirement[s] has more than eleven reports overdue to the treaty bodies. On average, States submit their initial reports 33 months late and their periodic reports 28 months late.<sup>46</sup>

While it might be assumed that the poorer developing countries are the most likely to be well behind in meeting their reporting obligations, delinquency is in fact a widely shared phenomenon. As of November 2005 the United States, for example, was officially listed as having 5 reports overdue, some by a very considerable period of time. China also had four overdue reports, while only 18 states were listed as having no more than a single report outstanding (including Canada, Finland, Germany, Italy and the United Kingdom, but also North Korea and Myanmar).<sup>47</sup> But the fact that reporting delinquency is all too common should not serve to distract attention from the fact that it poses a major threat to the integrity and effectiveness of the reporting procedures or that timely submission is a potentially appropriate criterion by which to measure the extent to which States live up to their international obligations in the human rights field. Indeed, it may be argued that it is precisely because there are no penalties or other disincentives attaching to tardy reporting that the practise has flourished.

Three conclusions may be drawn for present purposes from this brief survey. The first is that a stark requirement of timely submission of reports is an unworkable criterion for Council membership since it would lead to the disqualification of a huge number of States. The second is that incurring some form of penalty or disadvantage for systematic delinquency is both necessary and appropriate, but that it needs to be applied in a fashion which reflects existing realities. The third, which follows from the first

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46. *Id.* ¶ 24.

47. OHCHR, Treaty Body Database, List of reports 'Overdue by Country,' available at <http://www.unhcr.ch/tbs/doc.nsf/newhvoverduebycountry?OpenView> (last visited Nov. 5, 2005). See also Office of the U.N. High Comm'r for Human Rts., International Human Rights Treaty Bodies: Recent Reporting History under the Principal International Human Rights Instruments, U.N. doc. HRI/GEN/4/Rev.5 (June 3, 2005), available at <http://daccessdds.un.org/doc/UNDOC/GEN/G05/422/54/PDF/G0542254.pdf?OpenElement> (last visited Nov. 5, 2005).

two, is that the application of a modified or composite requirement in relation to reporting would be feasible and reasonable, and would constitute an important reinforcement of one of the key components of the existing arrangements for international accountability. While it is beyond the scope of the present analysis to suggest any precise model in this regard, the solution will presumably lie in some form of aggregate test according to which a State would be ineligible for election if, on aggregate, the sum of its reports was a total of more than two years overdue. It should be added that this would not necessarily represent an undue burden on developing countries since they are eligible for technical assistance provided by the Office of the High Commissioner for Human Rights in the preparation of reports if they request it.

### C. *Issuance of Open Invitations to UN Human Rights Experts*

This criterion refers to a technique developed in order to facilitate the functioning of the thematic special procedures which constitute another of the major human rights accountability mechanisms developed by the Commission on Human Rights. It involves a State issuing a “standing invitation” to all of the UN Special Rapporteurs, Special Representatives, and Independent Experts who deal with a particular theme.<sup>48</sup> The significance is that the relevant mandate-holder does not need to seek an invitation from a government on an ad hoc basis but has only to negotiate the timing of a proposed on-site visit to a country.<sup>49</sup>

The application of this criterion for Council membership would exclude the great majority of African and Asian countries (including China) as well as the United States and Russia.

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48. As of October 14, 2005, the following 53 countries have extended a standing invitation to thematic procedures: Argentina, Austria, Belgium, Brazil, Bulgaria, Canada, Colombia, Costa Rica, Croatia, Cyprus, Czech Republic, Denmark, Ecuador, Estonia, Finland, France, Germany, Georgia, Greece, Guatemala, Hungary, Iceland, Ireland, Islamic Republic of Iran, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Mexico, Mongolia, Netherlands, New Zealand, Norway, Paraguay, Peru, Poland, Portugal, Republic of Macedonia, Romania, San Marino, Serbia Montenegro, Sierra Leone, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Turkey, United Kingdom of Great Britain and Northern Ireland, and Uruguay. See Office of the U.N. High Comm’r for Human Rts., Standing Invitations, <http://www.ohchr.org/english/bodies/chr/special/invitations.htm> (last visited Oct. 16, 2005).

49. For an explanation of the concept of standing invitations see the joint written statement to the Commission on Human Rights by several non-governmental organizations entitled Standing Invitations to Thematic Human Rights Mechanisms, UN doc. E/CN.4/2004/NGO/2, available at [http://www.unhcr.ch/Huridocda/Huridoca.nsf/\(Symbol\)/E.CN.4.2004.NGO.2.En?Opendocument](http://www.unhcr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.2004.NGO.2.En?Opendocument).



*D. Non-condemnation by the Commission on Human Rights*

It is this requirement that would be the least demanding and lead to the exclusion from potential membership of the smallest number of countries. In good measure, the current reform criticism has been driven by those States such as China and Cuba which feel that the Commission should not have singled out particular countries for criticism in the form of a country-specific resolution. At present, there are 13 countries which are the subject of specific procedures. Some of these, however, are being dealt with under Item 19 on the Commission's agenda which concerns the provision of technical cooperation and advisory services, rather than under Item 9 dealing with violations of human rights. Although it would be presumed that only those dealt with under Item 9 would be excluded from potential membership of the Council, the use of Item 19 as a way of dealing with violators while avoiding a formal condemnation makes it difficult to attach undue consideration to this distinction.

The list of countries currently under consideration consists of: Belarus, Burundi, Cambodia, Cuba, Democratic People's Republic of Korea, Democratic Republic of the Congo, Haiti, Liberia, Myanmar, Palestinian territories occupied since 1967, Somalia, Sudan, and Uzbekistan.<sup>50</sup>

The use of such a list would be problematic for two major reasons. The first is that it in no way factors in the situation of other States in relation to which major efforts had been made to secure a country-specific procedure. They include, for example, China, Zimbabwe, Turkmenistan, Russia (in relation to Chechnya), and the United States (in relation to Guantanamo). Most observers would suggest that the failure to condemn in those cases owed more to the political clout of the countries concerned than to the insignificant nature of the alleged violations. The second reason is that all of the countries on the list are from developing countries and their exclusion from potential membership in the Council would only serve to underscore the "North as judge and South as defendant" critique of the Commission's work. While such an approach might seem reasonable to an observer steeped in U.S. state constitutional law assumptions about the appropriateness of disenfranchising felons,<sup>51</sup> the United Nations system is built on the

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50. See Office of the U.N. High Comm'r for Human Rts., Country Mandates, available at <http://www.ohchr.org/english/bodies/chr/special/countries.htm> (last visited Oct 5, 2005).

51. The 14th Amendment to the U.S. Constitution permits states to deny the vote "for participation in rebellion, or other crime." In 2004 it was estimated that some 4.7 million U.S. citizens were barred from voting because of their felony records. See Kevin Krajick,

radically different notion of the sovereign equality of states. While much of the evolving international human rights regime has been designed to transcend certain aspects of that notion, depriving delinquent States of their rights to vote and to participate in international governance without a procedure such as that mandated by the UN Charter in relation to the Security Council.

#### *E. Countries Subject to Security Council Sanctions*

One final additional criterion which has been suggested by the United States is that countries which are the subject of sanctions imposed by the Security Council should not be eligible for election. This argument was put forward by a senior U.S. diplomat in the context of discussions about the new Council. He urged UN Member States not to “make room on the Council for countries that seek to undermine the effectiveness of the UN’s human rights machinery – much less governments under Security Council sanctions or investigation for human rights reasons.”<sup>52</sup>

On its face this limitation would appear reasonable. By the same token consideration needs to be given to several factors which make the solution less satisfactory than might first appear. One is that only a rather limited range of countries would be precluded from election as a result. At present such an exclusion would affect only: Afghanistan, Burundi, Côte d’Ivoire, Democratic Republic of the Congo, Iraq, Libya, Rwanda, Sierra Leone, Somalia, Sudan, Tanzania, and Uganda.<sup>53</sup> The list does not include countries such as Myanmar or Uzbekistan which are subject to sanctions by groups such as the European Union, nor of course the much larger list of countries subject to some form of United States-imposed unilateral sanctions. Moreover, some of the States whose membership of the Commission the United States considers to be most problematic, such as Cuba, would not be covered. Another problem is the nature of Security Council sanctions. They are, in practice, imposed for a variety of reasons, only some of which reflect a poor human rights record. Thus, for example, a country may be subject to sanctions because it is facilitating arms imports by another state which is prohibited from obtaining them. While

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*Why Can’t Ex-Felons Vote?*, THE WASHINGTON POST, Aug. 18, 2004, at A19, available at <http://www.washingtonpost.com/wp-dyn/articles/A9785-2004Aug17.html> (last visited Oct. 14, 2005).

52. Statement by Ambassador Sichan Siv, U.S. Alternate Representative to the General Assembly, on Agenda Items 71 (b), (c), and (e) in the Third Committee, October 31, 2005, U.S. Mission to the U.N., Press Release #194 (05), Oct. 31, 2005, available at [http://www.un.int/usa/05\\_194.htm](http://www.un.int/usa/05_194.htm).

53. List of Countries Subject to United Nations Sanctions, available at [http://www.tid.gov.hk/english/import\\_export/uns/uns\\_countrylist.html](http://www.tid.gov.hk/english/import_export/uns/uns_countrylist.html).

sanctions might be fully warranted, it is questionable whether exclusion from the Human Rights Council should follow. If the answer to that question is in the affirmative, then the question is why exclusion from other international forums is not equally warranted if the objective is to impose a general purpose punishment.

The Security Council criterion is also complicated by the fact that respect for human rights has itself been proposed as an important element required if a country is to qualify for election to one of the proposed new permanent seats on the Security Council.

<sup>54</sup>

The final problem with this criterion is that it would endow the Permanent Five, veto-wielding members of the Security Council, with much of the power to determine which countries should or should not be able to sit on the Human Rights Council. This may be more of a political than an equity-based objection but it would nevertheless be a factor which would affect the overall political legitimacy of the new Council while at the same time resulting in the exclusion of relatively few countries, without catching all of the major human rights violators.

#### IV. AN ALTERNATIVE TO FORMAL MEMBERSHIP CRITERIA?

The clear conclusion that emerges from the foregoing analysis is that while the idea of membership criteria has a great deal to recommend it, it seems unlikely to be workable, and certainly unlikely to be effective, in practice. This has now been acknowledged by most observers, although some have still sought to encourage consideration of soft or voluntarily-assumed obligations which should be considered by states which are elected to the Council.

The best illustration of this process of reluctant abandonment of formal criteria is to be found in the December 2004 report of a high-level panel on UN reform.<sup>55</sup> In a section entitled A More Ef-

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54. The United States has urged that:

We must also ensure that new permanent members are supremely qualified to undertake the tremendous duties and responsibilities they will assume. In our view, qualified nations should meet criteria in the following areas: size of economy and population; military capacity; contributions to peacekeeping operations; commitment to democracy and human rights; financial contributions to the United Nations; non-proliferation and counterterrorism records; and equitable geographic balance.

Statement by Ambassador John R. Bolton, U.S. Representative to the U.N., on Security Council Reform, in the General Assembly, November 10, 2005, U.S. Mission to the U.N., Press Release # 214 (05), November 10, 2005, available at [http://www.un.int/usa/05\\_214.htm](http://www.un.int/usa/05_214.htm).

55. REPORT OF THE HIGH-LEVEL PANEL, *supra* note 28.

fective United Nations for the Twenty-First Century, the panel focused squarely on the issue of the inclusion in the Commission of countries with poor human rights records. Instead of using terms like egregious violators or the like, the panel preferred a diplomatic euphemism by referring to “States that lack a demonstrated commitment to [human rights] promotion and protection.” Such States, the report said, had sought Commission membership “not to strengthen human rights but to protect themselves against criticism or to criticize others.” The result was an erosion of credibility and professionalism: “The Commission cannot be credible if it is seen to be maintaining double standards in addressing human rights concerns.” But while emphasizing the need for reform the panel began by dismissing the possibility of setting criteria for membership, an approach which it said would only risk further politicization. Instead it opted for universal membership by which all 193 UN Member States would be able to participate and vote in the Commission’s proceedings.<sup>56</sup>

Amnesty International has also eschewed any formal criteria and has instead contented itself with calling for “electoral rules that effectively provide for genuine election of Council membership (precluding “clean slates”)<sup>57</sup>, that provide for election by a two-thirds majority of the General Assembly and that ensure that Council membership is effectively open to all members.”<sup>58</sup> This highlights the fact that the question of the size of the new Human Rights Council is a particularly contentious one with proposals varying from as few as 20, a number favored by the United States, to as many as 193 (or however many members there are at the time of the United Nations). These figures raise critical questions of legitimacy, credibility, acceptability, and diversity, all of which warrant much more systematic consideration than they have so far received in the discussions in international forums. Regrettably, in view of their considerable importance, those issues go well beyond the scope of the present article.

While Amnesty International concluded that it “does not consider that imposing specific criteria for membership is an effective

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56. *Id.*

57. Amnesty International has defined a “clean slate” as a “practice by which regional groups determine membership from their region by putting up the same number of candidates from the region as there are seats to be filled by that region.” The result is to avoid an electoral competition and instead to ensure that the countries agreed within the regional group will unavoidably be selected. Amnesty International, UN: Governments must act promptly and effectively on important human rights commitments in 2005 World Summit Document, AI Index: IOR 41/062/2005, Sept. 26, 2005, available at <http://web.amnesty.org/library/Index/ENGIOR410622005?open&of=ENG-393> (last visited Oct 12, 2005).

58. *Id.*

approach” it nonetheless went on to say that if Council membership is to be limited, the relevant “election rules and working methods should encourage the nomination and election of governments with a demonstrated commitment to the promotion and protection of human rights.”<sup>59</sup> This was elaborated in a subsequent statement in which Amnesty called upon states presenting themselves as candidates for election to the Council to “make public human rights commitments well in advance of the election date.”<sup>60</sup> However, the statement carefully avoided spelling out the precise nature of such commitments. In November 2005, Amnesty in collaboration with 40 other civil society groups, including Human Rights Watch, called upon states seeking election to the Council to “commit to abide by the highest standards of human rights and to cooperate fully with the [Council] and its mechanisms, and [to] put forward a platform that describes what they seek to accomplish during their term of membership.”<sup>61</sup>

The major challenge that then emerges in trying to ensure some degree of accountability on the part of the members of the new Human Rights Council is how best to encourage candidate states to put forward the sort of pledges or electoral platforms that have been called for and how to encourage other states to take account of the human rights record of the candidates in deciding how to cast their ballots. This process is best seen not as a matter of legal or other mandatory requirements but as a process of education.

In the remaining part of this article, the argument is made that a consolidated performance index is a vital part of any such endeavours. Expecting most governments to scrutinize in detail the record of every individual candidate for election, and to use appropriate and comparable criteria in doing so, is asking a lot and the record to date offers little prospect that such a process will apply. The availability of a consolidated index, applying the same criteria

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59. Amnesty International's Views on the Proposals for Reform of the UN's human rights machinery, AI Index: IOR 41/032/2005, News Service No: 089, 11 April 2005, available at <http://web.amnesty.org/library/index/engior410322005>.

60. Amnesty International's Ten-point Program for the Creation of an Authoritative and Effective Human Rights Council, AI Index: IOR 41/068/2005, 1 Nov. 2005, available at <http://web.amnesty.org/library/Index/ENGior410682005?open&of=ENG-393>.

61. Joint Letter on the U.N. Human Rights Council, Letter from Forty-one Civil Society Leaders to the President of the U.N. General Assembly, Nov. 1, 2005, available at <http://hrw.org/english/docs/2005/11/01/global11955.htm>. In addition to Amnesty International and Human Rights Watch, the letter was also signed by most of the other leading human rights groups including: The Carter Center, CARE International, the Fédération Internationale des Ligues des Droits de l'Homme, Freedom House, Global Rights, Human Rights First, International Commission of Jurists, International Crisis Group, International League for Human Rights, International Service for Human Rights, Open Society Institute, Physicians for Human Rights, and the World Organisation Against Torture.

to every state, offers an accessible basis for evaluation and one which is built upon criteria which have in effect been endorsed by all states rather than on a more selective list which is inevitably going to be presented by some states as having been designed to promote particular outcomes.

## V. SOME MODELS FOR A HUMAN RIGHTS INDEX

There are many advantages to the drawing up of a composite index which reflects in a single numerical rating a range of factors which have been weighted according to their relevance and significance. Such an index seeks to capture a complex reality and to reduce it to a form which provides a readily understandable measure of performance across a range of activities.

While there are now many such composite indexes prepared on an annual basis for a wide range of purposes,<sup>62</sup> it is useful to take note of two particularly pertinent models which could be considered in the construction of any such index in the human rights field. They are the Human Development Index and the Environmental Sustainability Index.

The first of these – the Human Development Index (HDI) – is perhaps the best-known and certainly the most frequently imitated recent initiative of this kind. Its origins lie in part in efforts to create an antidote to the standard measures of economic performance – Gross National Product per capita (GNP) – which for many years had been used to rate and rank countries' performance as though little else counted. Those who found it to be, in Amartya Sen's words, "an overused and oversold index,"<sup>63</sup> often argued that it should be replaced by reference to a complex set of tables which would give a better indication of the reality. But at the end of the

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62. Two such examples are a Commitment to Development Index and a Gender Equality Index. The latter has been developed by the World Economic Forum and measures the state of gender equality in 58 countries in relation to five criteria: economic participation, economic opportunity, political empowerment, educational attainment, and health and well-being. Augusto Lopez-Claros & Saadia Zahidi, *Women's Empowerment: Measuring the Global Gender Gap* (2005), [http://www.weforum.org/pdf/Global\\_Competitiveness\\_Reports/Reports/gender\\_gap.pdf](http://www.weforum.org/pdf/Global_Competitiveness_Reports/Reports/gender_gap.pdf).

The Commitment to Development Index measures the development-friendliness of the policies adopted by 21 of the world's richest countries. It takes account of the following factors: quality and quantity of foreign aid; openness to developing-country exports; policies that influence investment; migration policies; environmental policies; security policies; and support for creation and dissemination of new technologies. See Center for Global Development, *Commitment to Development Index*, [http://www.cgdev.org/section/initiatives/\\_active/cdi/about\\_cdi](http://www.cgdev.org/section/initiatives/_active/cdi/about_cdi).

63. Amartya Sen, *Assessing Human Development*, in U.N. Human Dev. Programme, Human Dev. Report Office, *Human Development Report 1999*, at 23 (1999) [hereinafter *Human Development Report 1999*].

day, it was an alternative composite indicator, one which was equally “crude but convenient,”<sup>64</sup> which succeeded in providing an alternative form of evaluation. This was the HDI. It was developed by Mahbub ul Haq and Amartya Sen within the framework of the *Human Development Report* (HDR) which was first published, under the auspices of the United Nations Development Program, in 1990. The HDI aggregates three different sets of indicators relating to (i) life expectancy at birth, (ii) literacy and school enrolment, and (iii) Gross Domestic Product per capita.<sup>65</sup> Since 1990 the same report has gone on to develop a range of other indexes which are also designed to capture complex realities by a numerical indicator. They include the Gender-related Development Index and the Gender Empowerment Measure (GDI/GEM), the Human Poverty Index (HPI-1 and HPI-2), the Human Freedom Index (HFI), and the Political Freedom Index (PFI).<sup>66</sup>

While the HDI has generated a considerable literature critiquing its shortcomings, omissions and pretensions,<sup>67</sup> there is no doubt that it has also generated intense interest and “a great deal of media coverage.”<sup>68</sup> Indeed, it would be fair to say that it has had a major impact on the way in which development success is measured. This is borne out not only by the extent to which the HDI is regularly cited in the mainstream development literature but also by the extent to which governments either invoke or denounce the ratings they receive depending upon whether or not they are happy with the outcome.<sup>69</sup>

An even more telling tribute to the success of the HDI is the extent to which it has been emulated in a variety of different contexts over the past decade. It has also stimulated others to seek to

64. *Id.*

65. *Id.* at 333. The Index covers 175 Member states of the United Nations as well as the Special Administrative Region of Hong Kong and the Occupied Palestinian Territories. Only 16 Member states are excluded, in each case because the necessary data is lacking. *Id.* at 211.

66. For an explanation of these composite indices and how they are calculated see UNDEP, Human Development Reports: Human Development Index Technical Note 1, [http://hdr.undp.org/docs/statistics/indices/technote\\_1.pdf](http://hdr.undp.org/docs/statistics/indices/technote_1.pdf).

67. For a sustained recent critique see Thomas W. Pogge, Can the Capability Approach Be Justified?, [http://mora.rente.nhh.no/projects/EqualityExchange/Portals/0/articles/pogge\\_1.pdf](http://mora.rente.nhh.no/projects/EqualityExchange/Portals/0/articles/pogge_1.pdf), especially pp. 64-70.

68. HUMAN SECURITY REPORT 2005, *supra* note 68. HUMAN SEC. CTR., THE HUMAN SECURITY REPORT 2005: WAR AND PEACE IN THE 21ST CENTURY (2005), available at <http://www.humansecurityreport.info/index.php?option=content&task=view&id=28&Itemid=63> [hereinafter HUMAN SECURITY REPORT 2005].

69. Kate Raworth & David Stewart, *Critiques of the Human Development Index: A Review*, in READINGS IN HUMAN DEVELOPMENT: CONCEPTS, MEASURES AND POLICIES FOR A DEVELOPMENT PARADIGM 140 (Sakiko Fukuda-Parr and A. K. Shiva Kumar eds., 2003); Anuradha K. Rajivan, Taking Stock of the HDR Experience: Potential, Limitations and Future Directions, <http://hdrc.undp.org.in/APRI/wkgppr/TakingStockHDRs.pdf>.

design more comprehensive and complex indices designed to achieve similar goals. For present purposes it will suffice to note one of the most detailed and scientifically sophisticated of these which is the Environmental Sustainability Index (ESI).<sup>70</sup>

The ESI seeks to encapsulate in a numerical index a set of 21 environmental sustainability indicators that measure factors such as natural resource endowments, past and present pollution levels, environmental management efforts, and the capacity of a society to improve its environmental performance. The stated objectives of the index are to provide “(1) a powerful tool for putting environmental decisionmaking on firmer analytical footing (2) an alternative to GDP and the Human Development Index for gauging country progress, and (3) a useful mechanism for benchmarking environmental performance.”<sup>71</sup> While the ESI shares some of the goals of the HDI, its methods are quite different. It makes use of a very extensive and carefully constructed set of indicators and it specifically emphasizes the importance of peer group comparisons in relation to specific indicators. As a result of the extent of its ambition, its authors inevitably have faced major challenges in filling “[s]erious and persistent data gaps” in relation to items that are covered and have lamented the fact that various issues of major environmental significance are not covered at all because of the absence of data.<sup>72</sup>

The ESI's sponsors have also sought to measure the impact of the index by looking at the extent to which it has been cited in mainstream publications. The resulting survey shows extensive use across a wide range of sources.<sup>73</sup> They have also recorded and endeavored to respond to a range of critiques. These include criticisms that the index underemphasizes some dimensions of environmental sustainability, that it is meaningless because of its efforts to combine too many disparate elements, that other indexes are more informative in certain respects, that it gives undue weight to governments' stated intentions rather than to their actual performance, and that it has an inherently “northern” bias which favors developed over developing countries.<sup>74</sup> Many of these

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70. 2005 ENVIRONMENTAL SUSTAINABILITY INDEX: BENCHMARKING NATIONAL ENVIRONMENTAL STEWARDSHIP, <http://sedac.ciesin.columbia.edu/es/esi/downloads.html>. The Index is prepared by the Yale Center for Environmental Law and Policy and the Center for International Earth Science Information Network, Columbia University, in collaboration with the World Economic Forum, Geneva, Switzerland and the Joint Research Centre, European Commission Ispra, Italy.

71. *Id.* at 1.

72. *Id.* at 2.

73. *Id.* at app. I at 403.

74. *Id.* at app. H at 397.



critiques would have clearly predictable counterparts in relation to any substantive human rights index that might be drawn up.

In general terms the advantages that might be obtained through the development of composite indices include the following:

- To convey through a single measure a sense of the implications of a range of complex data which would not otherwise be readily understood by non-professionals;
- To compensate for the shortcomings of individual indicators, so that the whole is actually more useful than the sum of the parts;<sup>75</sup>
- To facilitate comparisons among countries;
- To facilitate comparisons over time;<sup>76</sup>
- To draw attention to the significance of the issues reflected in the indicator;
- To facilitate the “reportability” of the issues in the media and thus help to develop a better public appreciation of the importance of the relevant issues;
- To generate a degree of public pressure through enhanced discussion and attention to the issues reflected in the component parts of the index; and

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75. The value of this function is strongly defended in a World Bank research study on governance which acknowledges that many of the available indicators are only “imperfect proxies” for some of the fundamental concepts of governance. The authors identify three advantages flowing from distilling the proxies into a small number of aggregate indicators: (1) the aggregate indicators span a much larger set of countries than any individual source, thereby permitting comparisons of governance across a broad set of countries; (2) aggregate indicators can provide more precise measures of governance than individual indicators; and (3) it is possible to construct quantitative measures of the precision of both the aggregate governance indicators and their components, allowing formal testing of hypotheses regarding cross-country differences in governance. Kaufmann, Kray, and Zoido-Lobaton, *Aggregating Governance Indicators*, 1 (1999).

76. It should be noted, however, that the HDI explicitly eschews its usage for this purpose. Thus the *Human Development Report 2005* notes that “Because of periodic revisions of data or changes in methodology by international agencies, statistics presented in different editions of the Report may not be comparable. For this reason the Human Development Report Office strongly advises against constructing trend analyses based on data from different editions.” U.N. Human Dev. Programme, Human Dev. Report Office, *Human Development Report 2005: International Cooperation at a Crossroads: Aid, Trade and Security in an Unequal World*, 212 (2005), available at <http://hdr.undp.org/reports/global/2005> [hereinafter *Human Development Report 2005*].

- To provide an incentive to governments and other decision-makers to take greater account of the factors reflected in the index in their policies and programs.

On the other hand, in addition to the inevitably difficult questions which will arise as to the design of any given index, there remains one over-arching question that needs to be answered in deciding whether to proceed with such an index: whether the disadvantages of giving prominence to a crude and technically unsatisfying index outweigh the advantages suggested above. It is highly instructive that this dilemma was squarely confronted by the architects of the HDI. One of them, Nobel Prize-winning economist Amartya Sen, subsequently stated that he had initially seen little merit in the HDI because of its crudeness and its inability to capture the richness and complexity of the information which underpinned it. But Sen went on to acknowledge that the principal proponent of the HDI, Mahbub ul Haq, had been right in insisting that only an indicator "of the same level of vulgarity as GNP" could succeed in challenging GNP in the popular imagination.<sup>77</sup> The real goal, in his view, was to use the HDI as a hook which would get the readers of the report "to take an involved interest in the large class of systematic tables and detailed critical analyses presented."<sup>78</sup> In Sen's words, the "crude index spoke loud and clear and received intelligent attention and through that vehicle the complex reality contained in the rest of the Report also found an interested audience."<sup>79</sup> And it is precisely such a rationale which is invoked by the proponents of most of the composite indices which are now being prepared. The question for present purposes is whether such a justification is sufficiently compelling in the human rights context.

## VI. THE FEASIBILITY OF A HUMAN RIGHTS INDEX

In fields closely related to human rights a growing number of composite indices have emerged in recent years in relation to governance issues and to economic policy. Thus, for example, the Index of Economic Freedoms is compiled by the Heritage Foundation and rates countries according to levels of: corruption, non-tariff barriers to trade, the fiscal burden of government (tax rates etc.), the rule of law (defined as efficiency within the judiciary and the ability to enforce contracts), regulatory burdens on business, re-

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77. Sen, *supra* note 63, at 23.

78. *Id.*

79. *Id.*

restrictions on banks, labor market regulations, and informal market activities.<sup>80</sup> Other notable governance-related indices include the Global Competitiveness Survey,<sup>81</sup> and the Corruptions Perception Index.<sup>82</sup> Such initiatives, and the publicity and attention that they have received, raise the question as to whether it is now time to seek to develop an authoritative composite index which would enable every country in the world to be ranked in a single index which measures their human rights records.

This section of the analysis consists of three parts. The first notes the historical reluctance of human rights proponents to engage in the development of composite indices. The second explores several recent developments which indicate a growing openness in this regard, and the third reviews arguments that a comprehensive general purpose human rights index is neither feasible nor desirable.

#### A. *The Historical Reluctance of Human Rights Proponents*

Despite the clear advantages to be gained from the development and use of composite indices, and the extent to which they have been promoted in other areas, the international human rights community has long been skeptical of the utility of such indices in relation to its own areas of concern. This remains true even as new indices are launched in relation to gender representation or empowerment, the rule of law, good governance and so on. As a result none of the major international human rights groups, including Amnesty International, the *Fédération internationale des droits de l'homme*, or Human Rights Watch, make any sustained use of indices in their work.

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80. William W. Beach & Marc A. Miles, *Explaining the Factors of the Index of Economic Freedom*, in MARC A. MILES, MARY ANASTASIA O'GRADY, & EDWIN FEULNER, JR., HERITAGE FOUNDATION AND WALL STREET JOURNAL, 2005 INDEX OF ECONOMIC FREEDOM: THE LINK BETWEEN ECONOMIC OPPORTUNITY AND PROSPERITY 57-78 (2005), available at <http://www.heritage.org/research/features/index/downloads.cfm> (scroll down to the link for Chapter 5 and click on that link).

81. GLOBAL COMPETITIVENESS REPORT 2005-2006: POLICIES UNDERPINNING RISING PROSPERITY (Augusto Lopez-Claros, Michael E. Porter & Klaus Schwab, eds., 2005). The report uses a Growth Competitiveness Index (GCI) which gives a score for the competitiveness of the macroeconomic environment, the quality of public institutions and the use of technology. *Id.*

82. TRANSPARENCY INTERNATIONAL, CORRUPTION PERCEPTIONS INDEX (2005), <http://ww1.transparency.org/surveys/index.html#cpi>. This index is prepared annually by Transparency International and ranks countries in terms of the degree to which corruption is perceived to exist among public officials and politicians. It is a composite index based largely on the perceptions of business people and the general public. See Frequently Asked Questions: TI Corruption Perceptions Index (CPI 2005), [http://ww1.transparency.org/cpi/2005/cpi2005\\_fa.en.html](http://ww1.transparency.org/cpi/2005/cpi2005_fa.en.html).

Several factors help to explain this reluctance. The first is historical. Freedom House was the first major advocacy group to develop a set of criteria against which countries human rights conduct was systematically ranked. It began this work in a rather elementary form in the mid-1950s and from 1978 onwards it began to produce detailed annual reports using an increasingly sophisticated methodology. Commentators generally considered its criteria to be ideologically skewed both in terms of the range of rights used as the basis for the evaluation and in terms of the subjectivity of the rankings that were given to different countries. In methodological terms, scholars were especially critical of the fact that Freedom House did not clearly indicate the factors taken into account in drawing up the various scales used and of the fact that the scales were not able to be disaggregated.<sup>83</sup> The rankings were especially criticized during the 1980's in relation to countries generally perceived to have been in comparable situations but whose rankings varied dramatically from one another's. They included Nicaragua/El Salvador, Egypt/Israel, and Zaïre/Chad. Those countries which were allied with the United States in the Cold War context appeared to be given the benefit of the doubt while those on the other side were evaluated harshly. Even after the Cold War ended commentators suggested that the surveys often reflected "erratic value judgments."<sup>84</sup>

Misgivings about the value of such indices were further exacerbated by the *World Human Rights Guide*, which was published over three editions between 1983 and 1992,<sup>85</sup> and used as the basis for an ill-fated *HDR* effort in the early 1990s to construct a Human Freedom Index. There were several problems with the index developed by Charles Humana. In the eyes of some commentators the virtual omission of the rights contained in the International Covenant on Economic, Social and Cultural Rights, apart from the right to form trade unions, the prohibition on child labor, and the right to take part in cultural life, ensured the one-sidedness of the

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83. Thus it has been noted that "the implicit range of each dimension and the weighting system (if any) employed in comparing countries and the decisional (mathematical) rule used to bring together units as a single ranking are never discussed." G. Lopez and M. Stohl, *Problems of Concept and Measurement in the Study of Human Rights*, in HUMAN RIGHTS AND STATISTICS: GETTING THE RECORD STRAIGHT 216, 223 (Thomas Jabine and Richard Claude, eds., 1992).

84. Cecelia Lynch, *World Human Rights Guide (3rd edition) by Charles Humana*. New York: Oxford University Press, 1992, 3 L. & POL. BOOK REV. 87 (1993) (book review), available at <http://www.bsos.umd.edu/gvpt/lpbr/> (follow "Reviews" hyperlink, then follow "Alphabetical Listing" hyperlink, then follow "H" hyperlink, then follow "Humana, Charles. (ed.)" hyperlink).

85. WORLD HUMAN RIGHTS GUIDE (Charles Humana ed., 1983); WORLD HUMAN RIGHTS GUIDE (Charles Humana ed., Facts on File, 2d ed. 1986); WORLD HUMAN RIGHTS GUIDE (Charles Humana ed., Oxford Univ. Press, 3d ed. 1992).

index and its failure to live up to its claim to assess human rights in general. Onuma, for example, concluded that the assessment was “based on the subjective view of the author” which, in turn, was said to reflect “the bias of Western NGOs and media.”<sup>86</sup> But much more problematically politically, and the reason why the use of the *Guide* by the *HDR* was so controversial, was the fact that the Humana Index took account of the “rights”: “to purchase and drink alcohol,” “to practise homosexuality between consenting adults,” “to use contraceptive pills and devices,” the freedom “of early abortion,” and the freedom “of divorce”.<sup>87</sup>

Even after considerable criticism had been directed at the first two editions of the index, one reviewer of Humana’s third edition expressed the hope that “the next edition will be less partial, although it would surely remain contentious”.<sup>88</sup> At the end of the day neither of these two much-publicized attempts to construct a composite index of human rights performance succeeded in persuading NGOs and other observers that rankings in this field could be done in an “objective” manner.

Another reason for the human rights community’s reluctance is the problem of the incommensurability of different states in terms of their human rights record. Members of the press and public often want to know whether country X’s record should be considered to be better than that of country Y. But the human rights groups have assiduously responded by insisting that the performance of one country cannot reasonably be compared with that of another without sending either false or undesirable messages. For example, should a country in which official torture is widespread and systematic be rated more highly than another country in which a significant number of disappearances, but little torture, have been reported? What conclusions could an observer be expected to draw from the fact that one country gets a 4 out of 10 ranking where another gets 5, or from the fact that both are classified as having, say, “significant but not appalling” human rights problems? And how can silent but systemic violations such as longstanding but reasonably subtle discrimination against ethnic, religious, or linguistic groups be adequately captured in such overall rankings?

A related objection is that every human right counts and the fact that a country scores well on a composite index of some sort

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86. Yasuaki Onuma, *The Need for an Intercivilizational Approach to Evaluating Human Rights*, 10 HUM. RTS. DIALOGUE (1997), available at <https://www.carnegiecouncil.org/viewMedia.php/prmTemplateID/8/prmID/574>.

87. WORLD HUMAN RIGHTS GUIDE (Charles Humana ed., Oxford Univ. Press, 3d ed. 1992), *supra* note 85, at 33.

88. Lynch, *supra* note 84, at 88.

should not be permitted to obscure the fact that it might nevertheless have a poor record in relation to one or more specific issues. Similarly, a government can abuse such rankings to trumpet the fact that its performance is better than that of other countries, despite the existence of ongoing violations. This could make the normative content of human rights relative and allow a state that is doing the “best” compared to other states, but is still not meeting its human rights obligations, to flaunt its high comparative rank. Ranking can also be problematic in relation to countries with very strong overall human rights records but which are nevertheless open to criticism in relation to certain shortcomings.

Another obstacle which has been identified is that “the documentation of individual cases is and must be the primary concern of the many organizations that work on behalf of individual victims.”<sup>89</sup> While that statement is tautologous on its face, it suggests that most human rights organizations could be classified in that way. But today in fact more and more groups perceive that a vital part of their work is to provide an overall sense of the performance of governments and other actors in relation to specific rights issues and that a dominant focus on individual cases is not only time-consuming and backward-looking but does not enable them to provide the overall picture that is needed.

The difficulty of taking appropriate account of country resource and other contextual factors within the confines of a composite index also constitutes another element that explains the attitudes that human rights advocates have towards indices. This reinforces the sense that it is difficult to use a monolithic index as a means by which to compare two countries which are quite differently situated.

Finally, the preparation of a wide-ranging composite index in the human rights field is rendered more difficult by deep disparities in the quality and quantity of available information from one country to another. This problem has several dimensions. In the first place, there are countries in relation to which official information is almost entirely unreliable and in which the access granted to international NGOs, as well as the capacity of domestic NGOs to function independently, are so restricted that quantifiable data is relatively scarce and evaluations must be based on a variety of other types of information. In such cases, it is not possible to compile technically “objective” measures of performance. By the same token, leaving such countries out of any comparative ranking that purports to be reasonably comprehensive is particularly problem-

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89. Jabine & Claude, *supra* note 83, *Introduction*, at 3.

atic. Secondly, where reliable and detailed statistical information about human rights issues is available, reliance upon it is likely to distort even further the comparative picture that emerges since countries with a genuine commitment to protecting human rights are likely to generate far more critical information about themselves than are countries in which there is little if any respect for human rights.

*B. The Growing Importance of Indices and Indicators in Human Rights*

But while the human rights community's historical record is clearly one of considerable and deep-rooted reluctance about indices and indicators it must also be acknowledged that times and attitudes are changing. This is due in part to the successful examples from other fields, to the greater availability of data and enhanced capacities to organize and manipulate it, and to the growing sophistication of the human rights community. The following section of the analysis considers some recent examples of openness to the use of indicators or indices by UN human rights treaty bodies, by the UN Commission on Human Rights and its Sub-Commission, and by Amnesty International.

1. *Human Rights Treaty Bodies*

The UN Committee on Economic, Social and Cultural Rights has consistently emphasized the value of national level indicators and benchmarks.<sup>90</sup> This dimension was taken up by the 1993 Vienna World Conference on Human Rights, which affirmed the importance of using indicators as a means of measuring or assessing progress in relation to those rights.<sup>91</sup> The Committee has taken up this challenge in a series of General Comments adopted since 1999, each of which has focused in part on the importance of indicators. Thus, for example, in its General Comment No. 13 (1999) on the right to education the Committee urged states to "include mechanisms, such as indicators and benchmarks on the right to

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90. Note that the definition of what constitutes an "indicator" in this context remains controversial. See Maria Green, *What We Talk About When We Talk About Indicators: Current Approaches to Human Rights Measurement*, 23 HUM. RTS. Q. 1062 (2001).

91. The Conference called for the pursuit of approaches "such as a system of indicators to measure progress in the realization of the rights set forth in the International Covenant on Economic, Social and Cultural Rights." World Conference on Human Rights, June 14–25, 1993, *Vienna Declaration and Programme of Action*, ¶ 98, U.N. Doc. A/CONF.157/23 (July 12, 1993).

education, by which progress can be closely monitored.”<sup>92</sup> Similarly in its General Comment No. 15 (2002) on the rights to water the Committee called upon states to identify “right to water indicators . . . in the national water strategies or plans of action.”<sup>93</sup> It suggested that these “should address the different components of adequate water (such as sufficiency, safety and acceptability, affordability and physical accessibility), be disaggregated by the prohibited grounds of discrimination, and cover all persons residing in the State party’s territorial jurisdiction or under their control.”<sup>94</sup>

It has to be acknowledged, however, that the Committee has had only limited success in encouraging governments to pay more serious attention to such indicators. Moreover, for present purposes, it is noteworthy that the role envisaged to be played by indicators is primarily at the national, rather than at the international, level.

## 2. *The Commission on Human Rights*

Despite the central importance attributed by many states to the issue of the composition of the Commission, there have been no formal proposals put to the Commission to develop an index or ranking which would evaluate the human rights standing of its actual or potential members. In 2002, however, an important group of Latin American governments, working within the framework of the Rio Group<sup>95</sup> proposed replacing the Commission’s country resolutions with a Global Human Rights Report which would “include a list of countries ranked by a human rights index based on quantifiable and relative variables related to political, civil, economic, social and cultural rights.”<sup>96</sup> This proposal, which was estimated to take five or six years to implement, drew support from both the then-Chairperson of the Commission and from the UN Secretary-General. The latter commented:

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92. U.N. Econ. and Social Council [ECOSOC], Comm on Econ., Soc. and Cultural Rights, *Implementation of the International Covenant on Economic, Social and Cultural Rights, General Comment No. 13: The Right to Education*, ¶ 52, U.N. Doc. E/C.12/1999/10 (Dec. 8, 1999).

93. ECOSOC, Comm. on Econ., Soc. and Cultural Rights, *General Comment No. 15: The Right to Water*, ¶ 37(f), U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003).

94. *Id.* at ¶ 53.

95. The Rio Group was established in 1986 and now consists of 19 Latin American states (including Argentina, Brazil, Chile, Colombia, Mexico, and Venezuela) seeking to coordinate their positions on key foreign policy issues. See CENTER FOR NONPROLIFERATION STUDIES, *Rio Group*, in INVENTORY OF INTERNATIONAL NONPROLIFERATION ORGANIZATIONS & REGIMES (2005), available at <http://ens.miiis.edu/pubs/inven/pdfs/rio.pdf>.

96. *Rio Group Seeks a Global Human Rights Index Free of Political Bias*, CYBER DYARYO, Mar. 22, 2002, [http://www.cyberdyaryo.com/features/f2002\\_0322\\_05.htm](http://www.cyberdyaryo.com/features/f2002_0322_05.htm).



[That] the idea of trying to approach human rights in a systematic manner, trying to determine how it is being applied and where it stands in the various countries in a constructive manner that can help the countries develop it further, taking the politics out of it and doing it very systematically, it is going to be very helpful.<sup>97</sup>

The proposal has not, however, subsequently been taken up within the Commission.

### 3. *A Racial Equality Index*

Proposals made over the past couple of years for the elaboration of a Racial Equality Index represent the first sustained indication of interest on the part of inter-governmental bodies in the preparation of a composite human rights index. The initiative derives from one of the recommendations which emerged from the highly controversial 2001 World Conference against Racism. The recommendation was that the UN Secretary-General should appoint a panel of “five independent eminent experts” whose task would be to give impetus to the implementation of the recommendations emerging from the Conference.<sup>98</sup> At its first meeting, in September 2003, the expert group made a series of recommendations, one of which was “that the international community find ways of measuring existing racial inequalities, possibly through the development of a ‘Racial Equality Index, similar to the Human Development Index.’”<sup>99</sup> This recommendation was subsequently endorsed by the UN General Assembly, which gave its authority to a request to the UN High Commissioner for Human Rights to examine the possibility of developing such an index.<sup>100</sup> The High Commissioner’s response has been positive but cautious. In her first report on the issue she noted that national classification systems exist in some countries but not others, that there is no ac-

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97. Office of the Spokesman, U.N. Secretary-General, San Jose, Costa Rica, 18 March 2002 – Press Encounter with President Rodriguez Echevarria (unofficial transcript) (2002), in *Off the Cuff: Remarks to the Press and the Public*, <http://www.un.org/apps/sg/offthecuff.asp?nid=93>.

98. See World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, *Report, Durban, 31 August–8 September 2001*, ¶ 191(b), U.N. Doc. A/CONF.189/12 (Jan. 25, 2002).

99. ECOSOC, Comm’n on Human Rights, *Views of the Independent Eminent Experts on the Implementation of the Durban Declaration and Programme of Action*, ¶ 6(f), U.N. Doc. E/CN.4/2004/112 (Feb. 10, 2004).

100. G.A. Res. 58/160, ¶ 34, U.N. Doc. A/RES/58/160 (Mar. 2, 2004).

cepted international classification system for “races,” “tribes,” “ethnic minorities,” or “indigenous peoples” and that those terms “have distinct and different meanings in different countries.”<sup>101</sup> International comparisons must thus rely on national-level data which are not readily comparable. She concluded that, “The issue is very complex and we must proceed step by step with prior, thorough consultations with competent partners within and outside the United Nations before engaging in the process of elaborating an actual project proposal.”<sup>102</sup> While the original proposal explicitly drew a comparison between the HDI and the proposed new index, the analyses undertaken so far point more in the direction of a series of indicators rather than a composite index.

#### 4. *International Criminal Law: An Amnesty International Proposal*

In discussions on approaches which might assist in evaluating the extent to which the standards in the Rome Statute of the International Criminal Court are being respected by States, Amnesty International has proposed the development of an annual “anti-impunity index,” the focus of which would be on “some things that can easily be defended, measured and accepted as relevant in the fight against impunity.”<sup>103</sup> The index would reflect both positive and negative steps taken by states. The former would include: ratification of the Rome Statute and of the Agreement on Privileges and Immunities of the International Criminal Court; enactment of effective implementing legislation; adoption of cooperation agreements with the Court; reports of crimes under international law; national criminal investigations opened and completed; prosecutions begun, final judgments awarded and sentences fully served; and orders of reparations made and implemented.<sup>104</sup> The negative elements might include: “amnesties, pardons and similar measures of impunity for genocide, crimes against humanity and war crimes—measures that are prohibited under international law when they prevent judicial determinations of guilt or innocence, the emergence of the truth or satisfactory reparations.”<sup>105</sup> The proposed index is wide-ranging and combines, somewhat uneasily

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101. U.N. High Comm’r on Human Rights, *Possibility of the Development of a Racial Equality Index*, ¶ 5, delivered to ESCOR Comm’n on Hum. Rights, U.N. Doc. E/CN.4/2005/17 (Dec. 14, 2004).

102. *Id.*

103. Amnesty Int’l, *Measuring the Preventive Impact of the Office of the Prosecutor – Intervention*, June 17, 2003 (prepared by Christopher Keith Hall) (on file with the author).

104. *Id.*

105. *Id.*

both objective and subjective elements. It does not appear to have been taken up by any group, nor to have been pursued by Amnesty International itself. Nonetheless, it demonstrates an interest in seeking to evaluate governmental performance in the area of international criminal law and to do so in a way which would convey to the broader public a sense of comparative achievement.

*C. The Current Outlook*

In 1992, an entire volume entitled *Human Rights and Statistics* contained no significant discussion of the possibility of a composite human rights index which could be used as a basis for comparative country rankings.<sup>106</sup> The situation today is very different. The examples given in the preceding section illustrate that a significant number of parties propose the use of indices. In general, however, despite some noteworthy efforts to move down the road to detailed comparative human rights indices, most observers remain determinedly sceptical about the desirability or feasibility of such an undertaking. Before reviewing the reasons for that scepticism it is appropriate to note two of the more elaborate efforts that have been undertaken in recent years.

The first, moderately ambitious, initiative concerns the preparation of a "Human Rights Commitment" Index.<sup>107</sup> This project was undertaken by the Danish Centre for Human Rights and led to the publication in 2000 of both a methodology for measuring comparative respect for human rights and a set of rankings.<sup>108</sup> The methodology is of the greatest interest in the present context. It consisted of the development of four dimensions of "commitment.": (i) formal commitment in terms of ratifications etc; (ii) commitment to civil and political rights; (iii) commitment to economic, social and cultural rights; and (iv) gender discrimination.<sup>109</sup> The first of these will be considered below in relation to the proposed accountability index. The second is reasonably comprehensive in taking account of violations of eight major types of rights.<sup>110</sup> However, the third and fourth are much less developed and highlight the difficulty of developing a genuinely balanced and comprehensive set of human rights indicators. The Commitment Index

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106. Jabine & Claude, *supra* note 83.

107. HANS-OTTO SANO & LONE LINDHOLT, DANISH CTR. FOR HUMAN RIGHTS, HUMAN RIGHTS INDICATORS: COUNTRY DATA AND METHODOLOGY 68 (2000), available at <http://www.humanrights.dk/upload/application/c05c487f/indicator-full.pdf>.

108. See *Id.*

109. *Id.* at 66-84.

110. They are: 1. extra-judicial killings /disappearances, 2. torture and ill-treatment, 3. detention without trial, 4. unfair trial, 5. participation in the political process, 6. freedom of association, 7. freedom of expression, and 8. discrimination. *Id.* at 72-74.

does not appear to have been developed or updated since 2000, and it is unclear whether it has had a practical impact in terms of its stated objective of contributing to “strategy development and country assessment in the project work” of the Danish Centre.<sup>111</sup>

Significantly, the creators of the Commitment Index note that they decided to refrain from developing a single index rating “because of the complexity of weighing rights and because of the inadequacy of available data” in relation to items (iii) and (iv).<sup>112</sup> And even where rankings have been assigned they note that “[t]ext and qualitative assessment must be combined with any use of indicators.”<sup>113</sup>

The second initiative consists of research undertaken under the auspices of the World Bank’s program on Governance into the feasibility of developing a comprehensive quantitative assessment of the relationships among human rights, governance and development indicators on a global basis.<sup>114</sup> Daniel Kaufmann, the principal architect of the Bank’s work in this area, compares the challenge today to that which faced those working on issues of governance and corruption a decade earlier. The relevant concerns were considered to be too difficult to measure, and where data existed, its reliability was questioned. Kaufmann points to the success achieved in those areas on the basis of “more rigorous statistical tools, improved survey techniques, and in-depth empirical analysis,” and concludes that comparable progress could occur in relation to human rights if an investment is made in the necessary empirical work, if an effort is made to collect and analyze the necessary data, and if margins of error are codified.<sup>115</sup> That work remains, however, at a relatively early stage and there is no reason to believe that a broadly accepted human rights performance index is imminent.

A variety of other commentators have all expressed considerable scepticism about the viability or utility of constructing meaningful composite indices of human rights performance. Sakiko Fukuda-Parr, who directed the preparation of the HDR from 1996 to 2004, has cautioned strongly against equating development and human rights goals and indicators. She highlights that the human rights paradigm is important precisely because it introduces ele-

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111. *Id.* at 1.

112. *Id.* at 66.

113. *Id.*, at 66.

114. See DANIEL KAUFMANN, WORLD BANK INSTITUTE, HUMAN RIGHTS AND GOVERNANCE: THE EMPIRICAL CHALLENGE (2004), available at <http://www.worldbank.org/wbi/governance/pubs/humanrights.html>, reprinted in HUMAN RIGHTS AND DEVELOPMENT: TOWARDS MUTUAL REINFORCEMENT 352 (Philip Alston & Mary Robinson eds., 2005).

115. Kaufmann, *supra* note 114, at 383.

ments of participation, non-discrimination, accountability etc. which are not prominently reflected in the development indices.<sup>116</sup> In addition, she warns that “monitoring human rights with data is particularly difficult because key issues such as participation, conduct and remedy are not quantifiable, and because data are not readily available that show distribution of achievements and deprivations.”<sup>117</sup>

Kate Raworth has put forward an even more cautious approach to the measurement of human rights through indicators, arguing that it would be a mistake to seek to apply universally applicable indicators.<sup>118</sup> She provides several reasons for such pessimism: a different policy mix is required in each country in order to fulfil human rights; a set of generally applicable indicators will not reflect different national circumstances; even those that do have broader appeal will not necessarily work across large income gaps or over long periods of time; and the feasibility of data collection varies dramatically from one country to the next.<sup>119</sup> In essence she argues for context specificity in the design of inevitably complex solutions, which in turn makes the use of standardized universal indicators all the more inappropriate.

Nancy Thede adopts a very different starting point to Raworth’s, but in practical terms her conclusion is not significantly different. She begins with a presumption that human rights indicators are “extremely desirable” in order to track progress over time and to enhance governmental accountability.<sup>120</sup> But she, too, is troubled by the complexity of human rights concepts, the need for interpretation and contextualization if they are to be meaningfully reduced to indicators, and the absence of sophisticated theoretical models which would underpin the validity of most indicators. Her concern is that:

. . . if a statistic is produced, it will be used, in many cases without contextual analysis and without any awareness of the methodological constraints under which it was generated. This tendency to “autonomisation of statistics” is enhanced by the numerous proposals for rating systems and comparative indi-

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116. Sakiko Fukuda-Parr, *Indicators of Human Development and Human Rights – Overlaps, Differences . . . and what about the Human Development Index?*, 18 STAT. J. U. N. ECON. COMM’N FOR EUR. 239, 244 (2001).

117. *Id.*, at 245.

118. Kate Raworth, *Measuring Human Rights*, 15 ETHICS & INT’L AFF. 111, 130 (2001).

119. *Id.* at 124-25.

120. Nancy Thede, *Human Rights and Statistics: Some Reflections on the No-man’s-land Between Concept and Indicator*, 18 STAT. J. U. N. ECON. COMM’N FOR EUR. 259 (2001).

ces based on calculations that are riddled with unadmitted subjective judgements and uncontrolled variables.<sup>121</sup>

Nonetheless, Theede tries hard to conclude on a positive note by calling for the fostering of what she terms a “culture of statistics” on the part of human rights groups, and the pursuit of “transparency and dialogue in building an international indicators framework.”<sup>122</sup>

A much more negative conclusion was reached, however, in the *Human Security Report 2005*.<sup>123</sup> The report reflects a major new initiative designed precisely to track developments in terms of human security defined as including measures of political violence, human rights abuses, criminal violence and human trafficking. The report provides significant support for a little-known index called the Political Terror Scale (PTS), which measures core violations of civil and political rights based on data taken from annual reports by the U.S. State Department and Amnesty International.<sup>124</sup> Interestingly, the biggest hole in the data relates to developed countries. While there are plenty of data available to document large-scale violations such as torture and killings there is relatively little comparable data to measure the type of human rights problems that are much more common in wealthier countries.<sup>125</sup> In addition to the PTS the report notes two other “parallel measures of the world’s least secure countries” based on sets of statistics compiled by widely differing sources. They are a human security dataset recording deaths from political violence, a political terror scale measuring “core” human rights abuses, and the World Bank’s composite “Political Instability and Absence of Violence Index.”<sup>126</sup>

For present purposes, however, the principal significance of the *Human Security Report* is that it specifically raises the question of whether a composite human security index would be feasible. It concedes that, in principle, it might be possible to combine various measures such as “battle-related death rates, ‘indirect’ death rates, and homicide and rape rates” in order to compile such an index.<sup>127</sup>

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121. *Id.* at 270.

122. *Id.* at 271.

123. HUMAN SECURITY REPORT 2005, *supra* note 68.

124. LINDA CORNETT & MARK GIBNEY, TRACKING TERROR: THE POLITICAL TERROR SCALE 1980-2001, (2003) available at [http://www.humansecurityreport.info/background/Cornett-Gibney\\_Political\\_Terror\\_Scale\\_1980-2001.pdf](http://www.humansecurityreport.info/background/Cornett-Gibney_Political_Terror_Scale_1980-2001.pdf).

125. HUMAN SECURITY REPORT 2005, *supra* note 68, at 78, 91.

126. *Id.*, at 91.

127. *Id.*

But, after noting that much of that data is not readily available or is not reliable, the authors go on to dismiss the desirability of such a composite index. Such indices can, according to the report, “conceal more information than they convey.”<sup>128</sup>

The overall picture that emerges from this survey of recent efforts is a mixed one. On the one hand, there have been regular calls made for the development of more innovative indices which measure and serve to draw attention to the comparative human rights performances of different states. On the other hand, the great majority of analyses reflect a consistent recognition not only of the complexity of such a task but of the extent to which it is potentially fraught with difficulty. The conclusion to be drawn is that very few experts – be they economists, statisticians, or human rights specialists – consider that a composite index of human rights performance is likely to be feasible, credible or useful in the foreseeable future.

#### VII. AN INTERMEDIATE SOLUTION: RESPONDING TO THE ACCOUNTABILITY CHALLENGE

The conclusion that emerges from the preceding analysis is not that the systematic collection of human rights-related statistical data and their incorporation into a composite indicator is per se undesirable. It is clear, however, that the time is not yet ripe for such a development. This is partly because an international consensus on what factors should be measured has not yet crystallized, and partly because the necessary data are not available and are unlikely to be reliably so for quite some time to come. There also remain considerable misgivings about the appropriateness of seeking to capture such a broad spectrum of data within a single index.

But the rejection of a composite index showing the overall human rights performance of each state is by no means the end of the original inquiry. There still remains a pressing and broadly acknowledged need for some basis upon which to evaluate the suitability for election of prospective members of the new Human Rights Council. While it may be feasible to block the election of any state which has been the subject of specific critical measures by the Security Council, such a measure does not go very far in satisfying the need for a generally applicable test of accountability.

The focus of the remaining part of this article is on an alternative measure which is designed to evaluate the performance of

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128. *Id.*

states in terms of their good faith cooperation with the procedures for promoting accountability upon which the international human rights regime has been constructed. The proposed Human Rights Accountability Index (HRAI) is far from a panacea, but it does respond directly to many of the calls that have been made in the wake of the demise of the Commission on Human Rights for states to be evaluated in the future on the basis of their records vis-à-vis the various accountability procedures which have been adopted. Before examining the possible elements to be included in such an Index, it is appropriate to consider some of the criteria on the basis of which any such index might usefully be constructed.

*A. Considerations in Designing a HRAI*<sup>129</sup>

It is probably true that no composite index of any type could ever fully satisfy all of its potential critics. There will always be some states that will look ahead and foresee that they would not do well on the basis of any such ranking. Nonetheless, based on the experiences surveyed above, it is possible to identify certain criteria which should help to ensure that objective observers favor the construction of an index which satisfies most or all of the considerations reflected in the various criteria.

*Accuracy* requires that the sources from which the data are derived provide a reasonably accurate picture. If the raw data are vague or in some way dubious, then any composite use of those data is likely to magnify the various distortions and raise serious questions as to the resulting index. The raw material should thus be accessible and its accuracy potentially verifiable.

*Objectivity* requires that in-built biases be eliminated from the design of the index. It should, in particular, be objective in the sense of constituting a faithful reflection of widely accepted international human rights standards, and should, as far as possible, avoid cultural, political and other biases.

*Utility.* A composite index is only worth preparing if its potential utility is clear. It should thus be designed and constructed in such a way that governments and others seeking to evaluate performance will be able and willing to make use of it.

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129. On the basis of a broad-ranging review of the potential use of human rights indicators in such contexts one commentator identified four minimal requirements that any such index would need to meet if it were to be both credible and politically acceptable: (i) it should be grounded in the major United Nations human rights instruments; (ii) it must emanate from an inclusive process; (iii) it must be statistically sound; and (iv) it must explicitly state the data sources and procedures used. He suggested that on this basis any such index would meet the necessary standards of transparency and accountability. Onuma, *supra* note 86.



*Methodological soundness.* The construction of a composite index is a difficult task, and it will be essential for appropriate expertise to be employed to make sure that the proposed methodology is convincing. In particular, consideration will need to be given to the relative weighting of different factors and to measures which might compensate for the limited relevance of a given factor in relation to certain states.

*Comprehensiveness,* in the sense of potential applicability to all states, is essential. The difficulty of gathering accurate and meaningful data on many states is one of the key reasons for rejecting various forms of possible composite indices. The HRAI should be able to measure the performance of almost all states equally well.

*Comparability of data.* Various indices have been proposed which would take account of developments at the national level such as the existence of a national human rights commission, or the constitutional recognition of human rights, or the role of the judiciary in upholding rights. Although such measures are potentially very important, they almost inevitably rely on subjective evaluations which mean that the data not readily comparable from one country to another. Thus for example a national human rights commission might be genuinely superfluous in a particular national context in which other mechanisms perform the same functions equally well or perhaps better.<sup>130</sup>

*General acceptability.* An index which is highly contested by key players is unlikely to serve the purposes for which it is established. It should thus seek to measure compliance with requirements whose legitimacy has been clearly endorsed by the great majority of states. While it may be difficult to demonstrate in formal terms the universal acceptability of every relevant standard, it is generally not difficult to point to a long succession of resolutions, usually adopted by consensus, which calls upon all states to take certain steps such as ratifying core treaties and cooperating with the various procedures.

### *B. An Outline of a Human Rights Accountability Index*

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130. This criterion renders problematic one attempt at a composite index which resembles the proposed HRAI. The "formal commitment" dimension of the Human Rights Commitment Indicators used by the Danish Centre for Human Rights measures not only the degree of national ratification of international human rights treaties, but also the extent to which relevant norms are included in national Bills of Rights. While this would be a reasonable criterion in some countries, it would be less so in relation to those which have opted for a constitutional structure that does not contain a detailed bill of rights. See SANO & LINDHOLT, *supra* notes 107–113 and accompanying text.

The proposed HRAI seeks to measure governmental performance in relation to three components: (i) the normative foundations of accountability; (ii) respect for procedural obligations; and (iii) responsiveness to the outcomes of the procedures.

### 1. *Normative Foundations of Accountability*

This part of the index would reflect the extent to which each state has ratified or acceded to the six core human rights treaties.<sup>131</sup> In addition, the acceptance of the various optional complaints procedures under the ICCPR,<sup>132</sup> ICERD,<sup>133</sup> CAT,<sup>134</sup> and CEDAW<sup>135</sup> should be reflected. While some states remain determinedly averse to the acceptance of such complaints procedures, they have clearly become an integral part of any strong definition of good global human rights citizenship.

Additional international instruments which could be included, if not immediately, in the HRAI are: (i) the first and second optional protocols to the Convention on the Rights of the Child, which relate to children in armed conflict<sup>136</sup> and to the sale of children, child prostitution and child pornography<sup>137</sup> respectively; and (ii) the optional protocol to the CAT which provides for on-site country visits.<sup>138</sup> A more controversial inclusion would be the optional protocol to the ICCPR, which provides for abolition of the death penalty.<sup>139</sup> In view of the depth of opposition to this provi-

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131. For a list of the core treaties and a discussion as to whether the Convention on the Protection of the Rights of All Migrant Workers and Members of their Families New York should be treated as a seventh core treaty for this purpose, see *supra* note 40 and accompanying text.

132. Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Mar. 23, 1976), reprinted in 999 U.N.T.S. 302.

133. CERD, *supra* note 40, at Art. 14.

134. CAT, *supra* note 40, at Art. 22.

135. Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. 54/4, U.N. GAOR, 54th Sess., Supp. No. 49, U.N. Doc. A/RES/54/4 (Dec. 22, 2000).

136. Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts, G.A. Res. 54/263, U.N. GAOR, 54th Sess., Supp. No. 49, Annex I, U.N. Doc. A/54/4 (Feb. 12, 2002).

137. Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, G.A. Res. 54/263, U.N. GAOR, 54th Sess., Supp. No. 49, Annex II, U.N. Doc. A/54/49 (Jan. 18, 2002).

138. Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 57/199, U.N. Doc. A/RES/57/199 (Dec. 18, 2002), reprinted in 42 I.L.M. 26.

139. Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, G.A. Res. 44/128, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/49 (July 11, 1991).

sion on the part of various states, it might be wiser not to include it in the index at this stage, despite the central importance attached by human rights proponents to eliminating capital punishment.

In addition, there are strong arguments in favor of adding two other reference points. The first would be the principal building blocks of international humanitarian law—the four Geneva Conventions of 1949<sup>140</sup> and the two Additional Protocols of 1977.<sup>141</sup> The second would be the Statute of the International Criminal Court (ICC).<sup>142</sup> The rationale for each of these additions is similar. The Security Council, the International Court of Justice, and other key international bodies have, in recent years, placed increasing reliance upon respect for the Geneva Conventions and Protocols. This is because it is now recognized, in a way that was not the case as recently as a decade ago, that the two bodies of law—human rights and humanitarian law—are intimately intertwined and cannot reasonably be viewed in isolation from one another in any given context. Similarly, the international community has consistently called upon all governments to ratify the ICC Statute. As a result, it achieved its 100th ratification in October 2005, only a little over seven years after its adoption.<sup>143</sup>

Consideration might also be given as to whether the Index should reflect participation in one of the major regional human rights treaties.<sup>144</sup> In Africa, Europe, and the Americas participa-

140. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; and Geneva 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.

141. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3; and Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609.

142. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90.

143. See Coalition for the ICC, 100th Ratification of the Rome Statute (2005), <http://www.iccnw.org/100th/>.

144. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222, *as amended by* Protocol No. 3 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, May 6, 1963, Europ. T.S. No. 45, Protocol No. 5 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Jan. 20, 1966, Europ. T.S. No. 55, Protocol No. 8 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Mar. 19, 1985, Europ. T.S. No. 118, and Protocol No. 11 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, May 11, 1994, Europ. T.S. No. 155; Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123; and African Charter on Human and Peoples'

tion in the appropriate regional regime clearly strengthens accountability. While there is thus a strong case for reflecting this variable in the index, the principal objection is that there is no such option available to countries in Asia and the Middle East and that they should not be penalized for that fact. This element could, however, be taken into account in the design of the index so that states which are ineligible to join a regional regime would not be penalized under the index.

## 2. *Respect for Procedural Obligations*

A very large part of the thrust of efforts to strengthen the international human rights regime over the past two decades has been to develop the procedural obligations assumed by states by virtue of their obligations as Member States of the United Nations (Charter-based obligations) or as a result of the ratification of specific treaties (treaty-based obligations). The most important procedural obligations in terms of Charter-based arrangements are to cooperate with the Special Procedures established by the Commission on Human Rights.<sup>145</sup> This involves two principal elements. The first is to respond substantively to the requests for information issued by the relevant Procedures. The second involves the issuance of “standing invitations” by which states signify in advance that, if requested by any of the Procedures, they will agree to a visit from the relevant office-holder to inspect the situation in the country concerned, subject only to agreement as to the timing.<sup>146</sup>

If international humanitarian law instruments were to be included in the HRAI then it would also be appropriate to factor in the preparedness of each state to facilitate visits by the International Committee of the Red Cross in order to inspect compliance with those standards.<sup>147</sup> Because the ICRC does not make its reports publicly available (with rare exceptions), this indicator would be limited to reflecting the relatively few situations in which visits have not been permitted.

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Rights, June 27, 1981, O.A.U. Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

145. “Special procedures’ is the general name given to the mechanisms established by the Commission on Human Rights to address either specific country or thematic issues.” Office of the U.N. High Comm’r for Human Rts., Special Procedures of the Commission on Human Rights, <http://www.ohchr.org/english/bodies/chr/special/index.htm> (last visited Feb. 1, 2006). For a current analysis and critique of the system see Amnesty Int’l, *United Nations Special Procedures: Building on a Cornerstone of Human Rights Protection*, AI Index IOR 40/017/2005, at 18, Oct. 1, 2005, available at <http://web.amnesty.org/library/Index/ENGIOR400172005>.

146. See discussion *supra* note 48.

147. See, e.g., David Forsythe, *THE HUMANITARIANS: THE INTERNATIONAL COMMITTEE OF THE RED CROSS* (2005).

Respect for treaty-based obligations would be measured by reference to the compliance by each state with its reporting obligations under the applicable treaties. While the timetable varies from one treaty to the next, the general principle is that a state should submit an initial report within two years of becoming a party to the treaty, and this is generally followed by the requirement that a periodic report be submitted every five years thereafter. Failure to submit a report is a clear violation of the terms of the treaty. The only issue to be decided in the design of the index would be how much leeway should be given to states before they are declared delinquent. This question arises because a general climate of tardiness has come to prevail, and evaluation solely by reference to the formal deadline would lead to a huge delinquency rate.<sup>148</sup> This is, however, a factor which could easily be accommodated in a well-designed index.

### 3. *Responsiveness to Procedural Outcomes*

The various procedures followed by the treaty bodies and by the different Special Procedures all lead to specific recommendations addressed to the state which finds itself under scrutiny. In relation to some of these procedures there are now follow-up arrangements which evaluate the extent to which a satisfactory response has emanated from the relevant state. In those instances there would be no difficulty factoring the outcomes into the HRAI. However, where such follow-up is not undertaken or is not specific, any attempt to reflect the response to recommendations in the index would require the making of a subjective judgment on the part of those preparing the index. While it should be noted that the making of such judgments is often required on the part of those responsible for the preparation of indices, it is likely that the very existence of the indices would provide important incentives to those involved. Both the treaty bodies and the special procedure mandate-holders would be encouraged to be more precise and specific in terms of the outcomes they want to see, and the governments to which the recommendations are addressed would have a significant incentive to act forcefully in response to the recommendations.

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148. See *supra* notes 45-46 and accompanying text.

In summary, the HRAI might reflect the following elements:

1. *Normative Foundations*

- ratification of, or accession to, the six (or seven) core UN human rights treaties;
- acceptance of the optional complaints procedures established under four of the core treaties (ICCPR, CERD, CAT, and CEDAW);
- ratification of the two optional protocols to the CRC and the one protocol to the CAT;
- ratification of the four Geneva Conventions of 1949 and the two Additional Protocols of 1977; and
- ratification of the Rome Statute of the International Criminal Court.

2. *Procedural obligations*

- provision of requested information to special procedures;
- standing invitations to special procedures;
- admission of the delegates of the ICRC to visit detainees; and
- timely submission of reports due to treaty bodies;

3. *Responsiveness*

- responses to recommendations by treaty bodies;
- responses to “final views” adopted in connection with communications procedures; and
- responses to recommendations by special procedures mandate-holders.

## VIII. CONCLUSION

The essential thrust of this article can be easily summarized. It is that the credibility and legitimacy of the new Human Rights Council—created by the United Nations to replace the Commission on Human Rights that existed from 1946 until 2005—will depend significantly on the extent to which it makes itself and the governments that are elected as its members accountable. One way of doing this is to facilitate an assessment of the empirical human rights track record of each government which should then be taken into consideration in the election process and in the Council’s subsequent activities. This will not happen, however, because of the

complexity and difficulty of undertaking a substantive evaluation and reducing it to a single ranking.

A more feasible option—one which could be pursued immediately—is to evaluate the extent to which each government has cooperated with precisely the forms of accountability which the Commission itself has consistently called upon states to accept. These revolve essentially around the ratification of a range of basic treaty standards, compliance with the procedural obligations that attach to those and other universally applicable standards, and responsiveness to the assessments that emanate from the various bodies set up by governments to ensure a basic form of accountability. These components of accountability could readily be captured in a single Human Rights Accountability Index which would be relatively straightforward to design and calculate, would faithfully reflect existing and accepted obligations, and would provide as good a foundation as any for a universal index to ensure a minimum level of accountability for states aspiring to be elected to the Human Rights Council.

This article has suggested the form which such a HRAI could take, but several aspects of this proposal warrant emphasis. The first is that the objective of such a composite index would be to measure accountability and not performance. In other words, a state which does not have a particularly good human rights record but is consistently prepared to cooperate with the international community in relation to these issues will rank well. In contrast, a state which is generally considered to have a strong human rights record but considers it unnecessary to cooperate with international procedures and to contribute to the strengthening of international accountability will not score highly. What counts is the state's degree of commitment to the international normative regime and its preparedness to cooperate with the various mechanisms established to promote accountability. This is an undeniable shortcoming, but one which afflicts almost any composite index, and it should not be sufficient to deter such an effort.

The second is that the process by which the index is developed should be consultative and provide for an opportunity for experts to give their input on its design and content before the initial survey is undertaken. This is consistent with the approach adopted in relation to those indices which have been used to assess comparative international performances in relation to issues such as human development and environmental sustainability, and it is important not to under-estimate the need for technical expertise even

in the design of the relatively straightforward index proposed here.<sup>149</sup>

Third, while it may ideally be desirable for such an index to be compiled by a United Nations agency, there is no reason why a consortium of non-governmental organizations could not achieve the same objective. Given the difficulty of persuading inter-governmental groups to move ahead with such initiatives, it may be both desirable and necessary for others to show the way. The HRAI can become a force to be reckoned with regardless of its provenance, provided only that it is done systematically and sensitively.

Finally, it may be objected that some of the proposed components are not yet sufficiently precise or susceptible to numerical evaluation as to be used for such purposes. The reality is that nothing will be more effective in persuading Special Procedures and treaty bodies to formulate their recommendations more precisely and to evaluate compliance more systematically than the prospect that their efforts will actually count in a practical and recognizable way.

Fifteen years ago, an index of this type would have been neither feasible nor reliable because of the uneven level of governmental participation in key aspects of the international human rights regime. Today, the picture is much more comprehensive and systematic, and the gaps are much less significant. The principal objective of the proposed HRAI is to encourage governments to engage with the system, as opposed to remaining outside it by refusing to participate or by participating in a manner which is no more than formalistic or perfunctory and thus does not satisfy the requirement of accountability.

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149. Thus, for example, the HDR is produced with the assistance of a Statistical Advisory Panel made up of statisticians and development economist working at both the national and international levels. It generally meets twice a year. See *Human Development Report 2005*, *supra* note 76, at 332.



# EUROPEAN ASYLUM LAW: RACE-TO-THE-BOTTOM HARMONIZATION?

JAMES D. FRY\*

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## I. INTRODUCTION

As European states have inched towards greater legal harmony in the past decade, asylum law has remained the least coordinated. For starters, asylum is still determined by EU member states' national laws, which vary significantly.<sup>1</sup> At least one group of scholars sees the development of asylum law as occurring on the bilateral level between states, not from the top down through broad European harmonization.<sup>2</sup> This is in stark contrast to the U.S. federal powers over asylum and immigration,<sup>3</sup> which derive from the implicit need to preserve sovereignty and arguably from Article I, Section 8, clause 4 of the U.S. Constitution. In fact, in Europe, cooperation seems preferred to harmonization, leaving much discretion to the member states.<sup>4</sup> If forced to choose one word to capture the essence of European asylum law, it would be "cleaving," which simultaneously can mean "to join together" and "to break apart." Such schizophrenia appears when reviewing asylum law and policy of the past decade, with little hope of meaningful harmonization in the near future, especially with the EU Constitution on the brink of rejection.<sup>5</sup>

This article is divided into three sections. Section II traces the efforts to harmonize European asylum law to the present. Section III

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\* Ph.D. Candidate (Geneva, HEI), LL.M. (Leiden), J.D. (Georgetown), M.I.A. (Columbia), B.A. (Brigham Young). The author wishes to thank Gregor Noll, Olivier de Schutter, Pieter Boeles, Rick Lawson and Herke Kranenborg for their invaluable comments.

1. See CATHERINE BARNARD, *THE SUBSTANTIVE LAW OF THE EU: THE FOUR FREEDOMS* 432-33 (2004).

2. See generally Rosemary Byrne, Gregor Noll & Jens Vedsted-Hansen, *Understanding Refugee Law in an Enlarged European Union*, 15 *EUR. J. INT'L L.* 355 (2004).

3. See generally Eric Stein, *Towards a European Foreign Policy?, The European Foreign Affairs System from the Perspective of the United States Constitution, in INTEGRATION THROUGH LAW* 1, 1 (Mauro Cappelletti et al. eds., 1986).

4. See Virginie Guiraudon, *Before the EU Border: Remote Control of the "Huddled Masses," in IN SEARCH OF EUROPE'S BORDERS* 191, 196 (Kees Groenendijk et al. eds., 2003).

5. See *The European Union Constitution: Dead, but Not Yet Buried*, *THE ECONOMIST*, June 4, 2005, at 47.

explores the reasons why it has been so hard to reach harmonization. Section IV addresses the popular idea that states are in a race to the bottom with asylum law, an idea this article rejects on account of faulty assumptions. Rather than linear, European asylum law's progress is cyclical, following a number of key indicators such as the business cycle, the waxing and waning of certain conflicts, and popular sentiments towards asylum in particular and immigration in general. Without federalization of the EU and asylum law, asylum law is doomed to a relatively fragmented existence.

Rational choice theory, which suggests that politicians will make decisions that maximize their chances of re-election, serves as the framework for understanding the cyclical nature of asylum law in Europe. Indeed, this incentive to appease public concerns over immigration issues has been observed since the 1970s in Europe.<sup>6</sup> When selecting its asylum policy, governments of host states must consider the interests of four groups: the electorate, other host states, asylum seekers and the countries of origin for those seekers.<sup>7</sup> The interests of other host states and asylum seekers would likely push for greater harmonization in order to advance predictability and coherence throughout the system. However, these groups typically have few constituents in the electorate, thus severely limiting their influence on politicians. The electorate in general will carry the most influence with politicians, subjecting asylum policy to the public's whims, which are often cyclical, depending on numerous factors discussed in Section IV. Finally, it must be noted that it would be impossible to provide a comprehensive overview of European asylum law, as there is much soft law and convoluted debate. Instead, this article merely provides a critical analysis of some of the issues from, admittedly, the perspective of an outsider.

## II. A BRIEF HISTORY OF ASYLUM LAW HARMONIZATION

To begin, it is important to note that European asylum law is inextricably linked to the free movement of persons,<sup>8</sup> as third-country nationals can move freely within the Community once they have crossed external borders.<sup>9</sup> The European Community (EC) began to realize the free movement of persons in 1986 with the gradual removal

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6. See Guiraudon, *supra* note 4, at 192-93.

7. See Gregor Noll, Lecture at Leiden Univ. Honours Class: *Whither Refugee Protection?: The Common European Asylum System* (Apr. 25, 2005).

8. See JOHN HANDOLL, FREE MOVEMENT OF PERSONS IN THE EU 412 (1995).

9. See KOEN LENAERTS ET AL., CONSTITUTIONAL LAW OF THE EUROPEAN UNION 37 (2d ed. 2005).

of internal borders through the adoption of the Single European Act, and with it the coordination of policy regarding access and movement of these individuals. The European Council adopted the Palma Document in 1989, which aimed at harmonizing asylum law by calling for the creation of a convention to determine the state responsible for asylum applications and for rules to govern free movement of asylum seekers, among other things.<sup>10</sup> The idea of free movement was further developed through working groups that established the foundations for the Dublin and Schengen Conventions,<sup>11</sup> which, among other things, seek to limit asylum seekers to one request throughout the European Union.<sup>12</sup> The system started to work in 1995 under Chapter 7 of the Schengen Convention, which had many states that opted into it, and was incorporated into the EU system under the Schengen Protocol. It must be emphasized that these Conventions were not for harmonizing the rules for reviewing asylum applications, but instead for ensuring that only one state reviewed the application.<sup>13</sup>

Meanwhile, the 1993 Treaty on European Union concluded in Maastricht provided the competency to the European Union to cooperate on asylum and immigration issues.<sup>14</sup> While the European Union dealt with asylum procedures and refugee status during this time, this soft law had little domestic impact because it was covered by the Co-operation in the Fields of Justice and Home Affairs (CJHA) provisions. The Treaty of Amsterdam shifted this competency from this third pillar to the first pillar of the European Communities, the European Community Treaty itself.<sup>15</sup> This change is significant because it dealt with the concerns expressed before the Amsterdam Treaty about the paucity of judicial protection for individual asylum

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10. See FRIEDL WEISS & FRANK WOOLDRIDGE, *FREE MOVEMENT OF PERSONS WITHIN THE EUROPEAN COMMUNITY* 182 (2002).

11. See HANDOLL, *supra* note 8, at 412.

12. Belgium-France-Federal Republic of Germany-Luxembourg-Netherlands: Schengen Agreement on the Gradual Abolition of Checks at their Common Borders and the Convention Applying the Agreement, arts. 28-38, June 19, 1990, 30 I.L.M. 68, 95-100 [hereinafter Schengen Implementation Agreement]; Convention Determining the State Responsible for Examining Applications for Asylum Lodged in one of the Member States of the European Communities, June 15, 1990, 30 I.L.M. 427; Monica den Boer, *Justice and Home Affairs: Cooperation Without Integration*, in *POLICY-MAKING IN THE EUROPEAN UNION* 389, 400 (Helen Wallace & William Wallace eds., 3d ed. 1996).

13. See U.K. ASS'N FOR EUROPEAN LAW & UNIV. ASS'N FOR CONTEMPORARY EUROPEAN STUDIES, *LEGAL ISSUES OF THE MAASTRICHT TREATY* 272-73 (David O'Keeffe & Patrick M. Twomey eds., 1994).

14. See HANDOLL, *supra* note 8, at 416-17.

15. The Amsterdam Treaty also had an Asylum Protocol attached, which requires all EU member states to see one another as the same countries of origin, though providing a rebuttable presumption of this. However, the scope of that Protocol is severely limited. See TEC, *infra* note 17.

seekers.<sup>16</sup> Moreover, the Amsterdam Treaty provided the EC with the ability to adopt binding measures on immigration and asylum. That said, the European Court of Justice (ECJ) is still limited by its inability to address internal borders if the issue deals with the maintenance of law and order or safeguarding security.<sup>17</sup> In addition, the Treaty Establishing the European Community (TEC) Article 68(1) limits the jurisdiction of the ECJ for preliminary rulings to national court decisions where there is no remedy under Community law.<sup>18</sup> While this provision limits the burden on the Court from asylum seekers, it places a significant barrier on these asylum seekers who typically do not have the finances to appeal a decision to the highest national courts.<sup>19</sup> Therefore, the Amsterdam Treaty does not go far enough in protecting asylum seekers.

Regardless, the EC has used its competency found in TEC Article 63, to pass numerous directives, regulations and decisions in creating what has become known as the Common European Asylum System (CEAS).<sup>20</sup> This system started with a special European Council in Tampere in 1999, which had the aim to implement Title IV, by creating a common asylum policy.<sup>21</sup> The metaphor “fortress Europe,” which has been used to describe the restrictive access to the European Union given to third-country nationals, is supported by nine articles comprising Title IV.<sup>22</sup> Article 61 provides the tasks needed to “establish progressively an area of freedom, security and justice” through “border control[] measures aimed at ensuring free movement of persons in accordance with Article 14 plus flanking measures in respect of external border controls, asylum, and immigration.”<sup>23</sup> In line with this and other articles, the Tampere Council’s goals were to partner with the countries of origin to make those states more attractive to their own people, establish a common European asylum system for procedure and recognition of asylum under the 1951 Geneva Convention, encourage fair treatment of third-country

16. See LAMMY BETTEN & NICHOLAS GRIEF, *EU LAW AND HUMAN RIGHTS* 131 (1998).

17. Consolidated Version of the Treaty on European Union and of the Treaty Establishing the European Community, art. 68, 2002 O.J. (C 325) 1, 61 [hereinafter TEC]; see also BETTEN & GRIEF, *supra* note 16, at 131.

18. TEC, *supra* note 17. WEISS & WOOLDRIDGE, *supra* note 10, at 33.

20. See Friedemann Kainer, *The European Concept of Integration and the Area of Freedom, Security and Justice*, in *THE EMERGING CONSTITUTIONAL LAW OF THE EUROPEAN UNION* 469, 480 (Adam Bodnar et al. eds., 2003).

21. See BARNARD, *supra* note 1, at 440 (noting that the implementation of Title IV was introduced by Amsterdam).

22. See Kenneth A. Armstrong, *Governance and the Single European Market*, in *THE EVOLUTION OF EU LAW* 745, 752 (Paul Craig & Gráinne de Búrca eds., 1999).

23. See also BARNARD, *supra* note 1, at 439.

nationals, and efficiently manage migration flows.<sup>24</sup> CEAS has further developed through numerous directives and regulations: 2003 Dublin II Regulation (mirroring the Dublin Convention); 2000 and 2002 regulations on EURODAC; 2004 Qualification Directive; 2001 Directive on Temporary Protection; 2003 Reception Directive; and the 2000 and 2005 Decisions on the European Refugee Fund.<sup>25</sup> However, as explained in Section III, these directives have not harmonized European asylum law or policy as the Tampere Council had hoped. Instead, these directives established a minimum standard of protection, which many think states are reluctant to go beyond. In this regard, European national asylum laws and policies may be seen as harmonizing through a race to the bottom, though Section VI refutes this assertion.

In short, the main problem with all of the instruments mentioned above, and the general spirit of the asylum regulation regime in Europe after the Tampere Council, is that most are one-sided in trying to control asylum seekers, not in protecting them through the bestowal of rights and freedoms.<sup>26</sup> Admittedly, the Qualification Directive, the Directive on Temporary Protection, and the Reception Conditions Directive all protect asylum seekers to a certain degree. For example, Article 3 of the Dublin Regulation provides clear rights for EU member states, including the right to examine any asylum application regardless of whether an obligation to examine the application exists.<sup>27</sup> However, these are the states' rights, with the individual asylum seekers only having the right under Article 3(4) to be informed in writing of the application of these regulations.<sup>28</sup> Admittedly, Articles 13 and 18 of the Qualification Directive appear to grant individuals the right to refugee status when they meet the requirements in Chapters II and III of that Directive.<sup>29</sup> However, these instruments are still soft law.

More than these protective measures, control measures have received stronger focus following the Amsterdam Treaty,<sup>30</sup> sometimes at the cost of conflicting with the 1951 Geneva Convention.<sup>31</sup> Such a focus on security likely has been influenced by post-9/11 and post-

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24. See *id.* at 440-41.

25. See Noll, *supra* note 7; see also Armstrong, *supra* note 22, at 754-75.

26. See WEISS & WOOLDRIDGE, *supra* note 10, at 27.

27. See Council Regulation 343/2003, art. 3(2), 2003 O.J. (L 50) 1, 3 (EC).

28. *Id.* art. 3(4).

29. See Council Directive 2004/83, arts. 13, 18, 2004 O.J. (L 304) 12 (EC).

30. See Ryszard Cholewinski, *No Right of Entry: The Legal Regime on Crossing the EU External Border*, in *IN SEARCH OF EUROPE'S BORDERS* 105, 111 (Kees Groenendijk et al. eds., 2003).

31. See HANDOLL, *supra* note 8, at 412.

Madrid security concerns.<sup>32</sup> Indeed, all of the short-term measures proposed by the Action Plan of the Council and the Commission in implementing the Treaty Amsterdam, adopted in December 1998, deal with preventing third-country nationals from reaching the external borders of the European Union.<sup>33</sup> Primarily, these rules on visas harmonize the penalties on carriers of potential asylum seekers.<sup>34</sup> The longer-term measures focus merely on stemming system abuse by visa applicants and improving uniform visa security specifications.<sup>35</sup> Moreover, the Presidency Conclusions of the European Council concluded at a summit on asylum and immigration in Tampere in October 1999 that they must develop “a common active policy on visas and false documents, including closer co-operation between EU consulates in third countries,” and “closer co-operation and mutual technical assistance between the member states’ border control services.”<sup>36</sup> Moreover, the Seville European Council made a common asylum policy a high priority, but this was primarily to allay security concerns, not to help in seekers’ protection.<sup>37</sup> All of these points indicate that there is little discernable discussion about the favorable treatment of third-country nationals trying to enter the European Union.

One somewhat positive development for asylum seekers is that the transfer system, established by the Dublin and Schengen Conventions, is in alleged disarray, with only one percent of successful transfers under the regime.<sup>38</sup> Indeed, member states view the system in such disarray that they are reluctant to request transfers.<sup>39</sup> However, such disarray can only be of marginal comfort to asylum seekers in search of real protection and fair treatment. The measure that would best protect them – a right to seek asylum – is noticeably missing in all the key binding instruments,<sup>40</sup> including the European Convention on Human Rights.<sup>41</sup> With immigration remaining a highly charged

32. See Armstrong, *supra* note 22, at 754.

33. See Cholewinski, *supra* note 30, at 111.

34. See *id.*; see also BARNARD, *supra* note 1, at 454.

35. See Cholewinski, *supra* note 30, at 111.

36. See *id.* at 111-12 (citing Tampere European Council: Presidency Conclusions, *op. cit.* 16, 1999, *Bull. EU 10-1999*, 24, available at <http://europa.eu.int/abc/doc/off/bull/en/9910/i1007.htm>).

37. See Armstrong, *supra* note 22, at 754.

38. See, e.g., Elspeth Guild, *The Border Abroad-Visas and Border Controls*, in *IN SEARCH OF EUROPE’S BORDERS* 87, 95 (Kees Groenendijk et al. eds., 2003).

39. See, e.g., *id.*

40. See, e.g., Schengen Implementation Agreement, *supra* note 12, art. 5; Cholewinski, *supra* note 30, at 111-12, 120. Please note the exception with Articles 13 and 18 of the Qualification Directive mentioned above. Council Directive, *supra* note 29.

41. See generally CLARE OVEY & ROBIN C.A. WHITE, *JACOBS AND WHITE: EUROPEAN CONVENTION ON HUMAN RIGHTS* 82 (3d ed. 2002); but see Charter of Fundamental Rights (EC) No. 2000/C, art. 18, 2000 O.J. (C 364) 1, 12; LENAERTS ET AL., *supra* note 9, at 734.

political topic, even in states such as the United Kingdom where asylum applications are markedly down,<sup>42</sup> it is unlikely that this focus on security and restriction will change in the near future.

### III. THE CURRENT STRUGGLE TO HARMONIZE

The European Commission and Council would point to the CEAS as a harmonized system. However, as already mentioned, national laws on substantive and procedural components for asylum remain diverse despite efforts to harmonize asylum law.<sup>43</sup> Indeed, only the rules on entry are truly harmonized throughout the EC.<sup>44</sup> This is so despite Article 2 of the Treaty of the European Union's (TEU) objective to adopt "appropriate measures" to regulate asylum, and the Article 14 requirement to harmonize national visa and asylum law.<sup>45</sup>

These broad goals aside, there are at least two policy reasons to harmonize asylum laws. First, under the principle of the free movement of persons, once an asylum seeker is in an EU member state, it is very difficult to control his or her movement. If there are substantial differences in the processing of asylum applications, then those states will be inundated with applications. Similarly, if there are substantial differences in the treatment of refugees once admitted, then those states will be inundated with refugees. Both types of states will have an incentive to worsen the situation and to discourage such inundation, leading potentially to a race to the bottom. Second, such differences could make it difficult to return or transfer these asylum seekers under the Dublin II Regulation. Under the Dublin system, the first state that deals with an asylum seeker retains responsibility for processing that application.<sup>46</sup> If a state is too liberal in letting seekers in, then it may face tremendous responsibilities in the future. Therefore, states have the incentive to become more restrictive at the beginning of the process. If states have different interpretations of such key terms such as "refugee," or are otherwise disharmonized, the Dublin system will not work properly.<sup>47</sup>

It should be noted that the provisions discussed in Section I have not expressly tried to harmonize asylum law. On the contrary, they

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42. See *From Flood to Trickle*, THE ECONOMIST, Sept. 4, 2004, at 55.

43. See Steve Peers, *EU Borders and Globalisation*, in IN SEARCH OF EUROPE'S BORDERS 45, 66 (Kees Groenendijk et al. eds., 2003).

44. See *id.*

45. See Wolfgang Weiß, *Defining the EC Borders*, in IN SEARCH OF EUROPE'S BORDERS 67 (Kees Groenendijk et al. eds., 2003) (citing Case C-387/97, *Wijsenbeek*, 1999 E.C.R. I-6207 at 6264, ¶ 40).

46. See Council Regulation 343/2003, *supra* note 27, arts. 3, 5.

47. See *generally* Noll, *supra* note 7.

have attempted to create the minimum safeguards for the procedures in processing applications, leaving the actual level of protection to be determined by the states. Such levels of protection vary. Indeed, Article 63(2)(a) of the TEC imposes obligations to adopt “minimum standards for giving temporary protection to displaced persons from third countries who cannot return to their country of origin and for persons who otherwise need international protection.”<sup>48</sup> The rest of Article 63 contains similar “minimum standards” language with regard to reception of asylum seekers in member states and on qualifications as refugees.<sup>49</sup> Such language falls short of a call for harmonization. Indeed, Article 63’s measures are clearly not comprehensive for asylum.<sup>50</sup> For example, there is no mention of integration for asylum seekers. At a minimum, a comprehensive list of measures regarding asylum is needed.

There are several factors affecting the cyclical nature of asylum law, which frustrate efforts to harmonize these laws. First, the start and end of certain conflicts significantly impacts the pressure within a state to tighten or loosen asylum policies. For example, the flare-up of civil war in Bosnia, coupled with Germany’s restrictive asylum policy in 1993, led to the Netherlands’ highest number of asylum applications since the Second World War.<sup>51</sup> As that conflict subsided, the number of asylum applications subsided as well. This same phenomenon was also observed in West Germany,<sup>52</sup> with a recent drop in asylum applications resulting from the removal of unpopular Afghan and Iraqi governments.<sup>53</sup> The clearest cyclical nature of asylum seeking has been in Austria, where there have been surges of applications following each conflict in Eastern Europe – for example, the 1956 Hungarian uprising, the 1968 suppression of the Prague Spring, and the 1981 establishment of martial law in Poland.<sup>54</sup> Similar cyclical interests in asylum have been observed with regard to the European business cycle, where governments severely restricted immigration controls, including asylum, in proportion to rising unemployment in the late 1970s.<sup>55</sup> Even without an economic downturn, the electorate

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48. TEC, *supra* note 17, art. 63

49. *Id.*

50. See WEISS & WOOLDRIDGE, *supra* note 10, at 30.

51. See Kees Groenendijk, *New Borders Behind Old Ones: Post-Schengen Controls Behind the Internal Borders and Inside the Netherlands and Germany*, in *IN SEARCH OF EUROPE’S BORDERS* 131, 135 (Kees Groenendijk et al. eds. 2003).

52. See Richard Davy, *The Central European Dimension*, in *THE DYNAMICS OF EUROPEAN INTEGRATION* 149 (William Wallace ed., 1990).

53. See *From Flood to Trickle*, *supra* note 42.

54. See Davy, *supra* note 52, at 14952.

55. See Guiraudon, *supra* note 4, at 193.



may become more xenophobic as third-country nationals flow into a country. This has been the case with the United Kingdom,<sup>56</sup> and is feared to happen in Spain following its most recent amnesty to 700,000 illegal immigrants.<sup>57</sup>

Moreover, scandals such as reports of “bogus refugees,” can inflame public opinion and stigmatize asylum seekers similar to what was observed in Germany in the early 1990s.<sup>58</sup> With regard to the business cycle, access to full rights can be expensive for a host state. As fiscal policy tightens with the downturn of the business cycle, pressure increases to cut benefits to the minimum standards under the European Convention on Human Rights. For example, this is what happened with the new government in Denmark.<sup>59</sup> While there is some talk of establishing better burden sharing between states of these expenses, such ideas have not yet been implemented.

## VI. THE RACE TO THE BOTTOM FALLACY

Even though the provisions in Section II are not aimed at harmonizing asylum law, the minimum standards established by the instruments discussed in Section III above are believed to be leading to harmonization through state reluctance to venture beyond these minimums for fear of being inundated by asylum shoppers.<sup>60</sup> The directives and regulations try to create the minimum safeguards for processing an application for asylum, temporary protection, and recognition of refugee status.<sup>61</sup> The problem will be that states are often tempted to stay at the minimum level. Indeed, there is very little incentive to give more than the minimum for fear of becoming viewed as attractive to asylum seekers. Media campaigns help get the word out to migrant networks, which then spread the word to potential asylum seekers to seek refuge in other, more hospitable states. However, commentators who see a race to the bottom overlook the possibility, or even the reality, that states can at times desire the admission of asylum seekers and other immigrants.<sup>62</sup> Such desires reverse the incentive structure outlined above in Section III, and states

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56. See *From Flood to Trickle*, *supra* note 42.

57. See *Let Them Stay*, THE ECONOMIST, May 14, 2005, at 56.

58. See Guiraudon, *supra* note 4, at 194.

59. See Noll, *supra* note 7.

60. See Olivier de Schutter, Lecture at Leiden Univ. Honours Class: *Towards a European Human Rights Policy* (May 30, 2005).

61. See WEISS & WOOLDRIDGE, *supra* note 10, at 172-74. Currently, there is only a draft directive on asylum procedures, so the minimum safeguards for processing applications still are not established.

62. See de Schutter, *supra* note 60.

at least stop trying to make their country seem inhospitable. At best, such desires make states seem welcoming to seekers.

Critics may question why states would want to become inviting to asylum seekers. There are at least three reasons. First, it has been well documented that most of Europe's population is aging due to its generally low birthrate.<sup>63</sup> Second, these demographic concerns throughout Europe and the shortage of skills in key sectors lead all states within the European Union to need increased skilled and unskilled labor.<sup>64</sup> Such labor is needed if the European Union is to achieve the Lisbon strategy to make the European Union the most competitive economy of the world.<sup>65</sup> Finally, many states are sincerely concerned about the plight of asylum seekers. Admittedly such concerns occasionally may take a back-seat to the political reality of populist politics, but the states' obligations under the 1951 Geneva Convention still remain the underlying shaper of asylum policy.<sup>66</sup> Just as states might want to increase admission of asylum seekers and other immigrants, states' attitudes can quickly change under populist politics, leading governments to reverse course, making their states seem less hospitable. However, the underlying business and demographic interests, which are not likely to go away anytime soon, ensure that sentiments will shift back again as populist politics surrounding immigration subside. Such swings, between economic and political considerations, lead to a cyclical asylum policy not a linear race to the bottom.

Moreover, as different states face different business cycles and varying political pressures with regard to asylum and immigration policies, it is highly unlikely that the *sui generis* asylum policies of the EU member states will synchronize without top-down unification of policy and law (perhaps through federalization of the EU and asylum law). The EU Constitution called for "a common policy on asylum, immigration and external border control, based on solidarity between member states, which is fair towards third-country nationals."<sup>67</sup> However, as it recently has become clear that the Constitution is on its

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63. See BARNARD, *supra* note 1, at 441.

64. See *id.*; see also Guiraudon, *supra* note 4, at 193.

65. See BARNARD, *supra* note 1, at 441.

66. However, some commentators see the Spanish Protocol as a clear violation of the Geneva Convention in that it discriminatorily concluded that citizens of EU member states cannot be admitted to asylum procedures. See Noll, *supra* note 7; see also Deirdre M. Curtin & Ige F. Dekker, *The EU as a "Layered" International Organization: Institutional Unity in Disguise*, in *THE EVOLUTION OF EU LAW* 83, 127 (Paul Craig & Gráinne de Búrca eds., 1999) (suggesting that the Amsterdam Treaty is in violation of the Geneva Convention requirements for limiting the access of EU citizens to asylum procedures).

67. Treaty Establishing a Constitution for Europe, art. III-257(2), Oct. 29, 2004, CIG 87/2/04; see also *id.* art. III-266.

way to being rejected,<sup>68</sup> European asylum law appears doomed to an uncoordinated existence for a while longer.

#### V. CONCLUSION

As the number of EU member states increases from 15 to 25 to 27 and beyond, with the level of development of asylum laws and policies varying significantly between states, the need has never been greater for harmonization. Unfortunately, political compromise likely will tend to push the minimum standards lower. For the protection of asylum seekers, it would be best to harmonize these laws as opposed to leaving it to the member states to decide the level of protection. A drawback from this harmonization is that both a ceiling and floor will be established, limiting member states' ability to provide protection. Such an approach pits sovereignty against community values, leading to a narrower ceiling-floor gap, causing greater harmonization. That said, without greater harmonization, asylum seekers remain at risk of neglect and uncertain status.

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68. See *The European Union Constitution: Dead, but not yet Buried*, *supra* note 5.

# HONOR KILLINGS AND THE ASYLUM GENDER GAP

VALERIE PLANT

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## I. INTRODUCTION

In 1991, a young Jordanian woman fled to the United States under threats of death.<sup>1</sup> The man who sought to kill her was her father, along with every other male family member at her father's command.<sup>2</sup> She had disobeyed him and her punishment was death.<sup>3</sup> The young woman's crime was choosing a low-paid Palestinian husband, engaging in premarital sex, and leaving the country without her father's consent.<sup>4</sup> Her father believed that those actions brought dishonor to his family, and he vowed to remove the stain by shedding her blood.<sup>5</sup> According to letters from her sister, he had ordered her brothers, uncles, and cousins to kill her on sight.<sup>6</sup>

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1. More on this woman's story, including decisions and the letters from legislators can be found at Center for Gender and Refugee Studies, *Honor Killing: Ms. A's Story*, <http://cgrs.uchastings.edu/campaigns/honor.php> (last visited Oct.7, 2005).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

In Jordan, where such honor killings go largely unprosecuted and the only protection for a woman is imprisonment in a criminal facility, she would have no hope of safety.<sup>7</sup> She sought asylum in the United States, but both an Immigration Judge and the Board of Immigration Appeals denied her application.<sup>8</sup> It was not until intense pressure, including letters from at least two dozen members of Congress, that the Immigration and Naturalization Service (INS) withdrew its opposition and the Board of Immigration Appeals granted her asylum.<sup>9</sup> She was one of the lucky ones. She was fortunate to escape her home country in time, far more fortunate than hundreds of other women who are the victims of such honor killings around the world each year. She was also fortunate enough to have her story reach those with the power to influence her fate.

The asylum process in the United States has responded inconsistently to family violence, and it unfortunately continues to take something extraordinary for the United States to extend such protection to family violence victims. However, the Department of Justice proposed new regulations in 2000,<sup>10</sup> which, once codified, may change the landscape of the domestic violence asylum claim. There are also resounding calls by scholars and practitioners in the area for reforms, including the addition of gender as a sixth enumerated ground upon which an asylum claim can be based.<sup>11</sup> In this article, I will first examine honor killings, the absence of recourse for the victims in their home countries, and the existing United States case law. I will then critically analyze the proposed regulations and their probable effect on asylum applications based on threats of honor killings, as well as several of the various proposals for reform that appear to hold greater promise than the proposed regulations.

## II. HONOR KILLINGS AND GOVERNMENTAL PROTECTION

The practice of honor killings is carried out for a variety of reasons and in a variety of circumstances. Honor killings, contrary to popular belief, are not limited to specific geographic regions.

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7. *Id.*

8. *Id.*

9. *Id.*

10. Asylum and Withholding Definitions, 65 Fed. Reg. 76,588, 76,588-98 (proposed Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208).

11. See, e.g., Tanya D. Bosi, Note, *Yadegar-Sargis v. INS: Unveiling the Discriminatory World of U.S. Asylum Laws: The Necessity to Recognize a Gender Category*, 48 N.Y.L. SCH. L. REV. 777, 803-12 (2003-2004); Jenny-Brooke Condon, Comment, *Asylum Law's Gender Paradox*, 33 SETON HALL L. REV. 207, 248-55 (2002).

They occur in a number of countries, and the governments and societies of each country react differently and provide different levels of protection to the victims of these killings. In this section, I will describe honor killings and several governmental approaches to such killings.

### A. *Honor Killings Defined*

#### 1. *Typical Bases of Honor Killings*

In many cultures, an individual's identity is closely tied to their family unit.<sup>12</sup> In such a culture, the family's honor is viewed as a personal reflection on each member of the family.<sup>13</sup> As a result, family members may have strong responses to actions of other family members that appear to bring dishonor on the family. These strong responses sometimes lead to great violence, which is the case in the practice of honor killings.

The phenomenon referred to as honor killing typically occurs when a female family member is thought to have brought dishonor on the family.<sup>14</sup> The type of dishonor is generally sexual in nature, such as engaging in premarital sex or having an extramarital affair.<sup>15</sup> A woman may also be killed for seemingly less serious transgressions, such as socializing with males,<sup>16</sup> seeking a divorce,<sup>17</sup> or even failing to serve a meal quickly enough.<sup>18</sup> The act might not even have occurred with the female's consent, as there have been cases in which men killed women for being the victims of rape,<sup>19</sup> or for her husband dreaming that his wife had betrayed him.<sup>20</sup> The conduct also need not be verified, with many women killed based solely on rumors and speculation within the

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12. Ferris K. Nesheiwat, *Honor Crimes in Jordan: Their Treatment Under Islamic and Jordanian Criminal Laws*, 23 PENN ST. INT'L L. REV. 251, 253-54.

13. *See id.*

14. *Id.*

15. *See id.*

16. *Id.*

17. Manar Waheed, *Domestic Violence in Pakistan: The Tension Between Intervention & Sovereign Autonomy in Human Rights Law*, 29 BROOK. J. INT'L L. 937, 944-45.

18. Kayla White, *Honor Killings*, The Prince of Wales Collegiate World Youth Manifesto Project (2003), [http://www.pwc.k12.nf.ca/cida/manifesto/honor\\_killings.htm](http://www.pwc.k12.nf.ca/cida/manifesto/honor_killings.htm) (last visited Oct. 7, 2005).

19. Amnesty Int'l, *Pakistan: Honour Killings of Girls and Women*, at 2, AI Index ASA 33/018/1999, Sept. 1999, <http://web.amnesty.org/library/engindex> (search "Countries" for "Pakistan"; then follow "Reports" hyperlink; then follow "Page 2" hyperlink; then follow "Pakistan: Honour killings of girls and women" hyperlink, then follow "PDF" hyperlink) [hereinafter Amnesty, *Pakistan: Honour Killings*].

20. *Id.* at 3.

community.<sup>21</sup> The typical bases for honor killings are therefore, quite varied. Likewise, the circumstances surrounding each killing vary widely.

## 2. *Typical Methods, Perpetrators, and Collaborators*

In cultures in which honor killings take place, the family members of the offending woman typically see her slaughter as the only solution to the taint on their family honor.<sup>22</sup> The perpetrators often feel as if they are left no choice but to kill the woman.<sup>23</sup> Each family that chooses to act on that perceived obligation approaches the situation differently, and there are many reported variations.

Male family members, such as a woman's husband, father or brother, are often the perpetrators of honor killings.<sup>24</sup> In one example, a young man in the Punjab province of Pakistan killed his sister by setting her on fire on a public street.<sup>25</sup> He reportedly killed her because of family suspicions that she had been having an improper relationship with a neighbor.<sup>26</sup> In Jordan, a man shot his twenty-year-old sister four times because she had been raped by another family member.<sup>27</sup> In a case in London, a man killed his sixteen-year-old daughter by stabbing her repeatedly and then slitting her throat.<sup>28</sup> He reportedly killed her based entirely on rumors that she had a boyfriend and "was behaving like a prostitute."<sup>29</sup> In another case in Pakistan, a man killed his wife after dreaming that she had betrayed him.<sup>30</sup> These examples are just a few incidents in which a close male family member carried out the killing.

Males, however, are not the only family members who are involved in perpetuating honor killings. Other women in a family are often involved in the act. In one example from England, a young Pakistani man strangled his sister while their mother held her down.<sup>31</sup> The victim in that killing was seven months pregnant

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21. *Id.* at 2; see, e.g., Geraldine Bedell, *Death before Dishonour*, OBSERVER, Nov. 21, 2004, available at <http://observer.guardian.co.uk/magazine/story/0,,1355883,00.html>.

22. Amnesty, *Pakistan: Honour Killings*, *supra* note 19, at 2.

23. See Bedell, *supra* note 21 (discussing a London honor killing of a young woman by her father, who subsequently explained that "he'd been forced to kill [her] because he'd been placed in an untenable position").

24. Amnesty, *Pakistan: Honour Killings*, *supra* note 19, at 3.

25. *Id.*

26. *Id.*

27. White, *supra* note 18.

28. Bedell, *supra* note 21.

29. *Id.*

30. Amnesty, *Pakistan: Honour Killings*, *supra* note 19, at 3.

31. *Id.* at 4; Bedell, *supra* note 21.

and the mother of two children.<sup>32</sup> They killed her based on her family's belief that she was having an extramarital affair.<sup>33</sup> In another case, a young woman's two aunts took her for a walk through their suburb to a patch of open land, then both suddenly stepped aside, and the teenage brother of the young woman quickly appeared and shot her five times in the head.<sup>34</sup> She was reportedly killed for refusing an arranged marriage and eloping with another man.<sup>35</sup> In one particularly well-known case from Pakistan, a young woman's mother brought a hired gunman to a meeting with the young woman in her attorney's office, where she was seeking a divorce from her abusive husband of ten years.<sup>36</sup> After entering the attorney's office, the gunman shot the young woman twice, and he and her mother left quietly, with her mother never even looking back at her child.<sup>37</sup> Thus the carrying out of honor killings is not limited to males of the family.

In addition, the immediately surrounding community may enforce an honor killing. In a case arising from Israel, after stabbing his sister to death in public in broad daylight, the perpetrator said "I didn't want to kill her. I didn't want to be in this situation. They [community members] push[ed] me to make this decision. I know what they expect from me."<sup>38</sup> Community involvement is often less subtle; however, and in some cases, tribal councils "decide that the woman should be killed and send men to carry out the deed."<sup>39</sup> The Council will nominate the killer, often forcing a young male relative, such as a son, brother or nephew, to carry out the execution.<sup>40</sup>

In addition to the complexity with regard to the perpetrators themselves, the chosen circumstances of honor killings vary widely

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32. Amnesty, *Pakistan: Honour Killings*, *supra* note 19, at 4; Bedell, *supra* note 20.

33. Amnesty, *Pakistan: Honour Killings*, *supra* note 19, at 4.

34. *Gendercide Watch, Case Study: "Honour" Killings and Blood Feuds*, [http://www.gendercide.org/case\\_honour.html](http://www.gendercide.org/case_honour.html) (last visited Oct. 7, 2005) [hereinafter GENDERCIDE WATCH] (citing Julian Borger, *In Cold Blood*, MANCHESTER GUARDIAN WKLY., Nov. 16, 1997).

35. *Id.*

36. *Id.* (citing Suzanne Goldenberg, *A Question of Honor*, THE GUARDIAN (UK), May 27, 1999); Bedell, *supra* note 21.

37. Amnesty, *Pakistan: Honour Killings*, *supra* note 19, at 5-6 (reporting the statement of a witness of the killing, that the victim's "mother was 'cool and collected during the getaway, walking away from the murder of her daughter as though the woman slumped in her own blood was a stranger'"); Radhika Coomaraswamy, *Identity Within: Cultural Relativism, Minority Rights and the Empowerment of Women*, 34 GEO. WASH. INT'L L. REV. 483, 496 (2002); GENDERCIDE WATCH, *supra* note 34 (citing Suzanne Goldenberg, *A Question of Honor*, THE GUARDIAN (UK), May 27, 1999). The case of Samia Sarwar can be found detailed in much of the academic literature on honor killings.

38. GENDERCIDE WATCH, *supra* note 34 (citing Suzanne Zima, *When Brothers Kill Sisters*, THE GAZETTE (MONTREAL), Apr. 17, 1999).

39. Amnesty, *Pakistan: Honour Killings*, *supra* note 19, at 3.

40. Bedell, *supra* note 21.



and often by region. In Sindh, Pakistan, honor killings are often carried out by hacking the victim to pieces with axes and hatchets.<sup>41</sup> In the Punjab region, the killings are more often accomplished by shooting the victim.<sup>42</sup> As the killings are perpetuated in order to restore a family's honor within the community, the killings are often performed openly and publicly.<sup>43</sup> Many of the cases described above were carried out in public. In the case where the young Punjabi woman was burned to death by her brother, "[h]er burned and naked body reportedly lay unattended on the street for two hours as nobody wanted to have anything to do with it."<sup>44</sup> However, in regions where the killings are more likely to be carried out by immigrants then living under a government less accepting of the commission of honor killings, the killings are often kept private.<sup>45</sup>

The commission of honor killings is clearly complex in a number of ways. Government responses to the acts are similarly complex and often inconsistent, with conflicts between legislative enactments and their implementation. Social protection or lack thereof also varies widely in each affected community. To provide a fuller explanation of the situation in which these women find themselves, government responses and social protection will be discussed in the next section.

### *B. Government and Social Protection*

Although many believe that honor killings are a phenomenon unique to certain regions, honor killings have occurred around the world.<sup>46</sup> Ancient Roman and French law both allowed a man to murder his wife or daughter for illicit sexual relationships under certain circumstances.<sup>47</sup> Many countries have such laws in force to this day. Haiti, for example, implemented the French law, which remains in force.<sup>48</sup> Honor killings were also legal in Brazil until 1991,<sup>49</sup> and have been reported in such countries as India,

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41. Amnesty, *Pakistan: Honour Killings*, *supra* note 19, at 3.

42. *Id.*

43. *Id.* at 5.

44. *Id.* at 3.

45. See generally Bedell, *supra* note 21 (detailing occurrences in England).

46. Rana Lehr-Lehnardt, *Treat Your Women Well: Comparisons and Lessons from an Imperfect Example Across the Waters*, 26 S. ILL. U. L.J. 403, 418 (2002).

47. *Id.* (citing Jeremy D. Weinstein, Note, *Adultery, Law, and the State: A History*, 38 HASTINGS L.J. 195, 229 n.252 (1986)).

48. *Id.* (citing HUMAN BUREAU OF DEMOCRACY, U.S. DEPT. OF STATE, HUMAN RIGHTS, AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES, SECTION 5, WOMEN (2000)).

49. *Id.*

Pakistan, Lebanon, Turkey, Egypt, and Jordan.<sup>50</sup> Occurrences of honor killings have been reported in England recently, as well.<sup>51</sup> In addition, a number of countries allow for mitigated sentences for men who kill their wives or girlfriends who are suspected of being unfaithful.<sup>52</sup> A number of scholars point to the doctrines of “provocation” in Brazil and “heat of passion” in the United States as remnants of such common law mitigations.<sup>53</sup> In this section, however, I will focus primarily on the protections available in Jordan and Pakistan.

Jordan has a particular problem with honor killings. Such killings are the most frequent form of murder in the country, constituting a quarter of all murders in Jordan.<sup>54</sup> Jordan retains legislation, however, that allows for exemptions from penalty or mitigated sentences for honor killings under certain circumstances.<sup>55</sup> Article 340 of the Jordanian penal code specifically allows for an exemption if a man catches his wife or female relative actively engaging in adultery.<sup>56</sup> Article 98 provides an additional so-called “fit-of-fury” defense, providing a reduction in penalty if a man injures or kills due to an unacceptable act of the victim.<sup>57</sup> This defense allows relief for perpetrators of honor killings that cannot qualify for Article 340 protection because they did not catch the victim in the midst of the adulterous or illicit act.<sup>58</sup> Although the former and present Kings and Queens of Jordan have urged their parliament to repeal or amend Article 340, parliament has refused.<sup>59</sup> As a result, persons actually prosecuted and convicted of honor killings continue to receive sentences of only several months to several years, despite the typical conviction of first-degree murder in Jordan carrying a sentence of death.<sup>60</sup> In one case, a man who stabbed his wife six times could not meet the statutory criteria of either Article 340 or 98, but the court nonetheless reduced his sentence for second-

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50. *Id.* (citing Douglas Jehl, *For Shame: A Special Report; Arab Honor's Price: A Woman's Blood*, N.Y. TIMES, June 20, 1999, at A1).

51. *See* Bedell, *supra* note 21.

52. Lehr-Lehnardt, *supra* note 46, at 405 (discussing the United States and Arab countries generally).

53. Coomaraswamy, *supra* note 37, at 497 (discussing feminist interpretation of the Brazilian doctrine of provocation); Lehr-Lehnardt, *supra* note 46, at 405 n.10; Victoria F. Nourse, *Law's Constitution: A Relational Critique*, 17 WIS. WOMEN'S L.J. 23, 41-43 (2002) (describing “provoked killings” and the U.S. doctrine of heat of passion as “a partial honor defense”).

54. Lehr-Lehnardt, *supra* note 46, at 421.

55. *Id.* at 419-20 (discussing Articles 340 and 98).

56. *Id.* at 420.

57. *Id.*

58. *Id.* 420-21.

59. *Id.* at 420.

60. *Id.* at 421-22.

degree murder by half because the man testified that he had suspected his wife of infidelity.<sup>61</sup> The lack of punishment for honor killings in Jordan, in addition to being “offensive to the murdered women and to women worldwide,”<sup>62</sup> demonstrates the Jordanian government’s acknowledgement and acceptance of the practice.

Honor killings are also a particular problem in Pakistan, where hundreds of women are killed each year.<sup>63</sup> Many cases likely go unreported, and most go unpunished.<sup>64</sup> The police almost always take the side of the perpetrator, and in the rare event of prosecution, the judiciary typically ensures a light sentence.<sup>65</sup> In fact, rather than providing protection to women from such killings, “[f]requently, fathers use police to recover or unlawfully arrest and detain their adult daughters who have married men of their choice.”<sup>66</sup> The police often fail to act even when a man directly reports to them that he has killed a female family member, clearly demonstrating their preference of enforcing custom over law.<sup>67</sup> Even in the well-publicized case of Samia Sarwar, who was gunned down in her attorney’s office, the perpetrators were never arrested.<sup>68</sup> As in Jordan, the leadership of Pakistan has spoken out against honor killings. Pakistani President Musharraf has reportedly “said that Pakistani men needed to change their attitude towards women, and urged those in authority to deal with cases of honour killing and not allow them to fall through cracks in the legal system.”<sup>69</sup> However, Amnesty International has called for greater action on Musharraf’s part, because Pakistan’s current criminal law allows the families of victims to forgive the perpetrator in lieu of prosecution, and the laws therefore often do not lead to punishment.<sup>70</sup> Pakistan has recently passed a law to

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61. *Id.*

62. *Id.* at 422.

63. Amnesty, *Pakistan: Honour Killings*, *supra* note 19, at 2. Some sources provide higher numbers. See Press Release, Amnesty International, Pakistan: Action as Well as Words Needed on So-Called “Honour” Killings, (Feb. 13, 2004), <http://web.amnesty.org/library/engindex> (search “Countries” for “Pakistan”; then follow “News” hyperlink; then follow “Pakistan: Amnesty International calls for action not words against “honour crimes” hyperlink, then follow “<http://news.amnesty.org/mav/index/ENGASA3313022004>” hyperlink located in the text) (last visited Oct. 7, 2005). [hereinafter Amnesty, Press Release] (reporting that around 1,000 women die in honor killings each year in Pakistan).

64. Amnesty, *Pakistan: Honour Killings*, *supra* note 19, at 2.

65. *Id.*

66. *Id.* at 13-14.

67. *Id.*

68. *Id.* at 11 (Samia Sarwar’s case was discussed in greater detail in Part I.A.ii.).

69. Amnesty, Press Release, *supra* note 63.

70. *Id.*

execute those convicted of honor killings,<sup>71</sup> but its effect has yet to be seen. Generally, in Pakistan the lack of support from the police and judiciary is so complete that women are left with little hope for protection or redress.

Governmental protection is unfortunately quite lacking in a number of countries. The penal codes of Lebanon and Syria provide nearly identical exemptions from penalty for perpetrators of honor killings.<sup>72</sup> Men who kill their wives are provided an honor defense in Kuwait, Tunisia, and Egypt.<sup>73</sup> Reduced sentences for male perpetrators of honor killings in cases of adultery are available in Egypt, Tunisia, Libya, Iraq, and Kuwait.<sup>74</sup> Algeria alone provides the honor defense to women who kill adulterous husbands.<sup>75</sup> Honor killings are also legally sanctioned in Morocco.<sup>76</sup> In addition to the lack of official protection, women in many countries also face a profound lack of social support. As discussed above, female family members of the victims regularly participate in the killings, and the immediately surrounding community often actively encourages the acts. In the case described above, while a man stabbed his sister to death in the street, a crowd of more than 100 people gathered “who—approving, urging him on—chanted, ululated, danced in the street, . . . cheered her killer, ‘Hero, hero! You are a real man!’”<sup>77</sup> In fact, because the Pakistani court system permits the family members of a victim to forgive the perpetrator, providing him a complete criminal pardon, families often agree in advance to forgive the perpetrator because of their overriding concern for the family honor.<sup>78</sup> With no police protection and very few women’s shelters, “[t]he isolation of women is completed by the almost total absence of anywhere to hide.”<sup>79</sup> In Jordan, the only official protection provided to surviving and potential victims of honor killings is indefinite incarceration in a criminal facility.<sup>80</sup> The Jordanian Women’s Union has established ten women’s shelters throughout Jordan since 1945, but report ongoing public

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71. Alasdair Soussi, *Women Challenge ‘Honor’ Killings*, THE CHRISTIAN SCI. MONITOR, Mar. 2, 2005, at 15, available at <http://www.csmonitor.com/2005/0302/p15s01-wome.html> (last visited Oct. 7, 2005).

72. Nesheiwat, *supra* note 12, at 273.

73. Lehr-Lehnardt, *supra* note 46, at 423.

74. *Id.*

75. *Id.*

76. Aili Mari Tripp & Ladan Affi, *Domestic Violence in a Cultural Context*, 27 FAMILY ADVOCATE 32, 35 (Fall 2004).

77. *Gendercide Watch*, *supra* note 34 (citing Suzanne Zima, *When Brothers Kill Sisters*, THE GAZETTE (MONTREAL), Apr. 17, 1999).

78. Waheed, *supra* note 17, at 964.

79. Amnesty, *Pakistan: Honour Killings*, *supra* note 19, at 2.

80. Nesheiwat, *supra* note 12, at 259.

condemnation of their work.<sup>81</sup> With the absence of official and unofficial protections, according to Amnesty International, “[f]or some women suicide appears the only means of escape.”<sup>82</sup> Asylum may be their only alternative.

### III. U.S. ASYLUM APPROACHES TO GENDER-BASED AND FAMILY VIOLENCE

The United States has demonstrated inconsistent responses to asylum applications based on domestic violence or violations of social norms. Many cases necessarily framed in gender-related terms have met with failure. This trend has developed in large part because of the asylum requirements laid out in the Refugee Act of 1980.<sup>83</sup> To qualify for asylum, an applicant must show that she is seeking protection “because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”<sup>84</sup> The alleged persecution must be on account of one of those enumerated grounds, but gender is noticeably absent from that list. As a result, many of those seeking asylum because they have been persecuted or threatened with persecution in some way for their gender or violation of gender-based norms are forced to try to fit their claim into an existing enumerated ground. Sometimes applicants successfully convince an immigration judge or Board of Immigration Appeals that the reason for their persecution overlaps with an enumerated ground, such as religion.<sup>85</sup> Often, however, women must instead attempt to substantiate their application based on the vague category of “membership in a particular social group.” A “Particular social group,” as a category, was never defined in the United Nations Convention Relating to the Status of Refugees<sup>86</sup> or in the Refugee Act of 1980, which has allowed it to be a malleable catch-all category for claims not falling squarely

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81. Soussi, *supra* note 71.

82. Amnesty, *Pakistan: Honour Killings*, *supra* note 19, at 2.

83. 8 U.S.C. §§ 1157-1159 (2002).

84. 8 U.S.C. § 1101(a)(27) (2004).

85. See, e.g., *In re S-A-*, 22 I. & N. Dec. 1328, 1336 (B.I.A. 2000). In *In re S-A-*, a young Moroccan woman who had been physically abused by her father was granted asylum. *Id.* at 1332-33, 1337. The Board was able to justify her grant of asylum by finding that the abuse she suffered was perpetuated not because of her gender or her violation of gender-based social mores, but instead on religion because of differing levels of religious fundamentalism between she and her father. *Id.* at 1336.

86. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150. The Convention is where most asylum law is rooted. Danette Gómez, *Last in Line—The United States Trails Behind in Recognizing Gender-Based Asylum Claims*, 25 WHITTIER L. REV. 959, 961 (2004).

within one of the other enumerated grounds.<sup>87</sup> However, that lack of definition has also “le[ft] room for the exclusion of certain cases according to the whims of the judiciary.”<sup>88</sup> That room for judicial interpretation has led to widely varying application and results.

*In re Kasinga*<sup>89</sup> yielded a decision that provided optimism to supporters of recognition of gender-based claims for asylum. The applicant in that case was a young woman from the Tchamba-Kunsuntu Tribe of Togo.<sup>90</sup> The persecution she was fleeing was that of female genital mutilation (FGM).<sup>91</sup> The Immigration Judge denied her application, but the Board of Immigration Appeals sustained her appeal and granted her asylum.<sup>92</sup> The Board found that Kasinga would be persecuted for being a member of the particular social group of “[y]oung women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice.”<sup>93</sup> Scholars at the time proclaimed that “[t]he *Kasinga* ruling represents a long overdue effort by the INS to expand antiquated laws to afford women protection from gender-related persecution.”<sup>94</sup> Generally, *Kasinga* was viewed as “offer[ing] a small glimmer of hope to those seeking asylum from gender-based persecution.”<sup>95</sup> However, critics condemned the narrowness of the recognized social group and the opinion’s failure to provide rules for similar future cases, instead allowing inconsistent rulings to continue.<sup>96</sup>

Three years later, the optimism inspired by *In re Kasinga*, was dramatically tempered by the decision issued in *In re R-A*.<sup>97</sup> In *In re R-A*, the asylum applicant was a woman who had been badly abused by her husband in Guatemala.<sup>98</sup> The Immigration Judge granted her application, which had been based on political opinion and her membership in a particular social group<sup>99</sup>, but the Board reversed.<sup>100</sup> The Board disagreed with her claim that the persecution she suffered was due to an imputed political opinion because the Board did not believe that there was “any ‘opinion’ the

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87. Gómez, *supra* note 86, at 965.

88. *Id.*

89. 21 I. & N. Dec. 357 (B.I.A. 1996) (en banc).

90. *Id.* at 358.

91. *Id.* at 367.

92. *Id.* at 357.

93. *Id.* at 358.

94. Mary M. Sheridan, Comment, *Fauziya Kasinga: The United States has Opened its Doors to Victims of Female Genital Mutilation*, 71 ST. JOHN’S L. REV. 433, 460 (1997).

95. *Id.* at 462.

96. *Id.* at 460.

97. 22 I. & N. Dec. 906 (B.I.A. 1999) (en banc).

98. *Id.* at 908.

99. *Id.* at 907, 911.

100. *Id.* at 907.

respondent could have held, or convinced her husband [that] she held, that would have prevented the abuse she experienced.”<sup>101</sup> Similarly, the Board did not believe that the applicant was abused by her husband because of her membership in the social group of “Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination.”<sup>102</sup> The Board criticized the Immigration Judge’s ruling, saying that the social group appeared to have been created entirely for the purposes of the case.<sup>103</sup> Instead, the Board stated that a particular social group must be one that is recognized in Guatemala as a group, consistent with the ways in which Guatemalan individuals might identify social subdivisions within their culture.<sup>104</sup> The Board insisted that the persecutor must be aware of the social group in order to persecute based on membership within the group, and did not believe that the applicant had shown that her husband targeted her for her membership in such a group.<sup>105</sup> As a result, the Board reversed the Immigration Judge’s grant of asylum.<sup>106</sup>

There is a dramatic gap between the Board opinions in *In re Kasinga* and *In re R-A-*, and the different outcomes are difficult to explain. Both cases were argued on the grounds of particular social group, and both applicants defined the group very narrowly. In each case, the group appeared to be narrowly defined in order to aid the Board in granting asylum by alleviating fears of a potential slippery slope. The application was granted in *In re Kasinga* and not in *In re R-A-* despite similar circumstances and similar social groups. In addition, the social group in *Kasinga* probably would not have met the stricter standard applied in *In re R-A-*, as it is unlikely that members of the Tchamba-Kunsuntu Tribe of Togo recognize the social group described and accepted in *In re Kasinga*. These cases exemplify the disparate treatment of gender-based violence in asylum claims, and illustrate the difficulties a woman persecuted because of her gender will face. An even more alarming disparity is evident when the gender-related claims of women are compared with those of men.<sup>107</sup> In response to the

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101. *Id.* at 917.

102. *Id.*

103. *Id.* at 918.

104. *Id.*

105. *Id.* at 918-19.

106. *See id.* at 923.

107. *See, e.g.,* Hernandez-Montiel v. I.N.S., 225 F.3d 1084, 1099 (9th Cir. 2000) (granting asylum to Mexican man who suffered persecution because of his membership in the particular social group of gay men in Mexico with female sexual identities); Toboso-Alfonso, 20 I. & N. Dec. 819, 822-23 (B.I.A. 1990) (recognizing sexual orientation as the basis for a particular social group for a Cuban man); Matter of Tenorio, No. A72-093-558 (IJ

decision in *In re R-A-*, however, the Department of Justice proposed new regulations “designed to ‘aid in the assessment of claims made by applicants who have suffered or fear domestic violence.’”<sup>108</sup> Then-Attorney General Janet Reno vacated the case of *In re R-A-* in anticipation of the codification of the new regulations,<sup>109</sup> and that case remains on hold today, as do many other gender-based applications.

#### IV. PROBABLE RESULT OF APPLICATION OF THE PROPOSED REGULATIONS TO HONOR KILLING-BASED ASYLUM CLAIMS

##### A. Description of the Regulations

Proposed in December of 2000 in response to *In re R-A-*, the amendments to the INS’ Asylum and Withholding Definitions are intended to “restate[] that gender can form the basis of a particular social group” and to “aid in the assessment of claims made by applicants who have suffered or fear domestic violence.”<sup>110</sup> The proposed rule is intended to “remove[] certain barriers that the *In re R-A-* decision seems to pose to claims that domestic violence, against which a government is either unwilling or unable to provide protection, rises to the level of persecution of a person on account of membership in a particular social group.”<sup>111</sup> The rule codifies the approach found in *Matter of Acosta*, wherein the Board of Immigration Appeals required that the members of a particular social group share an immutable trait.<sup>112</sup> The rule also specifically recognizes gender as an immutable trait.<sup>113</sup> Rather than “set[ting] forth what the precise characteristics of the particular social group might be[,]” however, the rule “states generally applicable principles that will allow for case-by-case adjudication of claims based on domestic violence or other serious harm inflicted by individual non-state actors.”<sup>114</sup> The Department of Justice chose to use general principles rather than precise characteristics based on their belief that a victim’s perception of her social group will be

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July 26, 1993) (recognizing sexual orientation as the basis for a particular social group for a Brazilian man).

108. Anita Sinha, Note, *Domestic Violence and U.S. Asylum Law: Eliminating the “Cultural Hook” for Claims Involving Gender-Related Persecution*, 76 N.Y.U. L. REV. 1562, 1592 (2001) (quoting Asylum and Withholding Definitions, 65 Fed. Reg. at 76,588).

109. *In re R-A-*, 22 I. & N. Dec. 906 at 906.

110. Asylum and Withholding Definitions, 65 Fed. Reg. at 76,588-98.

111. *Id.* at 76,589.

112. *Id.* at 76,593 (citing *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (1985)).

113. *Id.*

114. *Id.* at 76,589.



influenced by the social conditions in her home country, which would require subtle factual analysis in each case.<sup>115</sup>

The proposed rule contains a total of six factors drawn from the relevant case law. *Sanchez-Trujillo v. INS*<sup>116</sup> provided the first three factors, and *In re R-A-* provided the final three.<sup>117</sup> The proposed new factors are as follows:

- (i) The members of the group are closely affiliated with each other;
- (ii) The members are driven by a common motive or interest;
- (iii) A voluntary associational relationship exists among the members;
- (iv) The group is recognized to be a societal faction or is otherwise a recognized segment of the population in the country in question;
- (v) Members view themselves as members of the group; and
- (vi) The society in which the group exists distinguishes members of the group for different treatment or status than is accorded to other members of the society.<sup>118</sup>

The rule emphasizes that the additional factors are merely for consideration and are not necessarily determinative in any given case.<sup>119</sup>

#### *B. Application of Proposed Factors in Honor Killing Asylum Cases*

As noted above, the first three of the proposed new factors are drawn from *Sanchez-Trujillo v. INS*.<sup>120</sup> In that case, the Ninth Circuit listed those three factors as what should be considered when attempting to determine whether an asylum applicant has identified a cognizable particular social group.<sup>121</sup> The Court went on to hold that “young, working class, urban males who have failed to serve in the military or actively support the government” of El Salvador was not a cognizable particular social group for asylum purposes.<sup>122</sup> The Court felt that that group lacked close affiliation with other group members, drive toward common purposes, and “voluntary associational relationship” between members, the elements that now comprise the proposed new factors.<sup>123</sup>

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115. *Id.*

116. 801 F.2d 1571 (9th Cir. 1986).

117. Asylum and Withholding Definitions, 65 Fed. Reg. at 76,594.

118. *Id.* at 76,598.

119. *Id.*

120. 801 F.2d 1571 at 1576; Asylum and Withholding Definitions, 65 Fed. Reg. at 76,594.

121. *Sanchez-Trujillo*, 801 F.2d at 1576.

122. *Id.* at 1577.

123. *See id.*

One of the issues the *Sanchez-Trujillo* Court took with the identified social group was that it included such a large demographic segment of the Salvadorian population, one that was not otherwise affiliated with each other.<sup>124</sup> Operating under the assumption that the *Sanchez-Trujillo*-derived factors will be implemented as they were in *Sanchez-Trujillo*, those who have been threatened with honor killings would not fare much better than the applicants in *Sanchez-Trujillo* if they attempt to establish the social group of women threatened with honor killing. Honor killings affect women, and sometimes men, across many different countries.<sup>125</sup> The victims have been shown to be of all ages, and the killings carried out for a variety of reasons in a variety of circumstances.<sup>126</sup> As such, immigration officials operating under the proposed new rule would likely look to *Sanchez-Trujillo* and find that a characterization that includes such a broad and diverse demographic could not constitute a cognizable particular social group.

The remaining three factors proposed by the Department of Justice, drawn from *In re R-A*,<sup>127</sup> could also be difficult for applicants to satisfy. Those factors include that the group be recognized as a societal faction or segment of the home country's population, that members recognize themselves as group members, and that group members are distinguished by the home society for different treatment or status than other members of that society.<sup>128</sup> In *In re R-A*, the Board listed those factors as reasons why the applicant's identified group failed as a particular social group for asylum purposes.<sup>129</sup> As discussed above, the group articulated by the applicant in *In re R-A* was that of "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination," which encompasses a broad section of people who are indeed unlikely to either recognize themselves as members of that group or recognize that it is a group within the society.<sup>130</sup> Applicants attempting to base an asylum claim on a social group defined as women threatened with an honor killing would very likely face the exact same obstacles in meeting those factors. Those threatened with honor killing exist outside of that sphere for

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124. *Id.*

125. *See supra* Part I.A.

126. *See supra* Part I.A.

127. 22 I. & N. Dec. at 917-19; Asylum and Withholding Definitions, 65 Fed. Reg. at 76,594.

128. Asylum and Withholding Definitions, 65 Fed. Reg. at 76,598.

129. *In re R-A*, 22 I. & N. Dec. at 917-19.

130. *Id.* at 918.

the vast majority of their lives, until receiving such a threat by a family member who most likely views the applicant as his only target.<sup>131</sup> She is as outside of the practice and as suddenly and solitarily thrust into the situation as a victim of spousal abuse, and her claim based on particular social group would face the same obstacles.

An individual applying for asylum due to being threatened with an honor killing would have great difficulty in satisfying the factors proposed in the new asylum rule if basing such a claim on membership in the particular social group of those threatened with honor killings. However, the *Sanchez-Trujillo* Court indicated an alternative characterization that is promising for many asylum applicants threatened with honor killings, and which the Court recognized as a particular social group satisfying each of the three *Sanchez-Trujillo* factors incorporated into the proposed rule.<sup>132</sup> The characterization is also very likely to satisfy each of the *In re R-A*-factors, and has in fact already been recognized as a cognizable particular social group in another case.<sup>133</sup> The *Sanchez-Trujillo* Court explained that “[p]erhaps a prototypical example of a ‘particular social group’ would consist of the immediate members of a certain family, the family being a focus of fundamental affiliational [sic] concerns and common interests for most people.”<sup>134</sup> The Court went on to note “that a family was ‘a small, readily identifiable group.’”<sup>135</sup> Those threatening honor killings are typically family members of the intended victim,<sup>136</sup> and it is this familial association that could be used by those threatened in order to successfully argue persecution due to membership in that particular family group. It seems clear that a potential honor killing victim would have a significantly higher prospect of success in being granted asylum if she based her claim on membership in her particular family than on membership in the broader group of those threatened with honor killings.

As a brief example of potential application, consider the story of Alissar Rawashdeh.<sup>137</sup> Rawashdeh was a young Jordanian woman living in Ohio with her husband, his mother, and his two

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131. See *supra* Part I.A.

132. *Sanchez-Trujillo*, 801 F.2d at 1576.

133. *Aguirre-Cervantes v. INS*, 242 F.3d 1169, 1175-77 (9th Cir. 2001) (recognizing the immediate family, all abused by one family member, as a cognizable particular social group), *vacated*, 273 F.3d 1220 (9th Cir. 2001) (en banc).

134. *Sanchez-Trujillo*, 801 F.2d at 1576.

135. *Id.* (quoting *Hernandez-Ortiz v. INS*, 777 F.2d 509, 516 (9th Cir. 1985)).

136. See *supra* Part I.A.

137. See generally Ellen Miller, “They’ll Throw Rocks ‘Til I Die”: Jordanian Woman Fears She’ll Be Killed If She Is Sent Home, DENVER ROCKY MOUNTAIN NEWS, May 16, 2003, at 5A (describing the background and circumstances of Rawashdeh).

siblings.<sup>138</sup> He was allegedly abusive toward her, so she left him.<sup>139</sup> She was living with her uncle in California while attempting to obtain a refugee visa when she was detained in May of 2003.<sup>140</sup> Rawashdeh claimed that her family would stone her to death for leaving her husband if she were returned to Jordan in order to clear the family name.<sup>141</sup> In an application for asylum, if Rawashdeh based her claim on membership in the particular social group of those facing possible honor killing in their home country, even under the proposed new rule she would be unlikely to prevail. Such a social group would fail to satisfy at least four of the six factors under the proposed rule. She is not closely affiliated with any other member of that group by a voluntary associational relationship or otherwise. The group is also unlikely to be recognized as a societal faction or segment of the Jordanian population, nor are members likely to view themselves as group members. The members may be seen to share a common motive or interest in individual freedom to escape abuse or simply survive. The sixth factor would be easily satisfied, as those threatened with honor killings, particularly in Jordan, are distinguished from other potential victims of crime by lack of governmental protection and societal approval of their victimization.<sup>142</sup> While these factors are not considered determinative, an immigration official would be unlikely to use their discretion to grant asylum to someone whose social group satisfies only one of the six factors, particularly with the preexisting resistance to claims based on family violence. However, Rawashdeh could fall back on the social group of her immediate family. As discussed above, officials and courts have recognized the particular social group of an immediate family, so such a claim would begin with a much greater chance of success. One difficulty Rawashdeh, and others facing possible honor killing, could face is the limitation seen in *Sanchez-Trujillo*<sup>143</sup> and *Aguirre-Cervantes* to persecution by immediate family members.<sup>144</sup> Honor killings are often carried out by the male members of a victim's extended family.<sup>145</sup> In fact, Rawashdeh's uncle in California, with whom she had been living, was also trying to return her to Jordan on her family's behalf.<sup>146</sup> This aspect of honor killings renders

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138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *See supra* Part I.B.

143. *Sanchez-Trujillo*, 801 F.2d at 1576.

144. *Aguirre-Cervantes*, 242 F.3d at 1176.

145. Amnesty, *Pakistan: Honour Killings*, *supra* note 19, at 2.

146. Miller, *supra* note 137.

asylum applicants particularly at the mercy of official and judicial discretion. At this point and under the proposed rule, however, it appears as if basing her claim on the particular social group of her immediate family is her strongest option.

No matter how the applicant characterizes her particular social group, however, the proposed rule continues to contain an aspect of the current policy that has proven problematic: discretion.<sup>147</sup> The new rule lays out factors, but they are only factors for consideration, and are said to not be dispositive in any particular case.<sup>148</sup> The uncertainty associated with the application of the factors provides little guidance to either asylum applicants or immigration officials. The result is that asylum applicants are still operating on guesswork and immigration officials are free to decide claims based not on firm principles, but instead on their personal prejudices, the problem which initially led to such inconsistent decisions as *In re Kasinga* and *In re R-A*.<sup>149</sup> As a result, many scholars and practitioners have called for alternative solutions to the disparate treatment of gender-based asylum claims.

#### IV. CALLS FOR REFORM

Many commentators have called for reform in the treatment of gender-based claims. Ideas for reform have come in many forms, each with their own strengths and weaknesses. The most uniform call appears to be the addition of gender as an enumerated ground. I will address this concept, as well as several other proposals that seem to hold even greater promise.

There is a popular drive to add gender to the enumerated grounds in the asylum and refugee definitions.<sup>150</sup> There is wide academic support for this proposition. The idea is that immigration officials and courts would then be pressured to grant more claims based on forms of persecution to which women are more often subject.<sup>151</sup> Although I agree that gender belongs in the enumerated grounds as much as any of those currently appearing in the rule and should be added, I believe that at this point its addition would be purely symbolic. Immigration judges would continue to use their discretion to deny women's claims, similar to how they have

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147. Asylum and Withholding Definitions, 65 Fed. Reg. at 76,589.

148. *Id.* at 76,598.

149. See Shanyn Gillespie, *Terror in the Home: The Failure of U.S. Asylum Law to Protect Battered Women and a Proposal to Right the Wrong of In re R-A*, 71 GEO. WASH. L. REV. 131, 132-33 (2003).

150. See, e.g., Bosi, *supra* note 11; Condon, *supra* note 11.

151. See Condon, *supra* note 11, at 249.

largely ignored the Department of Justice Guidelines<sup>152</sup> for handling women's applications due to their preexisting biases.<sup>153</sup> Adding gender as an enumerated ground would be an important symbolic victory, but it would ultimately prove insufficient to remedy the problem.<sup>154</sup>

Laura Adams advocates an alternative approach.<sup>155</sup> She suggests a combination of the use of the family as the particular social group,<sup>156</sup> similar to the potential approach suggested in *Sanchez-Trujillo*, but with a twist. She would also alter the nexus requirement, focusing on "the state's failure to protect and the victim's membership in a particular social group, . . . view[ing] the state's failure to protect as persecution in itself."<sup>157</sup> The state would therefore, be the persecutor through the lack of protection provided to the group members, eliminating the need for an asylum applicant to demonstrate the motivating forces of her abuser or potential killer.<sup>158</sup> Adams explains that "[d]omestic violence is more than a private harm because the state fails to protect victims of violence within families for the reason that these victims are members of a particular social group—the family."<sup>159</sup> Such an approach appears as if it would be particularly helpful in overcoming the hurdle of judicial discretion, because it takes the conduct out of the private and into the public sphere,<sup>160</sup> where there is more solid evidence and fewer personal biases. There is ample evidence, as discussed above, that many countries fail to protect potential victims of honor killings, and will sometimes even assist in their commission. A number of countries also do not punish honor killings, thus failing to even provide a deterrent

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152. Memorandum from Phyllis Coven, Office of International Affairs, U.S. Department of Justice, Considerations for Asylum Officers Adjudicating Asylum Claims From Women, to all INS Asylum Officers and HQASM Coordinators (May 26, 1995) reprinted in Deborah E. Anker, *Women Refugees: Forgotten No Longer?*, 32 SAN DIEGO L. REV. 771, 794-816 (1995). The Guidelines "suggested that gender could provide the basis for membership in a particular social group," among other gender-sensitive recommendations. Christina Glezakos, Comment, *Domestic Violence and Asylum: Is the Department of Justice Providing Adequate Guidance for Adjudicators?*, 43 SANTA CLARA L. REV. 539, 551 (2003). The Guidelines also "emphasize that persecution based on political opinion in the form of a woman's belief that a man should not control her may also serve as a basis for asylum, regardless of whether the belief is actual or imputed." Gillespie, *supra* note 149, at 141.

153. See Glezakos, *supra* note 153, at 554-55; Gómez, *supra* note 86, at 962-63.

154. Deborah E. Anker, *Refugee Law, Gender, and the Human Rights Paradigm*, 15 HARV. HUM. RTS. J. 133, 139 (2002).

155. Laura S. Adams, *Fleeing the Family: A Domestic Violence Victim's Particular Social Group*, 49 LOY. L. REV. 287, 295-99 (2003).

156. *Id.* at 295-98.

157. *Id.* at 296.

158. See *id.* at 295-99.

159. *Id.* at 298.

160. *Id.* at 298-99.

effect.<sup>161</sup> The state persecution approach to domestic violence may be able to bridge the gap between what was lacking in *In re R-A* and what made the difference in *In re Kasinga*. Adoption of this policy modification would prove enormously helpful for asylum applicants based on domestic violence or honor killings.

Shanyn Gillespie also has an excellent proposal specifically for reducing the hurdles inherent in judicial discretion in the asylum process.<sup>162</sup> She agrees that adding gender as an enumerated ground “may not be the panacea that it appears because biased adjudicators will find other ways to manipulate the asylum definition to deny battered women protection. . . . [I]t would fail because it does not address the attitudes that are the source of the problem.”<sup>163</sup> Specifically, Gillespie proposes implementation of gender-sensitivity training for all asylum adjudicators, intended to “attack the specific source of the problem: gender stereotypes and misconceptions about domestic violence.”<sup>164</sup> She recognizes that judges would perhaps be adverse to such a program, so the program should instead be framed in terms of substantive law.<sup>165</sup> Such a sensitivity training program, particularly if focused on policy modifications like those suggested by Adams, could go far to remove the judicial discretion hurdles standing between some asylum seekers and the protection they so desperately need.

Gillespie also advocates an approach expressly rejected in *In re R-A*, granting asylum to domestic violence victims on the basis of political opinion.<sup>166</sup> She asserts that policy should be changed to “make it clear that a woman’s resistance to her husband’s desire to subordinate her qualifies as political opinion.”<sup>167</sup> Despite its rejection in *In re R-A*, this is an extremely strong argument, which should be subject to much more study and would be appropriately included in any gender sensitivity training program like the one advocated above. That full argument, however, is beyond the scope of this article.<sup>168</sup>

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161. See *supra* Part I.B.

162. See Gillespie, *supra* note 149, at 150.

163. *Id.* at 147.

164. *Id.* at 156.

165. *Id.*

166. *Id.* at 154-55.

167. *Id.* at 154.

168. For more information on this topic, see generally Gillespie, *supra* note 149; Patricia A. Seith, *Escaping Domestic Violence: Asylum as a Means of Protection for Battered Women*, 97 COLUM. L. REV. 1804 (1997).

## V. CONCLUSION

Honor killings are a problem in a number of countries around the world. Neither home countries nor general communities protect those threatened with honor killings. The victims have few alternatives, so asylum is a particularly important remedy that must be opened up to them. The proposed new gender rule arising from *In re R-A-* is intended to assist those seeking asylum due to domestic violence, but they are ultimately flawed, providing little guidance to asylum applicants and continuing to leave them at the mercy of judicial discretion. It is such judicial discretion that led to the past inconsistent rulings that the proposed rule was intended to remedy. A number of other solutions have been advocated. The strongest of these suggestions are gender sensitivity training for asylum adjudicators and the use of the particular social group of the family with a readjustment of the nexus requirement with the focus on the state's choice not to protect victims as the persecution. The policy that is finally enacted to help those threatened with honor killings and other domestic violence will only be effective if it is able to overcome the exercise of judicial discretion that has been seen in prior cases.



**GENERATIONAL GENOCIDE: COERCIVE POPULATION  
CONTROL AS A BASIS FOR ASYLUM IN THE UNITED  
STATES**

THOMAS L. HUNKER\*

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I. INTRODUCTION

Imagine a society that criminalizes the choice to have more than one child, where the government forces women to abort their babies and become sterilized after giving birth, and where sibling relationships no longer exist. As morbid as this idea may seem, it has become reality for many families throughout China and elsewhere. The purposes of this article are twofold: (1) to inform the reader of the horrors that ensue when an entire country embraces a culture of death in the name of population control; and (2) to discuss the United States’ response to the granting of asylum to victims of coercive population control (“CPC”) policies.

Based on research of recent historical and political events and the various policy arguments in favor of and against population control, this article reaches several conclusions. First and foremost, population control efforts that incorporate and promote abortion, contraception, and sterilization fail to meet their stated objectives of improving people’s standard of living and actually exacerbate the poverty problem while harming the social vitality of women and minorities. In addition, forced abortion, sterilization, and contraception violates basic human rights to life and procreation. In short, coercive population control constitutes a

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\* *Juris Doctor* Candidate, May 2006, Florida State University College of Law. The author wishes to acknowledge Professor Terrence Coonan’s guidance with this topic. Additionally, the author expresses his heartfelt thanks to his family for their love and support, as well as the Almighty for providing the inspiration.

direct assault on the generation of children born during its implementation.

Assuredly, population growth presents some inherent difficulties. As the world's human population continues to grow,<sup>1</sup> commentators express concern that it will one day reach a level that the earth's resources cannot support.<sup>2</sup> Particularly in the last century, governments, as well as intergovernmental and nongovernmental organizations, have responded to the perceived threat of overpopulation in various ways. The regular gathering and publishing of census data in an effort to monitor population growth has become a regular practice in most industrialized countries.<sup>3</sup> Reliable population data enables policymakers, businesses, non-profit organizations, and the public to maintain efficient and effective governments and economies.<sup>4</sup>

Unfortunately, some methods of dealing with increasing populations have led to grave human rights abuses involving forced abortions and sterilizations, as well as mandatory insertion of intrauterine devices ("IUDs") to prevent births.<sup>5</sup> At the forefront of the controversy stands China's so-called "one child" policy, which the communist regime first implemented during the

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1. The U.S. Census Bureau estimates world population for Aug. 31, 2005 at 6,463,645,246. U.S. Census Bureau, World Population Clock, <http://www.census.gov/main/www/popclock.html> (last visited Aug. 31, 2005).

2. See generally CHARLES DARWIN, ON THE ORIGIN OF SPECIES BY MEANS OF NATURAL SELECTION (John Murray ed., W. Clowes and Sons 6th ed. 1859), available at [http://embryology.med.unsw.edu.au/pdf/Origin\\_of\\_Species.pdf](http://embryology.med.unsw.edu.au/pdf/Origin_of_Species.pdf); THOMAS MALTHUS, AN ESSAY ON THE PRINCIPLE OF POPULATION, AS IT AFFECTS THE FUTURE IMPROVEMENT OF SOCIETY (J. Johnson 1798), available at <http://www.esp.org/books/malthus/population/malthus.pdf>. "Malthus concluded that unless family size was regulated [by the government], man's misery of famine would become globally epidemic and eventually consume Man [sic]." Univ. of Cal., Berkeley Museum of Paleontology, Thomas Malthus (1766-1834), <http://www.ucmp.berkeley.edu/history/malthus.html>. Malthus, a political economist, "believed that such natural outcomes were God's way of preventing man from being lazy." *Id.* Darwin, a naturalist, incorporated Malthus' work into his theory of natural selection, reasoning that "producing more offspring than can survive establishes a competitive environment among siblings, and that the variation among siblings would produce some individuals with a slightly greater chance of survival." *Id.*

3. See, e.g., Office for National Statistics, United Kingdom, available at [http://www.statistics.gov.uk/census2001/cb\\_8.asp](http://www.statistics.gov.uk/census2001/cb_8.asp) (last visited Aug. 31, 2005); U.S. Census Bureau, United States Census, available at <http://www.census.gov/main/www/cen2000.html> (last visited Aug. 31, 2005).

4. See U.S. DEPT OF COMMERCE, ECONOMICS AND STATISTICS ADMINISTRATION, U.S. CENSUS BUREAU STRATEGIC PLAN, FY 2004-2008 (Sept. 2003), <http://www.census.gov/main/www/strategicplan/strategic03.pdf>.

5. U.S. DEPT OF STATE, 108TH CONG., COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2003 725 (Joint Comm. Print 2004). See generally Planned Parenthood, *Understanding IUDs*, <http://www.plannedparenthood.org/pp2/portal/> (follow "health info"; then follow "IUDs") (last visited Apr. 1, 2005). A version of the IUD well-known in the United States is the "Dalkon Shield." Planned Parenthood, *IUDs Make a Comeback*, <http://www.plannedparenthood.org/pp2/portal/> (follow "choice magazine"; then follow "sexual health & sexuality"; then follow "January 2005-June 2005"; then follow "IUDs Make a Comeback").

1970s.<sup>6</sup> The U.S. Department of State reports numerous instances of local “family planning” officials forcing women to undergo abortions or sterilizations, as well as fining, imprisoning, or destroying the homes and property of those who resist.<sup>7</sup> China’s policy exemplifies the extent to which disrespect for human life can lead to government policies which harm women, persecute minorities, and destroy families.

Tragically, until 1996, asylum seekers fleeing countries with such policies, as for example China’s, found no refuge under United States law. Courts did not view forced abortion or sterilization policies as persecution because the desire to control population, rather than the suppression of political, religious, or ethnic dissidents, motivated governments to implement these policies.<sup>8</sup> Finally, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”).<sup>9</sup> Section 601 of IIRIRA explicitly grants refugee status to victims of coercive population control policies.<sup>10</sup>

The following sections of this article explore the nature of China’s one-child policy, and examine the history and politics that led to the passage of section 601. Part II discusses China’s one-child policy and the disastrous effects it has wrought on China’s people. Part III explains section 601 and its effect on United States asylum law as it relates to applicants fleeing the enforcement of coercive population control policies. Part III also describes the administrative history and motivations which led to the enactment of section 601. Part IV evaluates the arguments for and against section 601, and examines whether it remains an effective means of protecting refugees. Part V concludes.

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6. *Id.* at 10-11, 16 (statements of Rep. Pitts, Member, Comm. on Int’l Relations, and Stephen W. Mosher, President of the Population Research Institute); *Coercive Population Control in China: New Evidence of Forced Abortion and Forced Sterilization: Hearing Before the Comm. on Int’l Relations*, 107th Cong. 2-3 (2001) (statement of Rep. Henry J. Hyde, Chairman, Comm. on Int’l Relations) [hereinafter *Coercive Population Control in China*].

7. See U.S. DEPT OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES, CHINA (INCLUDES HONG KONG AND MACAU) § 1(f) (MAR. 4, 2002), <http://www.state.gov/g/drl/rls/hrrpt/2001/eap/8289.htm> (last visited Apr. 1, 2005).

8. See *Matter of Chang*, 20 I. & N. Dec. 38 (B.I.A. 1989), *superseded by statute*, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. § 1101(a)(42) (2000), Pub. L. No. 104-208, § 601, 110 Stat. 3009-689.

9. *Id.*

10. *Id.*

## II. CHINA'S HOLOCAUST: ONE-CHILD PER FAMILY

Exactly when China began its policy of one-child per family remains unclear. Some cite as far back as Mao Tse-tung's family-planning policies in 1955 as the starting point.<sup>11</sup> Others look to a 1979 speech by Deng Xiaoping calling for stricter limitations on childbirths.<sup>12</sup> Nevertheless, "the policy was in place nationwide by 1981" and "[b]y the mid-1980s, abortions, sterilisations and IUD insertions averaged some 30 million a year."<sup>13</sup> Today, under China's Population and Family Planning Law, entered into force in 2002, "[t]he National Population and Family Planning Commission (NPFPC) enforces the law and implements policies with assistance from the Birth Planning Association, which had 1 million branches nationwide."<sup>14</sup> "The law grants married couples the right to have a single child and allows eligible couples to apply for permission to have a second child if they meet conditions stipulated in local and provincial regulations."<sup>15</sup> Most local requirements state that women must wait at least four years to have a second child.<sup>16</sup> Enforcers issue fines (euphemistically named *social compensation fees*) for illegal births.<sup>17</sup> Officials also levy fines on those who help couples evade the birth limitations.<sup>18</sup> Of China's 2800 counties, 1900 set birth control targets and quotas.<sup>19</sup> Propaganda campaigns describe the choice to abort or to become sterilized as honorable in order to create psychological pressure for those contemplating the decision to have another child.<sup>20</sup> Enforcers use economic rewards for compliance, as well as penalties such as loss of job or demotion for deviance from the laws.<sup>21</sup> Women who do not qualify to have another child must undergo IUD implantation, including quarterly exams to make sure the device remains in place.<sup>22</sup> The minimum age for women to marry is twenty, twenty-

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11. See Andrew Brick, *Bookshelf: Cruel Reality of China's Population Policy*, WALL ST. J., July 28, 1993, at A12.

12. See Trish Saywell, *Abortions for the Masses*, FAR E. ECON. REV., June 9, 1994, at 54.

13. *Id.*

14. COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2003, *supra* note 5, at 706-07.

15. *Id.* at 707.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2003, *supra* note 5, at 707.

21. *Id.*

22. *Id.* at 707-08.

two for men, and laws make it illegal for single women to bear children.<sup>23</sup>

The Chinese position on physically coerced abortion and sterilization consists of the Central Government formally forbidding the practices,<sup>24</sup> while local cadres, under pressure to meet strict quotas and targets, administer forced abortions and sterilizations with near impunity.<sup>25</sup> For example, under Tianjin Municipality Regulations of Planned Birth Policy, “Tianjin carries out a system that holds the CEOs of the work units accountable for population quotas.”<sup>26</sup> CEOs at all levels are bound to hamper population growth from surpassing fixed quotas, and “[i]f they fail to do so, they will lose their promotions and lose their job and also face [other] punishment.”<sup>27</sup> For this reason, “Communist cadres . . . resort to . . . barbaric practices of forcing . . . abortion and sterilizations,” and even infanticide.<sup>28</sup> Women seeking asylum in the United States have reported instances where local enforcers come to their homes in the middle of the night seeking to force them to abort their babies.<sup>29</sup> One woman who recently spoke before Congress related a heart-rending tale of being physically escorted to a hospital where nurses prevented her from leaving. Then, an abortionist forced a ten centimeter needle into the victim’s abdomen, injecting 100 ml of Rufenol into the body of the fetus, killing it.<sup>30</sup> Independent investigations completed in China reveal a method of public example-making known as “killing the chicken to scare the monkey” in which “homes that housed families with more than one child had been razed to the ground by bulldozers.”<sup>31</sup> As a means of intimidation, local planned birth officials “brought all child-bearing-age women to the homes” in order to observe the destruction.<sup>32</sup>

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23. *Id.* at 708.

24. *Coercive Population Control in China*, *supra* note 6, at 18-19 (statement of Stephen W. Mosher, President, Population Research Institute).

25. *Id.* at 20-21 (statement of Harry Wu, Director, Laogai Research Foundation).

26. *Id.* at 20.

27. *Id.*

28. *Id.* at 20-21.

29. *Id.* at 5 (statement of Rep. Christopher Smith, Vice Chairman, Comm. on Int’l Relations).

30. *Coercive Population Control in China*, *supra* note 6, at 26-28 (statement of Mahire Omerjan). Ms. Omerjan, an Uzbek minority, described how, after the abortionists killed her seven-month old fetus in her womb, they began pressing on her abdomen to force the lifeless body out. Ms. Omerjan, a Muslim, expressed deepest sorrow at the violation of the tenets of her faith caused by the abortion. This was only her second child. *Id.*

31. *Id.* at 25 (Tianjin Investigation Report, Attachment II, statement of Harry Wu, Director, Laogai Research Foundation).

32. *Id.*

China's population control measures hearken back to Europe during the World War II era where the Germans perpetrated forced sterilization through the collaboration of "the science and medical communities, the judiciary, and the Nazi regime."<sup>33</sup> In 1935, Germany amended its laws "to allow women deemed 'hereditarily ill' to undergo abortion within the first six months of pregnancy."<sup>34</sup> In the name of racial and genetic purity, German authorities sterilized approximately 350,000 to 400,000 people, and some dissatisfied racial hygienists argued that "[ten to fifteen] percent of the entire population should be sterilized."<sup>35</sup> These acts, regarded as crimes against humanity at the Nuremberg Trials, pale in comparison to the numbers boasted by the Chinese government as the great victory of its Planned Birth Policy. "According to a recent report issued by the Chinese authorities, as the result of implementing the Planned Birth Policy over the last twenty years," the Chinese have reduced population growth by 330 million people.<sup>36</sup>

### III. SECTION 601 OF THE ILLEGAL IMMIGRATION REFORM AND IMMIGRANT RESPONSIBILITY ACT OF 1996

Prior to 1996, courts refused to include aliens fleeing coercive population control within the refugee definition by adhering to strict requirements created under the United Nations Convention on the Status of Refugees and defined under U.S. law.<sup>37</sup> Then in

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33. See Michael J. Malinowski, *Choosing The Genetic Makeup of Children: Our Eugenics Past-Present, and Future?*, 36 CONN. L. REV. 125, 143-44 (2003-2004) (citing DIANE B. PAUL, CONTROLLING HUMAN HEREDITY: 1865 TO THE PRESENT 87 (1995), and Robert N. Proctor, *Nazi Doctors, Racial Medicine, and Human Experimentation*, in THE NAZI DOCTORS AND THE NUREMBERG CODE 21 (George J. Annas & Michael A. Grodin eds., 1992)).

34. *Id.* at 144.

35. *Id.* at 145.

36. *Coercive Population Control in China*, *supra* note 6, at 24 (statement of Harry Wu, Director, Laogai Research Foundation).

37. Responding to the atrocities inflicted on Jews during World War II, member nations signed the United Nations Convention on the Status of Refugees in 1951, defining the term "refugee," and prohibiting the return of refugees to countries where they would face persecution. Convention Relating to the Status of Refugees art.1, July 28, 1951, 189 U.N.T.S. 150 (1951). Member nations later expanded the definition of "refugee" in 1967 with the promulgation of the United Nations Multilateral Protocol Relating to the Status of Refugees. Protocol Relating to the Status of Refugees art. 1, Jan. 31, 1967, 19 U.S.T. 6223 (1967). The basic thrust of these agreements reflected an international policy of *nonrefoulement*, which essentially means the "non-return" of refugees to the place where they would be persecuted. See generally *id.* art. 33 (impliedly defining "refouler" as "return"). But see *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 180 (1993) (holding that the French word "*refouler*" is not an exact synonym for the English word "return," and therefore, the refugee definition does not prohibit the return of Haitian refugees interdicted on the high seas).

In the United States, Congress amended the Immigration and Nationality Act ("INA") to conform to the Protocol through the Refugee Act of 1980. See Brief for Respondents at 1,

1996, Congress passed IIRIRA, including section 601 which essentially eliminates the nexus requirement<sup>38</sup> for three classes of

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McNary v. Haitian Ctrs. Council, Inc., 509 U.S. 155 (1993), (citing Refugee Act of 1980 § 107, 8 U.S.C. § 1253 (1988)). In its current form, United States asylum law defines a “refugee” as:

[A]ny person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

8 U.S.C. § 1101(a)(42)(A) (2000).

As a prerequisite to qualify for asylum, “the . . . [alien] must be outside of the country of his or her nationality or, if stateless, the country of last habitual residence.” AUSTIN T. FRAGOMEN & STEVEN C. BELL, IMMIGRATION FUNDAMENTALS: A GUIDE TO LAW AND PRACTICE § 6.2(a) (4th ed. 1996). After meeting this geographic requirement, the applicant must show that he or she possesses a well-founded fear of persecution in that country. *Id.* In *INS v. Cardoza-Fonseca*, the United States Supreme Court held that standard is less burdensome than the standard applied in claims for withholding of deportation (“clear probability” or “more likely than not”), and a one-in-ten possibility of persecution may suffice. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 423 (1987) (citing *INS v. Stevic*, 467 U.S. 407, 429-30 (1984)); *Id.* at 431 (citing ATLE GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW 180 (1966)). This standard includes both subjective and objective components. *Id.* at 450 (Blackmun, J., concurring). In *Matter of Acosta*, the Board of Immigration appeals adopted a four-part test for establishing these components:

(1) [T]he alien possesses a belief or characteristic a persecutor seeks to overcome in others by means of punishment of some sort; (2) the persecutor is already aware, or could easily become aware, that the alien possesses this belief or characteristic; (3) the persecutor has the capability of punishing the alien; and (4) the persecutor has the inclination to punish the alien.

19 I. & N. Dec. 211, 226 (B.I.A. 1985), *overruled on other grounds by Cardoza-Fonseca*, 480 U.S. at 446-47 & n.30 (1987).

To meet the evidentiary burden, the alien can, if necessary, rely solely on his or her own uncorroborated testimony, provided that it is “credible, persuasive, and points to specific facts that give rise to an inference that the applicant has been or has a good reason to fear that he or she will be singled out for persecution on one of the specified grounds.” *Carvajal-Munoz v. INS*, 743 F.2d 562, 574 (7th Cir. 1984). Due to the nature of asylum cases, an alien who has fled persecution may not have access to objective evidence to corroborate his or her testimony. For this reason, Immigration Judges will permit the alien to rely solely on uncorroborated testimony, and will decide how much weight to give it based on the alien's credibility. In cases of past persecution, Immigration and Naturalization Service (“INS”), (now the United States Citizenship and Immigration Service (“USCIS”)), regulations presume a well-founded fear of future persecution.

Even if an alien proves all of the elements, including the nexus requirement, *see infra* note 38, and the definition of “persecution,” *see infra* note 40, the Attorney General has broad discretionary powers to deny asylum based on a finding of either: (1) “a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution in the applicant's country of nationality;” or (2) a possibility of relocation within another part of the country from which the alien is fleeing. 8 C.F.R. § 208.13(b)(1)(i)(A)-(B) (2005).

38. Nexus refers to the phrase “on account of” which appears in the refugee definition, and means that the persecutor's motive in harming the alien must have a close relation to one of five enumerated grounds: “race, religion, nationality, membership in a particular social group, or political opinion.” *See* 8 U.S.C. § 1101(a)(42)(B)(2000). According the United States Supreme Court, “persecution on account of . . . ‘political opinion’” refers to “the victim's political opinion, not the persecutor's,” and harm inflicted on a person who chooses to remain neutral does not always establish persecution on this ground. *INS v. Elias-Zacarias*, 502 U.S. 478, 482-83 (1992). However, courts may make a finding of imputed

aliens: (1) those who have “been forced to abort a pregnancy or to undergo involuntary sterilization”; (2) those who have “been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program”; and (3) those who have a “well founded fear that [they] will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance”.<sup>39</sup> The law presumes that any applicant for asylum who fits into one of these three categories has been persecuted or has “a well founded fear of persecution on account of political opinion.”<sup>40</sup> The statute also provides a cap by declaring

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political opinion where the circumstances suggest that the persecutor attributed a particular opinion to the victim, despite the lack of evidence that the victim actually possessed any particular political opinion. *See, e.g.,* *Argueta v. INS*, 759 F.2d 1395, 1397 (9th Cir. 1985). In defining “particular social groups,” courts determine whether group members share an “immutable characteristic: a characteristic that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed.” *Matter of Acosta*, 19 I. & N. Dec. at 233 (citing ATLE GRAHL-MADSEN, *THE STATUS OF REFUGEES IN INTERNATIONAL LAW* 217 (1966)). Some courts also look to important voluntary associational relations or former associations when defining social groups. *See Hernandez-Montiel v. INS*, 225 F.3d 1084, 1092-93 (9th Cir. 2000). One court suggests that the family may be a “prototypical example of a particular social group.” *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986) (defining the term “particular social group” in 8 U.S.C. §1101(a)(42)(A)).

39. Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, § 601(a)(1), 110 Stat. 3009-689; *see* Jerome B. Ingber, *New INS Policy for Chinese Asylum Seekers*, 6 ASIAN PAGES, Aug. 1-14, 1996, at 14.

40. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. § 1101(a)(42) (2000), Pub. L. No. 104-208, § 601, 110 Stat. 3009-689. Building an asylum case ordinarily requires aliens seeking asylum to show that they either were victims of persecution before fleeing their country, or that the harm they fear upon return meets the definition of “persecution.” *Pitcherskaia v. INS*, 118 F.3d 641, 645 (9th Cir. 1997) (citing *Lopez-Galarza v. INS*, 99 F.3d 954, 958 (9th Cir. 1996)). Courts typically define “persecution” as “the infliction of suffering or harm upon those who differ . . . in a way regarded as offensive.” *Id.* at 647 (quoting *Sangha v. INS*, 103 F.3d 1482, 1487 (9th Cir. 1997)). “This definition . . . turns not on the subjective intent of the persecutor but rather on what a reasonable person would deem ‘offensive.’” *Id.* For example, where the persecutor “inflicts the suffering or harm in an attempt to elicit information, . . . for his own sadistic pleasure, . . . to ‘cure’ his victim, or to ‘save his soul’ is irrelevant.” *Id.* (citing *Nasseri v. Moschorak*, 34 F.3d 723, 724-25 (9th Cir. 1994); *see also* *Lopez-Galarza v. INS*, 99 F.3d 954 (9th Cir. 1996); LAROUSSE DICTIONARY OF BELIEFS AND RELIGIONS 243 (Rosemary Goring ed., 1994) (defining “inquisition”). Courts have found persecution in cases of “substantial economic disadvantage.” *See Kovac v. INS*, 407 F.2d 102, 107 (9th Cir. 1969). Moreover, confinement in a mental institution and administration of electric shock treatment to cure lesbianism has also been held to constitute persecution, *See Pitcherskaia*, 118 F.3d at 644. As well, “cumulative, specific instances of violence and harassment toward an individual and her family.” *See Korablina v. INS*, 158 F.3d 1038, 1044 (9th Cir. 1998). In addition, in cases of extreme, “atrocious” persecution, courts will not usually force the applicant to return, even where country conditions have substantially changed, or the possibility of internal relocation exists. *See Matter of Chen*, 20 I. & N. Dec. 16, 19 (B.I.A. 1989) (citing OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES § 136 (Geneva, 1988)). One other aspect of persecution that frequently arises in asylum cases involves the distinction between “persecution” and “prosecution.” Courts hold that “[p]rosecution for illegal activities ‘is a legitimate government act and not persecution.’” *Sadeghi v. INS*, 40 F.3d 1139, 1142 (10th Cir. 1994) (quoting *Kapcia v. INS*, 944 F.2d 702,



that “[f]or any fiscal year, not more than a total of 1,000 refugees may be . . . granted asylum . . . pursuant to a determination under [section 601].”<sup>41</sup> The following subsections describe the major events leading up to section 601’s passage, as well as some of the possible motivations for it.

### A. *Administrative History of Section 601*

Over eight years before the passage of section 601, Attorney General Edwin Meese promulgated guidelines permitting asylum for aliens fleeing coercive population control.<sup>42</sup> This marked the first of a litany of “botched efforts . . . to protect Chinese fleeing from their country’s one-child policy.”<sup>43</sup> The following year, in *Matter of Chang*, the Board of Immigration Appeals (“BIA”) dismissed the Meese guidelines as applicable only to the Immigration and Naturalization Service (“INS”), (now the United States Citizenship and Immigration Service (“USCIS”)).<sup>44</sup> Chang, a Chinese national, sought asylum based on (among other things) a well-founded fear of persecution on account of opposition to China’s one couple, one child policy.<sup>45</sup> The BIA denied Chang asylum, holding that general population control policies do not necessarily amount to persecution.<sup>46</sup> Because the Chinese government merely desired to prevent apparent problems resulting from overpopulation, the BIA determined that no nexus to any of the five enumerated grounds for asylum existed.<sup>47</sup>

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708 (10th Cir. 1991)). For example, since “a sovereign nation . . . [possesses] the right to enforce its laws of conscription . . . penalties for evasion are not considered persecution.” *Id.* (citing *M.A. v. United States INS*, 899 F.2d 304, 312 (4th Cir. 1990)).

41. 8 U.S.C. § 1157(a)(5) (2000).

42. See 135 CONG. REC. S8244 (daily ed. July 19, 1989); see also Rebecca O. Bresnick, *Reproductive Ability as a Sixth Ground of Persecution Under the Domestic and International Definitions of Refugee*, 21 SYRACUSE J. INT’L L. & COM. 121, 137 (1995) (citing *Guo Chun Di v. Carroll*, 842 F. Supp. 858, 862-63 (E.D. Va. 1994)).

43. See Paula Abrams, *Population Politics: Reproductive Rights and U.S. Asylum Policy*, 14 GEO. IMMIGR. L.J. 881, 882 (2000). The phrase “botched efforts” refers to a series of administrative and legislative blunders preceding the passage of section 601 which intended, but failed to supply courts with a legislative basis for including victims of coercive population control within the refugee definition. *Id.*

44. *Matter of Chang*, 20 I. & N. Dec. 38, 43 (B.I.A. 1989), *superseded by statute*, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. § 1101(a)(42) (2000). The B.I.A. accepted the INS’s position that the Attorney General did not direct the guidelines to immigration judges and the B.I.A., and that the guidelines applied only to the INS “in considering asylum requests from individuals who cite a fear of persecution upon return to . . . [China] for having violated that country’s ‘one couple, one child’ . . . policy.” *Id.* (paraphrasing the INS’s position).

45. *Id.* at 39.

46. *Id.* at 43.

47. *Id.* at 43-44.

Efforts to overrule *Chang* began immediately. First, Congress passed the Armstrong-DeConcini Amendment to the Emergency Chinese Immigration Relief Act of 1989, expressly overruling *Chang*.<sup>48</sup> However, President George Bush vetoed the bill, pledging instead to overrule *Chang* administratively.<sup>49</sup> In January of 1990, Attorney General Richard Thornburgh promulgated an Interim Rule permitting asylum based on CPC.<sup>50</sup> President Bush supported the rule by issuing Executive Order No. 12,711, underscoring the substance of the rule.<sup>51</sup> Unfortunately, when the final rule was published in July 1990, it made no mention of asylum based on CPC.<sup>52</sup> In the waning days of the Bush administration, Attorney General William Barr signed another final rule permitting asylum based on CPC and overruling *Chang*.<sup>53</sup> The Bush administration scheduled this rule for publication on January 25, 1993, but immediately after President Clinton's inauguration on January 22, a directive was issued, "prohibiting publication of any new regulations not approved by [a Clinton] agency head."<sup>54</sup> As a result of all this confusion, courts continued to rely on the reasoning of *Chang* in denying asylum to refugees fleeing CPC in China into the mid-1990s.<sup>55</sup>

### *B. Motivations Behind Section 601*

As one might gather from the foregoing discussion, the impetus behind section 601's passage focused almost exclusively on China. Note also that, intuitively, whenever one country grants asylum to refugees fleeing from another country, it necessarily expresses disapproval of human rights practices in that country. This poses an important question: was the passage of section 601 the result of strong Cold War, anti-communist sentiments, the product of

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48. 135 CONG. REC. H6731-32 (daily ed. Oct. 5, 1989); *Chen v. I.N.S.* 93, F. 3d 801, 803 (9th Cir. 1996).

49. Memorandum of Disapproval for the Emergency Chinese Immigration Relief Act of 1989, 25 WEEKLY COMP. PRES. DOC. 1853-54 (Dec. 4, 1989); *Guo Chun Di v. Carroll*, 842 F. Supp. 858, 863 (E.D. Va. 1994), *overruled on other grounds by* *Chen Zhou Chai v. Carroll*, 48 F.3d 1331 (4th Cir. 1995).

50. Refugee Status, Withholding of Deportation, and Asylum; Burden of Proof, 55 Fed. Reg. 2803, 2803-04 (Jan. 29, 1990) (to be codified at 8 C.F.R. pts. 298 and 242).

51. EXEC. ORDER NO. 12,711, 55 Fed. Reg. 13,897 (Apr. 13, 1990); Bresnick, *supra* note 42, at 139.

52. *Guo Chun Di*, 842 F. Supp. at 863 (referring to 55 Fed. Reg. 30,674 (July 27, 1990) (to be codified at 8 C.F.R. pts. 3, 103, 208, 236, 242, and 253)).

53. *Id.* at 864; *see also* Bresnick, *supra* note 42.

54. *Guo Chun Di*, 842 F. Supp. at 864.

55. *See* Abrams, *supra* note 43, at 887 & n.32 (citing *Zhang v. Slattery*, 55 F.3d 732 (2d Cir. 1995); *Chen v. INS*, 95 F.3d 801 (9th Cir. 1996); *Chen Zhou Chai v. Carroll*, 48 F.3d 1331 (4th Cir. 1995)).

unique bilateral relations between China and the United States, or some other factor? This subsection examines these possibilities.

1. *Anti-Communism and U.S. Immigration Policy*

In the latter part of the 20<sup>th</sup> Century, the push to topple communism resulted in the fall of the Berlin Wall in 1989, and the subsequent demise of the Soviet Union.<sup>56</sup> In addition, much of United States foreign policy reflected opposition to other major Marxist regimes, particularly China and Cuba. During the 1960s, the United States permitted an estimated 340,000 Cuban immigrants to enter the country by way of “freedom flights.”<sup>57</sup> In addition, Congress passed the Cuban Adjustment Act of 1966 (CAA) enabling Cuban immigrants to claim political asylum without establishing nexus.<sup>58</sup> Later, the Carter administration adopted an “open hearts and open arms” policy, resulting in a mass exodus from the Cuban port of El Mariel, emptying Castro’s prisons, and allowing over 125,000 Cuban nationals to flood the shores of the United States.<sup>59</sup> During the 1990s, after the fall of the Soviet Union, the Clinton administration notably limited Cuban immigration through a “Wet-Foot/Dry-Foot Policy.”<sup>60</sup> This tightening of Cuban immigration after the failure of communism in Russia suggests that U.S. policymakers felt less pressure to demonstrate to the world the superior compassion and humaneness of democracy over communism.

Nevertheless, the liberalized asylum policies adopted in favor of Cuban immigrants stand in stark contrast to those adopted in the United States with regard to Cuba’s Caribbean neighbor, Haiti. Despite decades of political turmoil similar to the brutal Castro regime, Haitian asylum-seekers must individually prove that they qualify for asylum based on one of the five enumerated grounds.<sup>61</sup> The disparity in treatment of Cuban and Haitian

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56. U.S. DEP’T OF STATE, FALL OF COMMUNISM, <http://www.state.gov/r/pa/ho/time/dr/17672.htm>.

57. Alberto J. Perez, *Wet Foot, Dry Foot, No Foot: The Recurring Controversy Between Cubans, Haitians, and the United States Immigration Policy*, 28 NOVA L. REV. 437, 443 (2003).

58. See Cuban Adjustment Act, Pub. L. No. 89-732, § 1, 80 Stat. 1161 (codified at 8 U.S.C. § 1255).

59. Perez, *supra* note 57, at 445.

60. *Id.* “Wet-Foot/Dry-Foot” refers to the practice of distinguishing between Cuban immigrants the Coast Guard intercepted at sea (wet-foots), and those who made it to U.S. soil (dry-foots). The Coast Guard returned the wet-foots to Cuba, and permitted the dry-foots to stay in the United States. See *id.*

61. See *id.* at 46-53 (detailing the plight of Haitian immigrants seeking asylum in U.S. courts).

asylum-seekers clearly demonstrates that anti-communism influences United States asylum policies.<sup>62</sup>

## 2. *United States Relations With China*

While anti-communist sentiments persisted throughout the years leading up to the passage of section 601, elements of the unique, and often contradictory, relationship between the United States and China may have contributed more significantly. “On January 1, [1979] the United States and . . . [China] formally establish[ed] diplomatic relations.”<sup>63</sup> Throughout the 1980s, college students in China initiated several pro-democracy demonstrations, demanding political and economic reforms.<sup>64</sup> Beginning in April of 1989, thousands of student protesters began to gather in Tiananmen Square in Beijing.<sup>65</sup> Embroiled in a continuous struggle to maintain control over its people, the Chinese government branded the demonstrators as part of a plot to “overthrow the Communist Party and the socialist system.”<sup>66</sup> On May 20, the government declared martial law in Beijing.<sup>67</sup> Then on June 3, the Chinese military opened fire on the thousands of student protesters gathered in Tiananmen Square.<sup>68</sup> The remainders were escorted out at gunpoint.<sup>69</sup> The Tiananmen Square massacre brought international attention to human rights abuses in China, and prompted policymakers in the United States to begin formulating the proper response.

According to a recently declassified State Department document, the Chinese Communist Party at the time of the Tiananmen Square massacre was engaged “in an exquisite balancing act” between the United States and the Soviet Union.<sup>70</sup> The Chinese government hosted three U.S. Naval warships in Shanghai on May 19, 1989, the day after Soviet President Mikhail

62. See *id.* at 454-55 (describing the benefits Cuban immigrants received through deferential U.S. asylum policies as “the spoils of the Cold War fervor.”); see also Ted Conover, *The United States of Asylum*, N.Y. TIMES MAGAZINE, Sept. 19, 1993, at 56, 58 (noting that “Eastern Europeans fleeing Communist regimes were practically all approved for asylum; victims of violence in Central American countries that had the support of the United States Government were routinely denied”).

63. 20th Century China: A Partial Chronology, Tiananmen Square T.V., Long Bow Group, Inc., <http://www.tsquare.tv/chronology> (last visited Aug. 31, 2005).

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. CHINA AND THE U.S – A PROTRACTED ENGAGEMENT, in *The U.S. “Tiananmen Papers” 2* (Michael L. Evans, ed., 2001), <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB47/> (last visited Aug. 31, 2005).

Gorbechev visited the city.<sup>71</sup> The State Department document also reports that the Chinese government instigated “a massive [propaganda] campaign to discredit U.S. influence [on] the Chinese people”, denouncing American ideologies as “bourgeois liberalism.”<sup>72</sup> In response, the United States abruptly ceased arms sales and military contacts with China, and diplomatic relations between the two countries waned.<sup>73</sup>

Oddly, at the same time political relations between the United States and China deteriorated, economic relations between the countries flourished. The United States annually extended a discretionary trade waiver to China granting it “Most Favored Nation” status.<sup>74</sup> Since 1989, politicians in Washington have introduced legislation seeking to assign certain human rights prerequisites to the extension of China’s waiver renewal, but their efforts have failed.<sup>75</sup> The fact that these legislative measures did not succeed while section 601 passed is instructive. It shows that most of Congress viewed section 601 as a way to condemn Chinese human rights abuses without burdening a profitable economic relationship with China.

When viewed in this historical context, it is not surprising that the Board of Immigration Appeals decision in *Matter of Chang* aroused so much action on the part of Congress and the President.<sup>76</sup> Note that the BIA handed down *Chang* on May 12, 1989,<sup>77</sup> just as Tiananmen Square was heating up. Policymakers in Washington wanted to overrule *Chang* in order to express disapproval of human rights abuses in China. However, President Bush, cognizant of the important U.S. economic interests in China, would not sign a bill that could jeopardize those interests.<sup>78</sup> This conclusion seems even more plausible when one compares the text of the vetoed Armstrong-Deconcini amendment, entitled “Chinese Fleeing Coercive Population Control Policies,” to the text of section 601.<sup>79</sup> While section 601 uses neutral language, not specifically naming China, Armstrong-Deconcini explicitly singles out:

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71. *Id.*

72. *Id.* at 2.

73. *Id.* at 3.

74. International Trade Data System (I.T.D.S.), Normal Trade Relations (Formerly known as Most Favored-Nation status - MFN), <http://www.itds.treas.gov/mfn.html> (last visited Aug. 31, 2005).

75. *Id.*

76. See generally *Matter of Chang*, 20 I. & N. Dec. 38, 43 (B.I.A. 1989) *superseded by statute*, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. § 1101(a)(42) (2000); Pub. L. No. 104-208, §601, 110 Stat. 3009-689.

77. *Id.*

78. Bresnick, *supra* note 42, at 137 & n.97.

79. 135 Cong. Rec. H6731 (daily ed. Oct. 5, 1989).

[N]ationals of the People's Republic of China who express a fear of persecution upon return to that country because they refuse to abort a pregnancy or resist surgical sterilization in violation of Chinese Communist Party directives on population, if such refusal is undertaken with full awareness of the urgent priority assigned to such directives by all levels of the Chinese government, and full awareness of the severe consequences which may be imposed for violation of such directives.<sup>80</sup>

It goes on to say:

In view of the urgent priority assigned to the "one couple, one child" policy by high level Chinese Communist Party officials and local party cadres at all levels, as well as the severe consequences commonly imposed for violations of that policy, which are regarded as "political dissent," refusal to abort or to be sterilized . . . shall be viewed as an act of political defiance justifying a 'well founded fear of persecution' sufficient to establish refugee status.<sup>81</sup>

President Bush may have feared that the harsh language of Armstrong-Deconcini would do further damage to an already unstable relationship with China.

### *3. Pro-life Politics and the United Nations Population Fund*

While anti-communism and relations with China seem to have contributed to section 601, debate within Congress reveals a much more direct motivation. Apparently, the driving force behind most of the opposition to China's population practices came from a strong abhorrence of government sponsorship of abortion and sterilization in general. Congress deliberated over two proposed prongs of opposition to coercive population control ("CPC") in China in the years leading up to the passage of section 601: (1) the drive to grant asylum to victims of China's one child policy; and (2) the desire to cut funding for United Nations Population Fund ("UNFPA") activities in China. Leading the charge, Representative Christopher Smith of New Jersey sponsored

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80. *Id.* at H6731-32.

81. *Id.* at H6732.

section 601 as well as legislation to eliminate funding for UNFPA activities.<sup>82</sup>

The UNFPA has long denied participating in China's one-child policy, and claims not to provide abortion related services.<sup>83</sup> However, many members of Congress find their denials hard to believe, especially in light of the fact that UNFPA shares office space with local Chinese population control cadres.<sup>84</sup> For example, in at least one instance, "the UNFPA office desk . . . faces—in fact touches—a desk of the Chinese Office of Family Planning."<sup>85</sup> U.N. watchdog groups also express distrust of the UNFPA's claimed anti-abortion policy in light of the fact that its "reproductive health kits" include vacuum aspirators, IUDs, and morning after pills.<sup>86</sup> On the other side of the aisle, liberals in Congress dismissed Representative Smith's statements as "anti-abortion rhetoric," claiming that the UNFPA provides important family planning and population assistance in over 140 countries.<sup>87</sup> Those who support funding UNFPA's efforts in China view the organization's work as a legitimate effort to deal with perceived impoverishing effects of overpopulation.<sup>88</sup>

Indeed, vigorous debate regarding the appropriate posture the United States should assume in addressing China's one-child policy circulated throughout Congress and elsewhere. Critics of section 601 argued that the bill's wide applicability would cause a vast expansion of millions of illegal immigrants and facilitate

82. *Id.*; see also 141 CONG. REC. H6446, H6447-48 (daily ed. June 28, 1995).

83. *Coercive Population Control in China*, *supra* note 6, at 39 (letter submitted for the hearing record from Stirling Scruggs, Director of Information and External Relations, United Nations Population Fund).

UNFPA does not support China's one-child policy, and is unequivocally opposed to targets and quotas. UNFPA does not provide support for abortions or abortion-related activities anywhere in the world. It is the policy of the UNFPA not to provide assistance for abortions, abortion services, or abortion-related equipment and supplies as a method of family planning.

*Id.*

84. *Id.* at 13-14 (statement of Josephine Guy, Director of Governmental Affairs, America 21).

85. *Id.* at 14.

86. UNFPA Elusive About Abortion Aid for Tsunami Victims, Catholic Family and Human Rights Institute, 8 Friday Fax, No. 3 (Jan. 7, 2005), [http://www.c-fam.org/FAX/Volume\\_8/faxv8n3.html](http://www.c-fam.org/FAX/Volume_8/faxv8n3.html) (reporting on UNFPA's aggressive population control efforts in Afghanistan and areas affected by the December 2004 tsunami). For a list of contents of UNFPA's "reproductive health kits" see UNITED NATIONS POPULATION FUND, REPRODUCTIVE HEALTH IN REFUGEE SITUATIONS: AN INTER-AGENCY FIELD MANUAL, ch. 2, <http://www.unfpa.org/emergencies/manual/2.htm>.

87. See, e.g., 141 CONG. REC. H6450-51 (daily ed. June 28, 1995) (statements of Rep. Lowey of N.Y.).

88. See 141 CONG. REC. S16481, S16488-89 (daily ed. Nov. 1, 1995) (statements of Sen. Kassebaum of Kan. and Sen. Boxer of Cal.).

Chinese alien smuggling into the United States.<sup>89</sup> Proponents of this view, which can be thought of as the “floodgates” objection, emphasize the need for the annual statutory cap on the number of immigrants granted asylum under section 601. Liberals and feminists oppose China’s one-child policy for other reasons, such as the freedom to procreate and gender equality.<sup>90</sup> Some commentators equate “pronatalist” policies, such as bans on abortion in Islamic countries and Ireland and United States laws that fund and favor childbirth, with China’s policies of forced abortion and sterilization.<sup>91</sup> These critics believe current asylum law does not go far enough in addressing what they perceive as human rights violations.<sup>92</sup> Ultimately, the voices in favor of section 601 prevailed by describing in gruesome detail the population control practices implemented by the Chinese government and emphasizing the failure of the courts and INS to adequately address these claims.<sup>93</sup>

#### IV. CONTINUED NEED FOR SECTION 601

This section evaluates the various arguments for and against section 601 and population control in general. Of all the objections to section 601, the “floodgates” argument holds the most persuasive value. Arguably, every alien fleeing China could claim refugee status under section 601 because the practice of coercive population control permeates most areas of the country. Even with the statutory cap, if the number of aliens granted asylum under section 601 exceeds the cap for a given fiscal year, INS does not deport the surplus. Those aliens who exceed the cap are permitted to remain in the United States and apply for employment authorization while they await approval from the Executive Office of Immigration Review under the cap for the

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89. 141 CONG. REC. H5389-01, H5406 (daily ed. May 23, 1995) (statement of Rep. Hamilton of Ind.); see also Cleo J. Kung, Comment, Supporting the Snakeheads: Human Smuggling from China and the 1996 Amendment to the U.S. Statutory Definition of “Refugee”, 90 J. CRIM. L. & CRIMINOLOGY 1271, 1315-16 (2000).

90. See, e.g., *Coercive Population Control in China*, *supra* note 6, at 11 (statement of Rep. Lantos of Cal.).

91. See, e.g., Abrams, *supra* note 43, at 897-99 & n.107 (arguing that pronatalist biases should not obscure the significance of the harm that occurs when the state prevents a woman from controlling her fertility); *but c.f.* Bresnick, *supra* note 42, at 121-23 (agreeing that “[p]rotection of one’s body is a basic human right, not a privilege,” but conceding that “unavailability or illegality of abortion in some nations does not amount to a reproductive rights violation . . . . Although denial of abortion results in continued pregnancy, it does not amount to government control of a woman’s reproductivity.”).

92. See Abrams, *supra* note 43, at 905; see also Bresnick, *supra* note 42, at 153.

93. See 141 CONG. REC. H6447-H6450 (daily ed. June 28, 1995) (statements of Rep. Smith of N.J.).



following fiscal year.<sup>94</sup> Yet nearly ten years after section 601's enactment, the United States has not become inundated with Chinese refugees. Perhaps this is due to the fact that applicants must first make it from China to the United States, and then section 601 only applies if resistance to coercive family planning is the sole basis for the grant of asylum.<sup>95</sup> Also, asylum in general only accounts for a small percentage of total immigration to the United States.<sup>96</sup>

The claim that promoting abortion and sterilization practices will improve standards of living defies logic. In countries committed to social welfare, as population narrows, a smaller working class becomes *more* burdened by a larger population of the aged.<sup>97</sup> Even here in the United States, policymakers struggle with the future of Social Security as the "Baby Boom" generation begins to retire, forcing the next generation to contribute more and receive less. China's communist system of government magnifies the adverse effects of a narrowing population on the standard of living of its people because the government controls more than half of the economy, and most Chinese citizens depend on the government for resource allocation.<sup>98</sup> Consequently, communism in China causes its poverty problem, not its large population.

Claims that population control methods improve the status of women and minorities are equally unfounded. Such practices harm women and minorities in various ways. For example, a severe imbalance between the number of men and women in China continues to grow. At last estimate, the ratio of men to women was 120-to-100.<sup>99</sup> Chinese families favor male babies largely because of their earning capacity and social status in Chinese culture. When implemented in this cultural context, China's one child policy results in widespread sex-selective abortion and

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94. See OFFICE OF INT'L AFFAIRS, ASYLUM DIVISION, AFFIRMATIVE ASYLUM PROCEDURES MANUAL, 49 (2003).

95. *Id.*

96. Conover, *supra* note 62.

97. See Pontifical Council for the Family, Declaration on the Decrease of Fertility in the World, at § 5 (Feb. 27, 1998), [http://www.vatican.va/roman\\_curia/pontifical\\_councils/family/documents/rc\\_pc\\_family\\_doc\\_29041998\\_fecondita\\_en.html](http://www.vatican.va/roman_curia/pontifical_councils/family/documents/rc_pc_family_doc_29041998_fecondita_en.html). The Vatican reports that, for thirty years, "the rate of growth of the world's population has continued to decline." *Id.* at § 3. Fifty-one of the one hundred eighty-five countries worldwide, including the United States, Canada, China, and most of Europe, are currently at "below-replacement-level." *Id.* In addition, thirteen countries, mostly in eastern Europe, currently experience "depopulation" in which the annual "number of deaths surpass[es] the number of births." *Id.*

98. *China's Economy: Time to Hit the Brakes*, THE ECONOMIST (May 13, 2004), available at [http://www.economist.com/opinion/PrinterFriendly.cfm?Story\\_id=2668182](http://www.economist.com/opinion/PrinterFriendly.cfm?Story_id=2668182).

99. *Coercive Population Control in China*, *supra* note 6, at 36 (statement of Harry Wu, Director, Laogai Research Foundation).

infanticide.<sup>100</sup> Chinese orphanages are full of little girls and men are typically left with an inadequate pool of potential brides. These factors contribute to the increase in trafficking of women.<sup>101</sup> In addition to social ramifications, CPC procedures pose a physical threat to women because officials perform mass abortions and sterilizations hastily, without regard to the health of the woman.<sup>102</sup> In regard to minorities, although China purports to apply its CPC policy less stringently, victims still report that officials aggressively force abortions and sterilizations on minorities to meet local quotas.<sup>103</sup> The inability to produce multiple offspring virtually eliminates any possibility that a minority group will become the majority in the future.

The spread of genocidal population control practices to other countries presents a compelling reason for a non-country specific provision like section 601. For example, the State Department reports instances of North Korean government officials prohibiting live births in prison camps, and forcing abortions and the killing of newborn babies.<sup>104</sup> Reports indicate similar atrocities in Indonesian-occupied East Timor. For example, at least 500 students there reported instances where government officials offered them vitamin injections for nutritional purposes which actually contained depro provera, a drug causing sterilization.<sup>105</sup> In Colombia, the terrorist organization, Revolutionary Armed Forces of Colombia (FARC), “employed large numbers of female combatants, [and] prohibited pregnancies . . . [by] order[ing] forced implantation of intrauterine devices and forced abortions.”<sup>106</sup> Even though CPC occurs in other countries throughout the world, virtually all cases brought under section 601 involve Chinese asylum-seekers. This phenomenon may be explained by the fact that, in practice, to qualify for asylum based on CPC, the applicant must base the claim for asylum *solely* on CPC practices.<sup>107</sup> Given

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100. *Id.* at 35-36 (statement of Stephen W. Mosher, President, Population Research Institute).

101. *Id.* at 24 (statement of Harry Wu, Director, Laogai Research Foundation).

102. *Id.* at 25. By visiting several “family planning” facilities in China, Mr. Wu discovered that “[t]he physician performed the surgeries quickly, spending no more than ten minutes on each sterilized woman.” *Id.*

103. *Id.*

104. U.S. DEP’T OF STATE, 108th CONG., COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2003, *supra* note 5, at 854.

105. *Human Rights in Indonesia, Hearing Before the Subcomm. on Int’l Operations and Human Rights of the Comm. on Int’l Relations*, pt. 1, 105th Cong. 10-12 (1998) (statement of Constancio Pinto, United States and United Nations Representative, National Council of Maubere (East Tomor) [sic] Resistance).

106. 2 U.S. DEP’T OF STATE, 108th CONG., COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2003 1791, 2349 (Joint Comm. Print 2004).

107. *See* OFFICE OF INT’L AFFAIRS, ASYLUM DIVISION, AFFIRMATIVE ASYLUM PROCEDURES MANUAL, 49 (2003).

the numerous other human rights violations occurring in countries that use CPC, aliens seeking asylum may more easily qualify under one of the five enumerated grounds for refugee status. Nevertheless, those victims of CPC who cannot establish the nexus requirement necessarily rely on section 601 to gain asylum.

Some courts have granted asylum by defining social groups by reference to opposition to the particular harm the persecutor desires to inflict. In *In re Kasinga*, the BIA held that:

[y]oung women who are members of the Tchamba-Kunsuntu Tribe of northern Togo who have not been subjected to female genital mutilation, as practiced by that tribe, and who oppose the practice, are recognized as members of a “particular social group” within the definition of the term “refugee” under section 101(a)(42)(A) of the Immigration and Nationality Act.<sup>108</sup>

Many African tribes force female genital mutilation (“FGM”) upon young women by seizing the women and cutting their genitalia with knives as part of a cultural ritual.<sup>109</sup> The *Kasinga* court recognized the narrow social group stated above in order to grant asylum to objecting victims of FGM.<sup>110</sup> In the absence of legislation like section 601, courts could apply the same reasoning to victims of coercive population control by defining the social group as: men and women who are residents of a country in which the government utilizes coercive population control, and who oppose forcible abortion and sterilization.<sup>111</sup> However, this social group definition differs from that used in FGM cases for several reasons: (1) it includes both men and women; (2) it does not specify a particular tribe or country; (3) it includes both past and potential victims of coercive population control. The main feature of the social group definition in *Kasinga* is its narrowness. Even the most liberal courts would not likely recognize such a broad social group to cover victims of CPC. For this reason, section 601 remains the only feasible basis for admitting aliens fleeing CPC.

Ultimately, one may conclude that governmental attempts to alter population increase as a force of nature are both foolish and

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108. *In re Fauziya Kasinga*, 21 I. & N. Dec. 357 (B.I.A.1996).

109. *Id.* at 361.

110. *See id.*

111. *Id.*

futile. Even Thomas Malthus, a proponent of population control, concedes:

[F]ood is necessary to the existence of man...the passion between the sexes is necessary and will remain nearly in its present state. These two laws, ever since we have had any knowledge of mankind, appear to have been fixed laws of our nature, and, as we have not hitherto seen any alteration in them, we have no right to conclude that they will ever cease to be what they now are, without an immediate act of power in that Being who first arranged the system of the universe, and for the advantage of his creatures, still executes, according to fixed laws, all its various operations.<sup>112</sup>

Furthermore, Darwin theorized in *On The Origin of Species*: [a]s many more individuals of each species are born than can possibly survive; and as, consequently, there is a frequently recurring struggle for existence, it follows that any being, if it vary however slightly in any manner profitable to itself...will have a better chance of surviving, and thus be naturally selected.<sup>113</sup>

By this, Darwin posits that natural population growth will inevitably result in competition, and in turn, evolution. Based on these ideas and observations, it seems unlikely that CPC practices will succeed in achieving decreased population, and conversely, increasing population may serve to benefit mankind in the long run.

## V. CONCLUSION

Regardless of one's political or moral views on abortion, contraception, and sterilization, objection to coercive population control remains a vital component of United States asylum law. Section 601 provides a workable solution to the dilemma facing victims of CPC in seeking refugee status, in terms of limiting a flood of immigrants from the People's Republic of China and expressing disapproval of a policy that violates basic human procreative rights and harms women and minority interests. As stated above, section 601 applies only to asylum-seekers who base their claims solely on objection to CPC practices, and removes the seemingly insurmountable barrier such victims face in proving a

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112. MALTHUS, *supra* note 2, at 4.

113. DARWIN, *supra* note 2.

nexus to one of the five enumerated grounds for refugee status. Whatever the motivations which led to section 601's passage, the statute represents a strong policy in favor of a culture that cherishes life and respects human dignity, thus exemplifying traditional values at the core of American society.

**WORKERS' RIGHTS IN THE MEXICAN MAQUILADORA  
SECTOR: COLLECTIVE BARGAINING, WOMEN'S  
RIGHTS, AND GENERAL HUMAN RIGHTS: LAW, NORMS,  
AND PRACTICE**

JOSHUA M. KAGAN

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“We believe it’s indispensable to democratize the world of work,  
because the workers have been kidnapped by their own unions.  
For ninety percent of them, their unions are just a pretense. They  
work under protection contracts and corrupt arrangements, which  
are never renegotiated. In our country, Mexicans can elect a new  
president, but the workers can’t *elect* their own leaders.”

~Francisco Hernández Juárez<sup>1</sup>

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1. DAVID BACON, *THE CHILDREN OF NAFTA: LABOR WARS ON THE U.S./MEXICO BORDER* 293 (Univ. of California Press 2004). Francisco Hernández Juárez is the Secretary-

## I. INTRODUCTION

It was hoped that the birth of *maquiladoras*<sup>2</sup>—“foreign-owned assembly plants clustered along the Mexico-U.S. border”<sup>3</sup>—in 1965 would christen an era of increased foreign investment and employment in Mexico.<sup>4</sup> These goals have been largely realized. Between 1966 and 2004, the number of Mexicans employed in the *maquiladora* sector grew from 3000<sup>5</sup> to approximately 1.14 million.<sup>6</sup> While the influx of *maquiladoras* in Mexico has delivered on its promise of increased employment, critics contend that such growth has come at the expense of human rights in the Mexican border towns.<sup>7</sup> This Note analyzes the emergence and sustainability of the Mexican *maquiladora* sector, its effect on working conditions and workers’ rights, the correlation between its

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General of the Mexican National Union of Workers (UNT). *Id.* In September 2002, the UNT introduced a series of labor reforms in the Mexican Chamber of Deputies. *Id.* at 292-93.

2. Throughout Mexican-American border culture, the words *maquiladora* and *maquila* are used interchangeably to describe the foreign-owned assembly plants clustered along the border. For the sake of consistency, the former is used throughout this Note. The term *maquiladora* is also often used to describe the workers in these plants. For the sake of consistency and clarity, it is used here only in reference to the assembly plants themselves.

3. THE MAQUILADORA READER: CROSS-BORDER ORGANIZING SINCE NAFTA 1 (Rachael Kamel & Anya Hoffman eds., American Friends Service Committee 1999) (hereinafter MAQUILADORA READER); see also William C. Gruben & Sherry L. Kiser, *NAFTA and Maquiladoras: Is the Growth Connected?*, in FEDERAL RESERVE BANK OF DALLAS, THE BORDER ECONOMY 22-24, at 23 (2001), available at [http://www.dallasfed.org/research/border/tbe\\_gruben.pdf](http://www.dallasfed.org/research/border/tbe_gruben.pdf). (“A *maquiladora* is a labor-intensive assembly operation. In its simplest organizational form, a Mexican *maquiladora* plant imports inputs from a foreign country—most typically the United States—processes these inputs and ships them back to the country of origin, sometimes for more processing and almost surely for marketing”); Elvia R. Arriola, *Voices from the Barbed Wires of Despair: Women in the Maquiladoras, Latina Critical Legal Theory, and Gender at the U.S.-Mexico Border*, 49 DEPAUL L. REV. 729, 762 (2000) (defining *maquiladoras* as sharing four basic characteristics: “(1) being American subsidiaries or contract affiliates under Mexican or foreign ownership; (2) principally engaged in the assembly of components . . . the processing of primary materials or the production of intermediate or final products; (3) that import most or all primary materials and components from American plants and re-export them to the United States; and that (4) are labor intensive”).

4. See JORGE A. VARGAS, MEXICAN LAW: A TREATISE FOR LEGAL PRACTITIONERS AND INTERNATIONAL INVESTORS 194 (West Group 1998).

5. Khosrow Fatemi, *Introduction to THE MAQUILADORA INDUSTRY: ECONOMIC SOLUTION OR PROBLEM?* 4 (Khosrow Fatemi ed., Praeger Publishers 1990) (hereinafter MAQUILADORA INDUSTRY).

6. BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEP’T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES—2004: MEXICO, § 6(b), (2005), available at <http://www.state.gov/g/drl/rls/hrrpt/2004/41767.htm> [hereinafter STATE DEP’T REPORT].

7. For general discussions of the negative consequences to human rights that the *maquiladora* industry has brought to Mexico, see HUMAN RIGHTS WATCH, A JOB OR YOUR RIGHTS: CONTINUED SEX DISCRIMINATION IN MEXICO’S MAQUILADORA SECTOR, (vol. 10, no. 1(B) 1998), available at <http://www.hrw.org/reports98/women2/> [hereinafter A JOB OR YOUR RIGHTS]; BACON, *supra* note 1, at 60-79; MARÍA PATRICIA FERNÁNDEZ-KELLY, FOR WE ARE SOLD, I AND MY PEOPLE: WOMEN AND INDUSTRY IN MEXICO’S FRONTIER (State Univ. of New York Press 1983); MAQUILADORA READER *supra* note 3; NORMA IGLESIAS PRIETO, BEAUTIFUL FLOWERS OF THE MAQUILADORA (Univ. of Texas Press 1992).

success and the enforcement of Mexican labor law, and its future prospects. In doing so, this Note suggests a model of corporate regulation whereby the interests of the state and the individual worker can hopefully be reconciled.

## II. HISTORY OF THE MEXICAN MAQUILADORA SECTOR

### A. *The Bracero Program*

In order to understand the current state of the Mexican *maquiladora* sector, it is helpful to understand its history and precursors. In 1942, the U.S. and Mexican governments entered into the Bracero Program.<sup>8</sup> Under the Bracero Program, Mexican citizens were permitted to take temporary agricultural work in the United States.<sup>9</sup> Border towns such as Tijuana and Ciudad Juárez (Juárez) grew dramatically as they became the bases from which U.S. farmers and agricultural companies hired Mexican workers.<sup>10</sup> Though the program ended in 1964, Mexican citizens remained hopeful that they would still be able to find work in these towns.<sup>11</sup> Thus, the termination of the Bracero Program did not halt the influx of Mexican citizens to the border towns. These towns became overcrowded, and their citizens suffered from “extreme shortages of food, water, shelter, and transportation.”<sup>12</sup>

### B. *The National Border Development Program (PRONAF)*

In an effort to boost Mexico's economy by attracting foreign investment and creating jobs for those living in these overcrowded border towns, the Mexican government created the National Border Development Program (Programa Nacional Fronterizo, or PRONAF) in 1965.<sup>13</sup> This program resulted in the development of the modern *maquiladora* sector. Under PRONAF, the Mexican government grants licenses to foreign companies to import machinery, raw materials, parts, and components into Mexico.<sup>14</sup> After assembly in Mexican *maquiladoras*, the products generally

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8. Bracero Agreement, Mex-U.S., Aug. 4, 1942, 56 Stat. 1759, available at <http://sunsite.berkeley.edu/calheritage/latinos/agreement1942frameset.html> (last visited Nov. 16, 2005); see also ERNESTO GALARZA, MERCHANTS OF LABOR: THE MEXICAN BRACERO STORY (McNally & Loftin 1972).

9. Bracero Agreement, *supra* note 8.

10. Jorge A. Vargas, *U.S. Border Patrol Abuses, Undocumented Mexican Workers, and International Human Rights*, 2 SAN DIEGO INT'L L.J. 1, 16 (2001).

11. *Id.* at 15-16.

12. *Id.* at 16.

13. *Id.*; see also MAQUILADORA READER, *supra* note 3, at 2-3.

14. MAQUILADORA READER, *supra* note 3, at 3.



are re-exported.<sup>15</sup> Other than the prospect of cheaper labor costs,<sup>16</sup> the major benefit to U.S. corporations setting up these assembly plants in Mexico was favorable tariffs. Under Section 9802.0080 of the Harmonized Tariff Schedule (HTS), the import duties levied by the U.S. were limited only to the value added in Mexico (the actual cost of wages and related costs in Mexico), “rather than the full value of the products.”<sup>17</sup>

### C. The 1989 Maquiladora Decree

Mexico has a long history of limiting foreign investment and ownership.<sup>18</sup> While the *maquiladora* program signified the beginning of a break from that tradition, the Mexican government originally limited *maquiladoras* to the Mexico-U.S. border region.<sup>19</sup> This limitation was intended to curtail the influx of foreign goods and competition into the Mexican domestic market, stimulate employment in the overpopulated border region, and capitalize on Mexico’s geographic proximity to the United States.<sup>20</sup> But ostensibly in response to the debilitating oil crises of the early 1980s,<sup>21</sup> Mexico sought to revitalize its economy by loosening the restrictions on *maquiladoras*.<sup>22</sup>

In 1989, the Mexican Government passed the Decree for the Promotion and Operation of the Maquiladora Export Industry (1989 Maquiladora Decree).<sup>23</sup> This decree had two primary effects on the *maquiladora* sector. First, it permitted *maquiladora* owners to sell up to half of their Mexican-manufactured goods in domestic markets.<sup>24</sup> Second, the 1989 Maquiladora Decree made *maquiladora* licenses valid for an indefinite period, versus the

15. *Id.*

16. See Thea Lee, *Happily Never NAFTA: There’s No Such Thing as Free Trade*, in *THE CASE AGAINST FREE TRADE* 70-77 (William Greider et al. eds., Earth Island Press and North Atlantic Books 1993).

17. VARGAS, *supra* note 4; see also MAQUILADORA READER, *supra* note 3, at 3.

18. See, e.g., VARGAS, *supra* note 4, at 119; Sanford E. Gaines, *NAFTA as a Symbol on the Border*, 51 UCLA L. REV. 143, 191 (2003).

19. See David A. Gantz, *New Challenges for the Maquiladoras: Legal and Policy Implications of NAFTA Article 303 for United States-Mexico Trade*, 30 DENV J. INT’L L & POL’Y 1, 11 (2001).

20. See Fatemi, *supra* note 5, at 8-10.

21. See Kenneth S. Culotta, *Recipe for a Tex-Mex Pipeline Project: Considerations in Permitting a Cross-Border Gas Transportation Project*, 39 TEX INT’L L.J. 287, 290 (2004).

22. See Fatemi, *supra* note 5, at 11.

23. DECREE FOR THE PROMOTION AND OPERATION OF THE MAQUILADORA EXPORT INDUSTRY, reprinted in 4 WILLIAM D. SIGNET, MEXICAN LAW LIBRARY 259-95 (West Publishing 1997) [hereinafter 1989 MAQUILADORA DECREE].

24. *Id.*; see also James R. Gallop & Christopher J. Craddock, *The North American Free Trade Agreement: Economic Integration and Employment Dislocation*, 19 J. LEGIS. 265, 277. (1993).

previously imposed two-year limit.<sup>25</sup> This liberalization of Mexico's foreign investment restrictions led to increased growth in the *maquiladora* sector and paved the way for the enactment of NAFTA five years later.

*D. The North American Free Trade Agreement (NAFTA)*

Recently, the most significant law affecting *maquiladoras*—and Mexico-U.S. commerce in general—has been the North American Free Trade Agreement (NAFTA).<sup>26</sup> Taking effect on January 1, 1994, NAFTA created a “free trade zone” between Mexico, the United States, and Canada.<sup>27</sup> Under NAFTA, the tariff exemptions afforded to the *maquiladora* industry are no longer confined to the border region, but are offered throughout Mexico.<sup>28</sup> While this further liberalization of Mexico's foreign investment framework was expected to stimulate economic growth throughout the nation, the *maquiladora* industry remains largely concentrated along the Mexico-U.S. border.<sup>29</sup>

Rather than immediately altering Mexico's foreign investment laws, NAFTA was intended to have a more gradual effect. As a result of this gradation, *maquiladoras* were permitted to sell 100 percent of their production into the Mexican domestic market by January 1, 2001.<sup>30</sup> By 2009, all products traded between the three NAFTA state-parties will receive duty-free entry if the products originated in a NAFTA state.<sup>31</sup>

While the piecemeal liberalization of Mexico's foreign investment laws has increased the prospects for the nation's economic growth, it is widely contended that the emergence of the *maquiladora* sector has also created an abundance of social problems within Mexico's border region. Among Mexicans, the general opinion of NAFTA's effect on the State is, at best, mixed. “In a poll conducted at the end of 2002 by Ipsos-Reid for the Woodrow Wilson Centre in Washington, only 29 percent of Mexicans interviewed said that NAFTA has benefited Mexico; 33

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25. 1989 MAQUILADORA DECREE, *supra* note 23; *see also* Gallop & Craddock, *supra* note 24.

26. *See* North American Free Trade Agreement, Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M. 296 [hereinafter NAFTA].

27. *Id.*; *see also* Gabriela A. Gallegos, *Border Matters: Redefining the National Interest in U.S.-Mexico Immigration and Trade Policy*, 92 CAL L. REV. 1729, 1734 (2004).

28. MAQUILADORA READER, *supra* note 3, at 3.

29. Two years after the enactment of NAFTA, more than 85 percent of *maquiladora* workers continued to be employed along the Mexico-U.S. border. *Id.*

30. VARGAS, *supra* note 4, at 195.

31. *See* Chiang-Feng Lin, *Investment in Mexico: A Springboard Toward The NAFTA Market – An Asian Perspective*, 22 N.C. J. INT'L L. & COM. REG. 73, 119 (1996).

percent thought that it had hurt the country and 33 percent said that it had made no difference.”<sup>32</sup> It would be unrealistic to suggest that all of the social ills occurring in Mexico’s border towns are solely attributable to the emergence of *maquiladoras*. Many of the problems undoubtedly stem from a confluence of causes, among them the vast wealth disparity and unemployment along the border that proponents of the *maquiladora* system suggest it is intended to rectify. Nonetheless, in order to fully understand the scope of *maquiladoras* in the trans-border region, an examination of these social situations is warranted.

### III. HUMAN RIGHTS CONCERNS ASSOCIATED WITH THE MEXICAN MAQUILADORA SECTOR

#### A. Substandard Working Conditions

One of the primary complaints lobbed against the *maquiladora* sector is that the working conditions are substandard. Issues surrounding the working conditions in *maquiladoras* include general occupational health and safety concerns, allegations of fundamental human rights violations, and life-threatening situations.

Exposure to dangerous chemicals is a common health threat for *maquiladora* workers.<sup>33</sup> One study published in the *American Journal of Industrial Medicine* (AJIM study) stated that 43 percent of *maquiladora* workers “interviewed reported being exposed to dust-borne chemicals during at least part of their shift, while 45 percent reported gas or vapor exposure.”<sup>34</sup> In the same study, 41 percent of workers surveyed reported that their daily work regularly involved handling chemicals.<sup>35</sup> “A similar study, conducted in Tijuana, found that 35 percent of those surveyed handled chemicals on a daily basis.”<sup>36</sup> Granted, exposure to chemicals may be a routine part of work in any factory. However,

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32. *Free Trade on Trial*, THE ECONOMIST 13, Jan. 3, 2004.

33. See Michael S. Barr et al., *Labor and Environmental Rights in the Proposed Mexico-United States Free Trade Agreement*, 14 HOUS. J. INT’L L. 1, 16 (1991); George Kourous, *Workers’ Health Is on the Line: Occupational Health and Safety in the Maquiladoras*, in MAQUILADORA READER, *supra* note 3, pp. 52-56, at 52 (citing a study published in the *American Journal of Industrial Medicine* which found that many *maquiladora* workers reported exposure to toxic materials); Diane Lindquist, *Toxic Legacy: Polluter Leaves Faint Tracks; but U.S.-Mexican Officials Follow Trail into ‘Uncharted Waters’*, SAN DIEGO UNION-TRIB., Apr. 6, 1993, at C1 (discussing health problems of *maquiladora* workers frequently exposed to toxic chemicals).

34. Kourous, *supra* note 33, at 52.

35. *Id.* at 53.

36. *Id.*

without appropriate safety equipment and training, this exposure quickly becomes a dangerous proposition.

*Maquiladora* workers often are neither properly trained nor educated as to the relevant safety precautions for their particular job.<sup>37</sup> A study of Tijuana/Tecate *maquiladora* workers by the Comité de Apoyo Fronterizo Obrero Regional (CAFOR study) found that “53 percent of the . . . workers surveyed . . . had not received Material Safety Data Sheets from their employers, as required by Mexican law.”<sup>38</sup> That same study found that “40 percent of all workers surveyed had not received any training from employers regarding on-site hazards or recommended protective practices.”<sup>39</sup> “A similar survey of *maquiladora* workers in Reynosa, Tamaulipas, conducted by the Centro de Estudios Fronterizos y de Promoción de los Derechos Humanos,” revealed that “72 percent of the respondents had not received training in handling toxic substances, 53 percent had no training in general health risks related to their work, and 50 percent hadn’t been taught the proper execution of plant emergency response plans.”<sup>40</sup>

Another area of concern is the function of safety equipment in *maquiladoras*. They may lack safety equipment, existing safety equipment may be outdated, or the equipment may malfunction.<sup>41</sup> For example, in 1996, eight workers suffered third-degree burns in an explosion at a Juárez *maquiladora* that regularly handled flammable substances but did not have basic fire safety equipment.<sup>42</sup> The CAFOR study found that “only 33 percent of electronics workers with exposure to airborne toxins reported being given filter respirators.”<sup>43</sup> Respondents also reported that *maquiladora* owners disable the safety controls on machinery in the hopes of improving procedural efficiency.<sup>44</sup>

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37. *Id.*; see also Sherri M. Durand, *American Maquiladoras: Are They Exploiting Mexico's Working Poor?*, 3 KAN. J.L. & PUB. POL'Y 128, 131 (1994) (citing a report by the U.S. General Accounting Office which found that eight American-owned *maquiladoras* “lacked or had incomplete hazard-specific programs and training necessary to mitigate certain observed hazards”).

38. Kourous, *supra* note 33, at 53.

39. *Id.*

40. *Id.*

41. *Id.* at 52; see also ALTHA J. CRAVEY, *WOMEN AND WORK IN MEXICO'S MAQUILADORAS* 6 (Rowman & Littlefield 1998); PRIETO, *supra* note 7, at 10-11 (describing the reflections of a *maquiladora* worker, Gabriela, on working with toxic acids and chemicals in a room without appropriate safety or ventilation equipment); Judith Ann Warner, *The Sociological Impact of the Maquiladoras*, in *MAQUILADORA INDUSTRY*, *supra* note 5, at 193.

42. Kourous, *supra* note 33, at 52.

43. *Id.* at 54.

44. *Id.*

The average workweek in the *maquiladoras* is five to ten hours longer than the average workweek in the U.S.<sup>45</sup> One study found that only 7 percent of *maquiladora* workers reported working less than 45 hours per week.<sup>46</sup> Although the average 48-hour workweek is supposed to be spread out over six days, *maquiladora* owners have “*gringo-ized*” the week “by collapsing the 48 hours into five days.”<sup>47</sup> Despite condensing the legally mandated workweek, additional Saturday work shifts still are a regularity, and overtime hours are often worked at the same rate of pay.<sup>48</sup> During these shifts, workers are expected to keep their production in line with certain output quotas.<sup>49</sup> A worker who does not demonstrate a consistent pattern of improved production risks losing her job.<sup>50</sup> Long workweeks and the emphasis on production to meet individual output quotas further contribute to the physically and mentally stressful work environment of *maquiladoras*. Studies reveal that the combination of long working hours and high production quotas is likely related to the high incidence of worker injuries and negative health effects.<sup>51</sup>

*B. Health Effects and Health-Related Problems Associated with Working in the Maquiladoras*

Due to the factors described in the preceding section, *maquiladora* work results in high incidences of injury, disease, and general poor health.<sup>52</sup> The CAFOR study indicated several negative health conditions among Tijuana *maquiladora* workers, such as chest pain (76.5 percent of respondents),<sup>53</sup> rashes (62.5 percent of respondents),<sup>54</sup> and upper airway irritation (58.55 percent of respondents).<sup>55</sup> An additional 21 percent of the respondents reported illnesses that they believed were caused by

45. Arriola, *supra* note 3, at 773.

46. *Id.*; see also DEVON G. PEÑA, THE TERROR OF THE MACHINE: TECHNOLOGY, WORK, GENDER, AND ECOLOGY ON THE U.S.-MEXICO BORDER, 46-51 (Univ. of Texas Press 1997).

47. KATHRYN KOPINAK, DESERT CAPITALISM: MAQUILADORAS IN NORTH AMERICA'S WESTERN INDUSTRIAL CORRIDOR 137 (Univ. of Arizona Press 1996).

48. Arriola, *supra* note 3, at 773; see also CRAVEY, *supra* note 41, at 97 (“[M]aquiladoras commonly extend the working day beyond the limit of eight hours mandated by Mexican labor law”).

49. Arriola, *supra* note 3, at 772.

50. *Id.*

51. See Warner, *supra* note 41, at 193.

52. See, e.g., CRAVEY, *supra* note 41, at 96-97; PRIETO, *supra* note 7, at 4-5, 21; Kourous, *supra* note 33, at 52-53.

53. Kourous, *supra* note 33, at 52.

54. *Id.*

55. *Id.*

work conditions; the majority attributed these to chemical exposure.<sup>56</sup>

Another informative study of the health problems faced by *maquiladora* workers was conducted in 1992 by the University of Massachusetts–Lowell, Work Environment Program (Lowell Study).<sup>57</sup> This study focused on *maquiladora* workers in Matamoros and Reynosa.<sup>58</sup> Common complaints among the respondents to the Lowell Study included headaches (56 percent),<sup>59</sup> chest pressure (41 percent),<sup>60</sup> and stomach pain (37 percent).<sup>61</sup> Additionally, of those respondents who reported exposure to airborne substances for the full duration of their shift, 43 percent experienced nausea or vomiting and 31 percent experienced eye or nose secretions.<sup>62</sup> The Lowell researchers concluded that the *maquiladora* workers surveyed suffered from these acute health problems as a result of their exposure to hazards in their working environment and that these conditions had the potential to develop into chronic medical conditions.<sup>63</sup>

In addition to the negative health effects associated with exposure to chemicals and other toxic substances, *maquiladora* workers report a high incidence of “musculoskeletal disorders related to the rapid pace of work, poor workplace design, and other ergonomic hazards.”<sup>64</sup> “Optical nerve disorders and stress-related illnesses are prevalent,” also.<sup>65</sup> In the AJIM study, 21 percent of respondents “reported pain, numbness, or tingling in one or both hands” as a result of the stress and repetitive labor experienced in the *maquiladora*.<sup>66</sup> Other respondents in this study complained of chronic elbow, forearm, or shoulder pain.<sup>67</sup>

The health consequences of working in a *maquiladora* may also be understood by examining the incidences of birth defects in children born to past or present *maquiladora* workers.<sup>68</sup> A study of *maquiladora* workers in Nogales found a 14 percent incidence of

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56. *Id.* at 53.

57. Rafael Moure-Eraso, et al., *Back to the Future: Sweatshop Conditions on the Mexico-U.S. Border*, 31 AM. J. INDUS. MED. 587, 587 (1997).

58. *Id.*

59. *Id.* at 591.

60. *Id.*

61. *Id.*

62. *Id.* at 592.

63. Michael Joseph McGuinness, *The Politics of Labor Regulation in North America: A Reconsideration of Labor Law Enforcement in Mexico*, 21 U. P.A. J. INT'L ECON. L. 1, 34 (2000).

64. *Id.*

65. Warner, *supra* note 41, at 193.

66. Kourous, *supra* note 33, at 53.

67. *Id.*

68. See CRAVEY, *supra* note 41, at 97 (describing the birth weights of workers' children “as a measure widely accepted as an excellent indicator of the” mother's health).

low birth-weight babies,<sup>69</sup> three times greater than the rate for pregnant women who worked in service occupations in that region.<sup>70</sup> Another study determined that children born to *maquiladora* workers are three to five times more likely to suffer from anencephaly.<sup>71</sup> Studies in Matamoros linked the high rate of mental retardation exhibited in the children of *maquiladora* workers with the mothers' work-related exposure to PCB while they were pregnant.<sup>72</sup> Thus, not only do the workers themselves suffer the negative health consequences of *maquiladora* work, but such work also takes a detrimental toll on the health of their children.

### C. Low Wages

Workers are paid a low wage for all the hardships they endure in the *maquiladoras*. In general, the income of Mexican workers has lost 76 percent of its purchasing power over the past two decades.<sup>73</sup> "The government estimates that 40 million people live in poverty, with 25 million in extreme poverty."<sup>74</sup> While the Mexican government claims that unemployment is less than 6 percent, the National Union of Workers (Unión Nacional de Trabajadores) argues the number is closer to 25 percent.<sup>75</sup> There is widespread belief that the government intentionally holds down wages—thus perpetuating this crisis—in order to encourage foreign investment and sustain the *maquiladora* sector.<sup>76</sup> After the Mexican peso was devalued in January 1995, prices of groceries and basic services began to climb steeply, but the wages paid to most *maquiladora* workers did not increase correspondingly.<sup>77</sup> The average wage of manufacturing workers in Mexico increased 1.2 percent during 2003, "less than the 3.98 [percent] rate of inflation for the same period."<sup>78</sup> The low wage

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69. *Id.*

70. *Id.*

71. AUGUSTA DWYER, ON THE LINE: LIFE ON THE U.S.-MEXICAN BORDER 53 (Monthly Review Press 1995); *see also* BACON, *supra* note 1, at 73-74 (noting the high rate of anencephaly among children born to *maquiladora* workers in the Tijuana *barrio* of Chilpancingo).

72. *See* Durand, *supra* note 37, at 131.

73. BACON, *supra* note 1, at 54.

74. *Id.*

75. *Id.* (citing the Unión Nacional de Trabajadores as putting the number of unemployed in Mexico at more than 9 million people, or a quarter of the workforce).

76. *See id.* at 50, 61; *see also* JIM YONG KIM ET AL. EDS., DYING FOR GROWTH: GLOBAL INEQUALITY AND THE HEALTH OF THE POOR 267 (Common Courage Press 2000); KOPINAK, *supra* note 47, at 148-50 (discussing three governmental sources for the downward pressure on wages); Durand, *supra* note 37, at 132.

77. *See* BACON, *supra* note 1, at 71.

78. STATE DEP'T REPORT, *supra* note 6, at ¶ 3.

paid to *maquiladora* workers makes purchasing even basic necessities problematic.<sup>79</sup>

The purchasing power of wages paid to *maquiladora* workers stands in stark contrast to those paid to American workers just across the border. A 2001 study by the Center for Reflection, Education, and Action presents an illustrative example of this disparity in purchasing power.<sup>80</sup> The study found that “it took a *maquiladora* worker in Juárez almost an hour to earn enough money to buy a kilo . . . of rice.”<sup>81</sup> A *maquiladora* worker in Tijuana needed an hour and a half to earn enough for that same purchase.<sup>82</sup> By comparison, a dockworker in the San Pedro harbor, south of Los Angeles, earned enough to buy the rice after only three minutes of work.<sup>83</sup> Even a worker in Los Angeles earning minimum wage needed only twelve minutes of work to earn enough to purchase an equivalent amount of rice.<sup>84</sup>

#### D. Women's Rights Issues

The majority of *maquiladora* workers are female.<sup>85</sup> As such, women's rights issues represent one of the most integral components of the struggle for workers' rights. Perhaps the most controversial and highly publicized issue of all stems from the frequent requirement that they undergo pregnancy testing prior to hiring.<sup>86</sup> Workers report this practice is commonplace and contend

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79. Joshua Briones, *Paying the Price for NAFTA: NAFTA's Effect on Women and Children Laborers in Mexico*, 9 UCLA WOMEN'S L.J. 301, 311 (1999) (quoting Eduardo Badillo Martinez, the Secretary of Coordination at the Comité Urbano Popular Asociación Civil) (“[S]alaries for *maquiladora* workers are so small that most cannot buy basic necessities for survival”); see also Arriola, *supra* note 3, at 769; Durand, *supra* note 37, at 132.

80. BACON, *supra* note 1, at 215.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. Scholars differ as to exactly what percentage of *maquiladora* workers are female, though they seem to agree that females make up the majority of the *maquiladora* workforce. See Arriola, *supra* note 3, at 767 (noting that while women make up 37 percent of Mexico's general labor force, roughly 56 percent of its *maquiladora* workers are female); Jorge A. Vargas, *Family Law in Mexico: A Detailed Look Into Marriage and Divorce*, 9 SW. J.L. & TRADE AM. 5, 25 (2002-2003) (commenting that women make up over 95 percent of the *maquiladora* workforce).

86. See A JOB OR YOUR RIGHTS, *supra* note 7; see also Sam Dillon, *Sex Bias is Reported by U.S. at Border Plants in Mexico*, N.Y. TIMES, Jan. 13, 1998, at A8; Ken Guggenheim, *Pregnancy Test a Standard Practice for Female Job Seekers in Mexico*, L.A. TIMES, Sept. 26, 1999, at B7; *Mexican Women Fight for Labour Rights*, BBC News Online, Aug. 29, 2002, <http://news.bbc.co.uk/1/hi/world/americas/2223655.stm>; Molly Moore, *Rights of Pregnant Workers at Issue on Mexican Border*, WASH. POST, Aug. 21, 1996, t A20.



that companies will not hire pregnant job applicants.<sup>87</sup> In addition, many *maquiladora* workers report that their employers distribute birth control pills once they are hired.<sup>88</sup> These workers also report that employers fire or pressure coworkers to quit if they refuse to take birth control or become pregnant during their employment at *maquiladoras*.<sup>89</sup> It is widely believed that the *maquiladora* owners have adopted this policy in response to Mexico's labor laws,<sup>90</sup> which provide for six weeks of paid maternity leave prior to a woman's delivery date as well as six weeks of paid leave after the delivery.<sup>91</sup> The law also requires that workers returning from maternity be fully reinstated to their previous position with any appropriate accrued rights or benefits.<sup>92</sup> It is a common contention that Mexico's *maquiladora* owners attempt to circumvent these provisions by restricting their hiring of pregnant workers.<sup>93</sup>

While critics claim that these mandatory pregnancy tests represent an affront to such protected interests as women's rights,<sup>94</sup> human rights in general,<sup>95</sup> labor rights,<sup>96</sup> and individual privacy rights,<sup>97</sup> the Mexican *maquiladora* industry maintains its right to continue such practices. In response to the allegations

87. See, e.g., BACON, *supra* note 1, at 169; A JOB OR YOUR RIGHTS, *supra* note 7; Human Rights Watch, *No Guarantees: Sex Discrimination in Mexico's Maquiladora Sector*, in MAQUILADORA READER, *supra* note 3, pp. 31-35, at 31; PRIETO, *supra* note 7, at 41; Nora Lockwood Tooher, *For Mexican Women, Sexism Is a Daily Battle*, in MAQUILADORA READER, *supra* note 3, pp. 38-40, at 39; Nicole L. Grimm, *The North American Agreement on Labor Cooperation and Its Effects on Women Working in Mexican Maquiladoras*, 48 AM. U. L. REV. 179, 219 (1998).

88. See Tooher, *supra* note 87, at 39-40; Michelle Smith, *Potential Solutions to the Problem of Pregnancy Discrimination in Maquiladoras Operated by U.S. Employers in Mexico*, 13 BERKELEY WOMEN'S L.J. 195, 200 (1998).

89. See Smith, *supra* note 88, at 197-98; see also Shelley Case Inglis, *Expanding International and National Protections Against Trafficking for Forced Labor Using a Human Rights Framework*, 7 BUFF HUM. RTS. L. REV. 55, 92 (2001); Juan Carlos Linares, *The Development Dilemma: Reconciling U.S. Foreign Direct Investment in Latin America with Laborers' Rights: A Study of Mexico, The Dominican Republic, and Costa Rica*, 29 N.C. J. INT'L L. & COM REG. 249, 280-81 (2003).

90. See BACON, *supra* note 1, at 169; PRIETO, *supra* note 7, at 41.

91. Mexican Federal Labor Law (Ley Federal del Trabajo), art. 170, *reprinted in* 1 WILLIAM D. SIGNET, MEXICAN LAW LIBRARY 403 (West Publishing 1997) [hereinafter FLA]; see also Tooher, *supra* note 87, at 39.

92. See FLA, *supra* note 91; VARGAS, *supra* note 4, at 171.

93. See, e.g., BACON, *supra* note 1, at 169; CRAVEY, *supra* note 41, at 135; PRIETO, *supra* note 7, at 41.

94. See Human Rights Watch, *supra* note 91, at 31 (describing pregnancy-based discrimination as a form of sex discrimination because it targets a condition that only women experience).

95. See, e.g., Arriola, *supra* note 3, at 784; Lee A. Tavis, *Novartis and the U.N. Global Compact Initiative*, 36 VAND. J., TRANSNAT'L L. 735, 757-59 (2003).

96. See Grimm, *supra* note 91, at 219-21.

97. See, e.g., Arriola, *supra* note 3, at 787; Berta Esperanza Hernandez-Truyol, *Sex, Culture, and Rights: A Re/Conceptualization of Violence for the Twenty-First Century*, 60 ALB. L. REV. 607, 615 n.32 (1997); Tavis, *supra* note 95, at 758.

that such discriminatory hiring and firing practices are based on a desire to avoid paying government-mandated maternity benefits, *maquiladora* owners have asserted that these pregnancy tests serve four legitimate goals: (1) they prevent high turnover among the *maquiladora* workforce;<sup>98</sup> (2) they help maintain consistent production levels within each *maquiladora*;<sup>99</sup> (3) they contribute to Mexico's aggressive family-planning program by controlling unplanned births;<sup>100</sup> and (4) they protect the health of pregnant women and their unborn children by excluding them from the laborious work of the *maquiladoras*.<sup>101</sup> However, despite these assertions, the negative press and vocal condemnation of the mandatory pregnancy tests required of *maquiladora* workers continues.

### E. Child Labor

A widespread issue in the economies of many developing nations, child labor is also common in Mexico's *maquiladoras*.<sup>102</sup> "The Mexican government's Secretariat of Labor and Social Forecasting estimates that eight hundred thousand children under the age of fourteen work in various sectors of the economy."<sup>103</sup> There are accounts of children between eleven and fourteen years of age working up to fifteen hours per day.<sup>104</sup> The emergence of the *maquiladora* industry has served to further increase the prevalence of child labor in the Mexican economy.<sup>105</sup>

## IV. A DEFICIENT CULTURE OF UNIONIZATION

In much of the developed world, a common way of protecting workers from these predicaments arises in the form of unionization and collective bargaining. By banding together, workers can increase their bargaining power with their employer as well as increase their collective ability to influence legislation and

98. Tooher, *supra* note 88, at 40.

99. Arriola, *supra* note 3, at 783-84.

100. Tooher, *supra* note 88, at 39-40.

101. Arriola, *supra* note 3, at 785-86.

102. See Griselda Vega, *Maquiladora's Lost Women: The Killing Fields of Mexico—Are NAFTA and NAALC Providing the Needed Protection?*, 4 J. GENDER RACE & JUST. 137, 147-49 (2000).

103. BACON, *supra* note 1, at 33.

104. See Don Sherman, *Congeladora Del Rio Workers Fight for Union Recognition*, 4 MLNA (July 1999), <http://www.igc.apc.org/unitedelect/alert.html>, noted in Arriola, *supra* note 3, at 780 n. 4.

105. See Jill C. Strogiludis, *The Refugee Act of 1980: An Empty Promise to Exploited Children*, 29 J. MARSHALL L. REV. 995, 1002 (1996).

government regulation. It is much easier for an employer to ignore a myriad of fragmented, easily-replaceable, individual voices, than to take no notice of a voice that speaks for his entire workforce. But if Mexican *maquiladora* workers could increase their lot by banding together and unionizing, why haven't they done so?

First, it must be acknowledged that the owner of a Mexican *maquiladora*, and perhaps even a Mexican government official, is likely to assert that Mexico does, in fact, have labor unions. These *sindicatos* are fraught with corruption, though. They are often affiliated with the *maquiladoras* themselves and make no pretense as to their true loyalties. Thus, *maquiladora* workers often determine membership in such a *sindicato* to be fruitless.

Enrique Dávalos, of the Centro de Información para Trabajadoras y Trabajadores, A.C. (CITTAC) of Tijuana,<sup>106</sup> gives five reasons why he believes that legitimate labor unions have not taken hold among the *maquiladora* workers of Tijuana.<sup>107</sup> First, Mr. Dávalos asserts that the unemployment rate in Mexico is so high and the working conditions in many other industries so poor that striking or dissenting workers are easily replaceable. As Mr. Dávalos puts it, "there [is] a line of other people who want your job."<sup>108</sup> The second reason cited by Mr. Dávalos as to why labor unions have not become prevalent among the *maquiladora* workers of Tijuana is the threat of businesses leaving Mexico for other developing nations.<sup>109</sup> With the increasing globalization of the world's economy and the manufacturing industry's virtually limitless access to a ready and willing workforce, there exists a "race to the bottom" in the international manufacturing and assembly industries.<sup>110</sup> With the ubiquitous threat of losing jobs to

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106. "The Workers' Information Center (CITTAC) is a non-governmental organization of women and men from Baja California, Mexico, that promotes, publicizes, supports, and accompanies workers' struggles—especially within the *maquiladora* industry—to better their labor and living conditions, defend their human rights (especially those related to labor and gender), and create autonomous and democratic organizations." CITTAC, *¿Qué es CITTAC?* [http://www.cittac.org/index.php?option=com\\_content&task=view&id=14&Itemid=28&lang=es](http://www.cittac.org/index.php?option=com_content&task=view&id=14&Itemid=28&lang=es) (last visited Dec. 14, 2005).

107. Enrique Dávalos, Address Before the University of San Diego School of Law Chapters of the National Lawyers Guild and Amnesty International (Mar. 2, 2005) (notes on file with author).

108. *Id.*

109. *Id.*

110. The phrase "race to the bottom" is used here to describe the phenomenon whereby multinational corporations seek to maximize their profit margin by locating their manufacturing and assembly plants in the nations with the cheapest labor and the least stringent regulation of workers' rights and labor law. Thus, developing nations either adopt lax regulatory policies or do not enforce existing policies for fear of losing foreign investment to another developing nation that is "closer to the bottom." See, e.g., Clyde Summers, *The Battle in Seattle: Free Trade, Labor Rights, and Societal Values*, 22 U. PA J. INT'L ECON. L. 61, 89 (2003); Chantal Thomas, *Globalization and the Reproduction of Hierarchy*, 33 U.C. DAVIS L. REV. 1451, 1492-93 (2000); Alison A. Gormley, Note, *The Underground Exposed:*

countries like China or Bangladesh,<sup>111</sup> there are incentives for workers not to “rock the boat” and for the government to cultivate a climate that is inhospitable to unionization.

The third explanation put forth by Mr. Dávalos is that workers simply have little time for organizational activities.<sup>112</sup> The aforementioned protracted work hours, coupled with the family responsibilities of many *maquiladora* workers,<sup>113</sup> leaves little time for unionizing the workforce. Fourth, Mr. Dávalos asserts that the *maquiladora* workers are unaware of their rights.<sup>114</sup> Without knowledge of their labor rights under Mexican law, these workers often fail to see the benefit of organization. NGOs such as CITTAC seek to remedy this situation by informing *maquiladora* workers of their rights, so that they might make better-informed decisions and raise their collective well-being.

The fifth and final reason that Mr. Dávalos gives for the dearth of effective labor unions in Tijuana is that foreign companies often lack knowledge of, or otherwise ignore, Mexican labor law.<sup>115</sup> As mentioned above, the Mexican government has a disincentive to enforce its labor laws on foreign *maquiladora* owners, lest they risk losing jobs to other developing nations. Since the Mexican government fails to enforce its statutorily encoded protections for collective bargaining, Mr. Dávalos asserts that *maquiladora* owners frequently repress efforts to unionize by firing those involved in such organizations.<sup>116</sup>

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*The United States Corporations' Use of Sweatshops Abroad, and the Abuse of Women*, 25 SUFFOLK TRANSNAT'L L. REV. 109, 117-19 (2001).

111. For general discussions of the role of developing nations like China and Bangladesh in the international “race to the bottom,” see Timothy A. Canova, et al., *Labor and Finance as Inevitably Transnational: Globalization Demands a Sophisticated and Transnational Lens*, 41 SAN DIEGO L. REV. 109, 113 (2004); Lisa Clay, *The Effectiveness of the Worker Rights Provisions of the Generalized System of Preferences: The Bangladesh Case Study*, 11 TRANSNAT'L L. & CONTEMP. PROBS. 175, 185-86 (2001); Stephen F. Diamond, *The “Race to the Bottom” Returns: China’s Challenge to the International Labor Movement*, 10 U.C. DAVIS J. INT'L L. & POL'Y 39 (2003); John C. Knapp, Note, *The Boundaries of the ILO: A Labor Rights Argument for Institutional Cooperation*, 29 BROOK. J. INT'L L. 369, 396 n.125 (2003).

112. See Dávalos, *supra* note 107.

113. See, e.g., PRIETO, *supra* note 7, at 33-34 (describing the “double shift” that women work between the *maquiladora* and at home); GEOGRAPHY OF GENDER IN THE THIRD WORLD 291 (Janet Henshall Momsen & Janet G. Townsend eds., State Univ. of New York Press 1987); Lesley J. Wiseman, Student Article, *A Place for “Maternity” in the Global Workplace: International Case Studies and Recommendations for International Labor Policy*, 28 OHIO N.U. L. REV. 195, 210 (2001).

114. See Dávalos, *supra* note 107.

115. *Id.*

116. *Id.* (“If [your] boss learns you are trying to unionize, you will be fired immediately”).

## V. THE HISTORY AND DEVELOPMENT OF MEXICAN LABOR LAW

These preceding justifications seem to be a plausible explanation for the lack of effective labor organization among Tijuana *maquiladora* workers, but an appreciation of the historical development of Mexican labor law is vital to a full understanding of the deficient culture of unionization in Mexico.

A. *The Revolution of 1910 and the 1917 Constitution*

In order to comprehend the letter and application of Mexican labor law today, one must first understand its historical antecedents: the Mexican Revolution of 1910 and the 1917 Constitution. The Mexican Revolution of 1910 was intertwined with the notions of workers' and labor rights.<sup>117</sup> Prior to the Revolution, the *laissez-faire* system of labor regulation in Mexico equated to long working days, backbreaking work, and marginal pay.<sup>118</sup> President Porfirio Díaz sought to perpetuate these circumstances by suppressing strikes and labor unions,<sup>119</sup> but through organizational efforts—including involvement in labor unions—the Mexican *campesinos* (peasants) were able to rise up in the 1910 Revolution and defeat the ruling, aristocratic *latifundistas*.<sup>120</sup>

In the wake of the 1910 Revolution, Mexico sought to create a paternalistic governmental regime which recognized and affirmed workers' rights.<sup>121</sup> These notions are enshrined in the Mexican Constitution of 1917.<sup>122</sup> In particular, Article 123 of the 1917 Constitution is the basis for Mexico's current labor law.<sup>123</sup> Article 123 of the Constitution enumerates the rights of individual workers in detail, including the right to strike and the right to form unions.<sup>124</sup>

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117. See, e.g., VARGAS, *supra* note 4, at 152-54; Lin, *supra* note 31, at 90, n.94.

118. See, e.g., ANNA L. TORRIENTE, MEXICAN & U.S. LABOR LAW & PRACTICE: A PRACTICE GUIDE FOR MAQUILAS & OTHER BUSINESSES 53 (National Law Center for Inter-American Free Trade 1997); Jenna L. Acuff, Comment, *The Race to the Bottom: The United States' Influence on Mexican Labor Law Enforcement*, 5 SAN DIEGO INT'L L.J. 387, 390 (2004); Mark J. Russo, *NAALC: A Tex-Mex Requiem for Labor Protection*, 34 U. MIAMI INTER-AM. L. REV. 51, 71 (2002).

119. See, e.g., A. Maria Plumtree, Note, *Maquiladoras and Women Workers: The Marginalization of Women in Mexico as a Means to Economic Development*, 6 SW. J. L. & TRADE AM. 177, 191 (1999).

120. See, e.g., *id.*; Russo, *supra* note 118, at 72.

121. See, e.g., Acuff, *supra* note 118, at 391-92.

122. See, e.g., McGuinness, *supra* note 63, at 6.

123. VARGAS, *supra* note 4, at 154.

124. CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS [Const.], as amended, Diario Oficial de la Federación [D.O.], 5 de Febrero de 1917 (Mex.), available in English at <http://www.ilstu.edu/class/hist263/docs/1917const.html>. Among the protections

### B. The Federal Labor Act

In 1931, Mexico's National Congress passed the Federal Labor Act (*Ley Federal del Trabajo*), implementing the paternalistic protection of workers enumerated in the 1917 Constitution.<sup>125</sup> Eventually, the Federal Labor Act of 1970 (FLA) replaced the 1931 Act.<sup>126</sup> The FLA remains the primary source of labor law in Mexico today.<sup>127</sup> It re-codifies the paternalistic protection of workers inherent in the 1917 Constitution. In addition to sections providing for compulsory profit-sharing,<sup>128</sup> protection of women's rights,<sup>129</sup> and the prohibition of child labor,<sup>130</sup> the FLA also contains provisions regarding collective labor relationships.

Title VII of the FLA governs collective labor relationships.<sup>131</sup> Employees are granted the right to freely associate and form trade unions.<sup>132</sup> The FLA also maintains that a person may neither be forced to join nor prohibited from joining a labor union.<sup>133</sup> However, in addition to the provisions of Title VII of the FLA, all unions in Mexico are "subject to the jurisdiction of the Confederation of Mexican Laborers" (CTM).<sup>134</sup> Long Mexico's largest labor organization, the CTM is widely considered to serve as an extension of the Mexican government.<sup>135</sup> Within the last ten years, the CTM has counted approximately 70 percent of the Mexican labor force among its members.<sup>136</sup> According to observers,

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provided by Article 123 of the 1917 Constitution are: a limitation of eight working hours per day without overtime compensation; prohibition of work by children under 14 years of age; one month of paid maternity leave; requirement that the minimum wage be sufficient to satisfy the normal material, social, and cultural needs of the head of the family; profit-sharing among workers; entitlement to a Christmas bonus (*aguinaldo*); the right of employees to strike and employers to engage in lockouts; and the right to organize by forming unions, professional associations, etc. *Id.*

125. VARGAS, *supra* note 4, at 156.

126. See FLA, *supra* note 91, at 315-711.

127. See VARGAS, *supra* note 4, at 156.

128. The FLA mandates compulsory profit-sharing under Title III, Ch. VIII, art. 117-31. FLA, *supra* note 91, at 359-67.

129. The FLA prohibits sex-based discrimination (art. 3), requires employers to provide child-care services for their employees (art. 171), and requires that pregnant mothers be granted 12 weeks of paid maternity leave with full reinstatement, including accrued benefits, upon return (art. 170). *Id.* at 315, 403-05.

130. The FLA prohibits the employment of children under 14 years of age or overtime work for children under 16 years of age (art. 5). *Id.* at 317.

131. Title VII of the FLA encompasses art. 354-439. *Id.* at 477-513.

132. *Id.*

133. This protection is provided in art. 358 of the FLA. *Id.* at 477.

134. VARGAS, *supra* note 4, at 172.

135. *Id.*; see also DAN LA BOTZ, THE CRISIS OF MEXICAN LABOR 1 (Praeger 1988); EDWARD J. WILLIAMS & JOHN T. PASSE-SMITH, THE UNIONIZATION OF THE MAQUILADORA INDUSTRY: THE TAMAULIPAN CASE IN NATIONAL CONTEXT 3 (Institute for Regional Studies of the Californias, San Diego State Univ. 1992); Acuff, *supra* note 118, at 398.

136. Jill Sanner Ruhnke, *The Impact of NAFTA on Labor Arbitration in Mexico*, 26 LAW & POL'Y INT'L BUS. 917, 929 (1995).

government involvement in the collective bargaining relationship undermined the strength and growth of a legitimate union movement in Mexico.<sup>137</sup>

### *C. Government Involvement in Labor Organization*

The strong connection between the government and the existing labor unions has led to accusations of corruption,<sup>138</sup> and it has contributed to the disparity in bargaining power within Mexican collective labor relationships. Any historical success of Mexican labor unions (*sindicatos*) at organizing workers has come as a result of alignment with the government, notably the Institutional Revolutionary Party (PRI).<sup>139</sup> Widely vilified for its praetorian practices and 70-year totalitarian dominance of the Mexican state, the PRI conspired with the dominant labor unions to keep workers' wages low in order to attracting foreign investment.<sup>140</sup> The CTM consistently supports these government anti-inflation wage-price pacts.<sup>141</sup> Government interference in labor organization spawns *sindicato* leaders who are loyal to the government rather than to the workers they claim to represent.<sup>142</sup> Accusations of government interference with labor unions go even farther: There are accounts of PRI officials breaking up labor meetings at critical moments, harassing independent union leaders, and even having some of them murdered.<sup>143</sup> While the PRI is no longer the ruling party in Mexico, having been displaced by the National Action Party (PAN), allegations of corruption and government interference with the labor unions continue.<sup>144</sup>

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137. See, e.g., VARGAS, *supra* note 4, at 172; Jennifer Mandina, *International Watch: NAFTA's Contribution to the Discrimination of Mexican Women in the Maquiladoras*, 9 BUFF. WOMEN'S L.J. 25, 30 (2000-2001); William F. Pascoe, *Déjà Vu All Over Again? Collective Bargaining and NAFTA: Can United States and Mexican National Unions Foster Growth Under the NAALC?*, 19 ARIZ. J. INT'L & COMP. L. 741, 748-49 (2002); Russo, *supra* note 118, at 74-76.

138. See, e.g., Symposium, *The Multinational Enterprise as Global Corporate Citizen*, 21 N.Y.L. SCH. J. INT'L & COMP. L. 1, 20 (2001); Juan Forrero, *Tijuana Workers Reject Independent Union*, SAN DIEGO UNION-TRIB., Dec. 16, 1993, at B3.

139. See, e.g., David Fairris, *Unions and Wage Inequality in Mexico*, 56 INDUS. & LAB REL. REV. 481, 483 (2003).

140. See, e.g., KIM ET AL., *supra* note 76, at 267.

141. *Id.*

142. See, e.g., Smith, *supra* note 88, at 213.

143. See, e.g., Plumtree, *supra* note 119, at 194.

144. See Symposium, *supra* note 138, at 20.

*D. The North American Agreement on Labor Cooperation (NAALC)*

The final legal enactment relating to Mexican labor law and the regulation of trade unions in Mexico is the North American Agreement on Labor Cooperation (NAALC).<sup>145</sup> The NAALC—which entered into force on January 1, 1994—is a side agreement to NAFTA.<sup>146</sup> The objectives of the NAALC include: (1) to “improve working conditions and living standards in each Party’s territory;”<sup>147</sup> (2) to “promote, to the maximum extent possible, the labor principles set out in Annex 1”<sup>148</sup> (including the freedom of association and protection of the right to organize, the right to bargain collectively, the right to strike, elimination of employment discrimination, and prevention of occupational injuries and illnesses);<sup>149</sup> (3) to “promote compliance with, and effective enforcement by each Party of, its labor law;”<sup>150</sup> and (4) to “foster transparency in the administration of labor law.”<sup>151</sup> Thus, the NAALC does not create any uniform labor laws or labor standards between the three NAFTA countries.<sup>152</sup> Instead, the NAALC emphasizes requiring that each Party to: (a) enact labor laws that are protective of workers’ rights, and (b) enforce these domestic labor laws.<sup>153</sup>

While the NAALC seems to be a well-intentioned effort to promote the creation of protective “black letter” labor law in the domain of each State-Party, critics contend that it has improved the enforcement of domestic labor laws in Mexico very little, if at all.<sup>154</sup> The problem with the NAALC, according to observers, is that it lacks effective enforcement mechanisms.<sup>155</sup> Within the European Union, the European Court of Justice has the power to review specific labor law violations and decisions by a member-state’s highest court.<sup>156</sup> The NAALC lacks any such supranational

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145. See North American Agreement on Labor Cooperation, U.S.-Can.-Mex., Sept. 13, 1993, 32 ILM 1499 [hereinafter NAALC], available at <http://www.naalc.org/english/agreement.shtml> (last visited Nov. 16, 2005).

146. See Maria Teresa Guerra & Anna L. Torriente, *The NAALC and the Labor Laws of Mexico and the United States*, 14 ARIZ J. INT’L & COMP L. 503 (1997).

147. NAALC, *supra* note 145, at art. 1(1).

148. *Id.* at art. 1(2).

149. *Id.* at annex 1.

150. *Id.* at art. 1(6).

151. *Id.* at art. 1(7).

152. See Guerra & Torriente, *supra* note 146, at 505.

153. *Id.*

154. See, e.g., KIM ET AL., *supra* note 76, at 267 (“Mexico routinely disregards its labor laws, and the NAALC has led to little or no improvement in enforcement”).

155. See, e.g., Kate E. Andrias, *Gender, Work, and the NAFTA Labor Side Agreement*, 37 U.S.F. L. REV. 521, 552 (2003).

156. *Id.* at 551.



tribunal for adjudicating alleged labor law violations.<sup>157</sup> Instead, under the NAALC, an individual must appeal to another State-Party's National Administrative Office (NAO) to investigate allegations of labor violations.<sup>158</sup> This procedure was implemented in *The Mexican Pregnancy Testing Case*.<sup>159</sup>

In *The Mexican Pregnancy Testing Case*, the US NAO had to apply Mexican labor law in order to determine whether Mexico failed to enforce its own non-discrimination laws in permitting the mandatory pregnancy testing of *maquiladora* workers.<sup>160</sup> Under pressure from the Mexican government, the US NAO failed to enforce any sort of labor standard, citing "differing opinions within the Government of Mexico on the constitutionality and legality of the practice."<sup>161</sup> Therefore, despite its optimistic goals, the NAALC has failed to meet its obligation of enforcing the domestic labor law of its State-Parties.

Furthermore, the NAALC limits the remedies available for a particular labor law violation, depending on the classification of the particular violation.<sup>162</sup> Some labor law violations may warrant the issuance of binding remedies on the violating party, while the remedy available for other violations may be limited to consultation and/or an expert evaluation process.<sup>163</sup> Thus, while violations of a State-Party's health and safety, child labor, and minimum wage laws may hypothetically result in binding remedies,<sup>164</sup> the only remedy available for violations of the freedom

157. *Id.*

158. *Id.*

159. U.S. N.A.O. Case No. 9701 (The Mexican Pregnancy Testing Case) was submitted in May 1997 by a group of NGOs that accused the Mexican government of failing to meet its obligations under Mexican labor law, and thus the NAALC, by permitting widespread discriminatory pregnancy testing in its *maquiladora* sector. U.S. NAT'L ADMIN. OFFICE, BUREAU OF INT'L LABOR AFFAIRS, U.S. DEP'T OF LABOR, SUBMISSION CONCERNING PREGNANCY-BASED SEX DISCRIMINATION IN MEXICO'S MAQUILADORA SECTOR (1996), available at <http://www.dol-union-reports.gov/ilab/media/reports/nao/submissions/Sub9701.htm>; U.S. NAT'L ADMIN. OFFICE, BUREAU OF INT'L LABOR AFFAIRS, U.S. DEP'T OF LABOR, PUBLIC REPORT OF N.A.O. SUBMISSION NO. 9701, at II (1998), available at <http://www.dol.gov/ilab/media/reports/nao/pubrep9701.htm> [hereinafter U.S. N.A.O. PUB. REPORT OF REVIEW]. For the U.S. N.A.O.'s statement of the facts, analysis, and recommendations regarding the *Mexican Pregnancy Testing Case*, see U.S. N.A.O. PUB. REPORT OF REVIEW; see also Andrias, *supra* note 155, at 551.

160. Andrias, *supra* note 155, at 551.

161. U.S. N.A.O. PUB. REPORT OF REVIEW, *supra* note 159, at VII(2).

162. For an explanation and discussion of the NAALC's three-tier system of labor violations and the respective remedies available, see *NAALC Objectives, Obligations, and Principles*, in HUMAN RIGHTS WATCH, CANADA/MEXICO/UNITED STATES: TRADING AWAY RIGHTS: THE UNFULFILLED PROMISE OF NAFTA'S LABOR SIDE AGREEMENT at IV (Vol. 13, no. 2(B), 2001), available at [http://www.hrw.org/reports/2001/nafta/nafta0401-04.htm#P445\\_66138](http://www.hrw.org/reports/2001/nafta/nafta0401-04.htm#P445_66138).

163. *Id.* at ¶ 5; see also Andrias, *supra* note 155, at 552-53.

164. According to the most recent data available, a total of 30 submissions have been filed with NAOs under the NAALC. Nineteen were filed with the US NAO, with seventeen

to associate, the right to bargain collectively, and the right to strike is non-binding ministerial consultation.<sup>165</sup>

*E. Mexico's Proposed New Law: The Abascal Project*

In December 2002, a group presented a proposal to reform the FLA to the Mexican Chamber of Deputies.<sup>166</sup> This proposal is commonly known as the Abascal Project, after Mexico's Labor Secretary, and driving force behind the proposal, Carlos Abascal Carranza.<sup>167</sup> Critics of the law contend that the Abascal Project both fails to address the existing deficiencies of Mexican labor law and actually makes the situation for Mexican workers worse.<sup>168</sup> These critics maintain that the Abascal Project makes the FLA less protective of workers' rights by curtailing the rights of unions and denying Mexican workers their heretofore statutorily protected rights regarding long-term employment, working hours, and profit-sharing.

Human rights organizations allege that the Abascal Project will weaken the general protection of organized labor by adding new ways in which a union's certification may be revoked,<sup>169</sup> and by introducing concepts such as "radius of action,"<sup>170</sup> "processability,"<sup>171</sup> and "legitimation"<sup>172</sup> to obstruct the formation of democratic unions.<sup>173</sup> Such provisions, it is asserted, will

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involving allegations against Mexico and two involving allegations against Canada. Seven were filed with the Mexican NAO involving allegations against the US. Four were filed with the Canadian NAO, with two involving allegations against Mexico and two involving allegations against the US. To date, no binding remedies had been issued by any of the NAOs. U.S. DEP'T OF LABOR, BUREAU OF INT'L LABOR AFFAIRS, STATUS OF SUBMISSIONS UNDER THE NORTH AMERICAN AGREEMENT ON LABOR COOPERATION (NAALC), *available at* <http://www.dol.gov/ilab/programs/nao/status.htm> (last visited Nov. 16, 2005).

165. Andrias, *supra* note 155, at 553.

166. U.S. DEP'T OF LABOR, BUREAU OF INT'L LABOR AFFAIRS, U.S. NAO PUB. SUBMISSION US2005-01 (2005), *available at* <http://www.dol.gov/ilab/media/reports/nao/submissions/Sub2005-01.htm#f18> [hereinafter PUBLIC SUBMISSION US2005-01].

167. *Id.*

168. *Id.*; *see also* HUMAN RIGHTS WATCH, MEXICO: FOX'S LABOR REFORM PROPOSAL WOULD DEAL SERIOUS BLOW TO WORKERS' RIGHTS: LETTER TO MEXICO'S CHAMBER OF DEPUTIES (2005), *available at* <http://hrw.org/english/docs/2005/02/09/mexico10156.htm> (last visited Apr. 15, 2005).

169. Under the Abascal Project, a union's certification may be revoked for not reporting changes in a union's board or its statutes to the Secretariat of Labor or for not reporting increases or decreases in the number of union members. Additionally, a union's registration may be cancelled if the collective bargaining agreement is not amended for two consecutive terms. PUBLIC SUBMISSION US2005-01, *supra* note 166, n.14.

170. The term "radius of action" limits the sectors in which unions can organize. *Id.* at n.18.

171. Critics claim that "processability" is simply a term used to justify impeding the exercise of collective rights without proper basis. *Id.*

172. "Legitimation" is described as a means of blocking the formation of unions based on an employer's subjective perceptions. *Id.*

173. PUBLIC SUBMISSION US2005-01, *supra* note 166.

further debilitate an already ineffective and unrepresentative system of collective bargaining. These critics also claim that the Abascal Project will weaken workers' individual rights by: (1) giving employers an increased ability to hire temporary workers who may be terminated at any time without penalty,<sup>174</sup> (2) granting employers significant discretion in altering working hours,<sup>175</sup> and (3) allowing employers greater leniency in substituting productivity bonuses for wages, without any provisions for the profit-sharing of the benefits of such increased productivity.<sup>176</sup> However, as this potential reformation of the FLA is still in its formative stages,<sup>177</sup> it remains to be seen exactly how such reforms would be legislated, and perhaps more importantly, how they would be enforced.

## VI. ENFORCEMENT OF MEXICAN LABOR LAW

While the paternalistic overtones of Mexican labor law and the labor law obligations of the NAALC may seem to create a protective environment for the promotion of workers' rights, the aforementioned examples of human rights concerns associated with the Mexican *maquiladora* sector imply that this is not the reality of the situation. Thus, the problem for Mexican *maquiladora* workers lies not in the laws themselves, but rather in their lack of enforcement.<sup>178</sup> There are a myriad of conceivable explanations for why the Mexican government has chosen not to enforce its labor laws. However, each justification must be predicated on a devaluation of the human rights of Mexico's *maquiladora* workers in relation to some other concern.

One explanation for the lack of enforcement of Mexico's labor laws in the *maquiladora* sector is that no one is holding the Mexican government accountable. Despite the defeat of the PRI in 2000,<sup>179</sup> accusations of government corruption and exploitation of

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174. *Id.* at § IV(1).

175. *Id.*

176. *Id.*

177. As of the writing of this Note, the Abascal Project had not been enacted into law by the Mexican legislature. However, in May 2005, Mexican Secretary of Labor Carlos Abascal continued his push for labor reform by distributing a document entitled, "Modernization of the Federal Labor Law." See United Electrical, Radio and Machine Workers International, Mexican Labor News and Analysis, May 2005, Vol. 10, No. 5, Labor Law Reform on Back Burner, available at [http://www.ueinternational.org/Mexico\\_info/mlna\\_articles.php?id=87#424](http://www.ueinternational.org/Mexico_info/mlna_articles.php?id=87#424) (last visited Dec. 11, 2005).

178. BACON, *supra* note 1, at 76 (describing the commonly-held opinion of *maquiladora* workers that "their problem isn't the law; it's the lack of enforcement").

179. See *PRI Beaten in Mexico Election*, BBC NEWS, July 3, 2000, <http://news.bbc.co.uk/1/hi/world/americas/799550.stm>.

the workforce are still common.<sup>180</sup> Due to its limitations, the NAALC has been ineffective in creating an impetus for the enforcement of Mexican labor laws. While Mexico is a signatory to international conventions and resolutions by the United Nations and the International Labour Organization articulating the importance of women's and workers' rights,<sup>181</sup> the ability of these organizations to bind Mexico to any such international obligations has also been somewhat limited.<sup>182</sup> Despite the statutes Mexico has passed and international treaties it has ratified—evidencing a desire to comport with international standards relating to labor and women's rights—the Mexican government still remains unwilling to circumscribe its own state sovereignty in the name of these international legal standards.<sup>183</sup>

Many of the reasons cited by Mr. Dávalos for the deficient union presence in Tijuana<sup>184</sup> may also explain the lack of enforcement of Mexican labor laws within the *maquiladoras*. These explanations include: workers who do not know their rights,<sup>185</sup> labor unions that fail to hold employers accountable for violations of Mexican labor laws,<sup>186</sup> and foreign companies that either ignore or do not comprehend their obligations within the Mexican legal system.<sup>187</sup> While these justifications amount to, at best, an ignorance of the law, they cannot exculpate the Mexican

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180. See, e.g., Heidi M. Timmons, Comment, *Fox Tracks Across the Mexican Maquiladora Industry*, 17 TRANSNAT'L LAW. 321, 331 (2004) (citing a World Bank study which estimates that "corruption costs Mexico 9 percent of its Gross Domestic Product"); Nick Miles, *Challenges Ahead for Fox*, BBC NEWS, June 9, 2003, <http://news.bbc.co.uk/1/hi/world/americas/2974970.stm>.

181. Relevant UN Conventions and Declarations to which Mexico is a signatory include: The Universal Declaration of Human Rights (arts. 2, 20, 23, 25), the Convention on Economic, Social, and Cultural Rights (arts. 3, 7, 8, 10), the Convention on Civil and Political Rights (arts. 3, 22), and the Convention on the Elimination of All Forms of Discrimination Against Women (arts. 2, 11). See Office of the United Nations High Commissioner for Human Rights, Mexico, Ratifications and Reservations, available at <http://www.unhcr.ch/tbs/doc.nsf/newhvstatusbycountry?OpenView&Start=1&Count=250&Expand=112#112> (last visited Nov. 16, 2005). Mexico has also ratified the International Labour Organisation (ILO) Workers' Representatives Convention (arts. 1, 2, 5). International Labour Organization, Workers' Representatives Convention, C135 (June 23, 1971), available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C135>.

182. See Reka S. Koerner, Note, *Pregnancy Discrimination in Mexico: Has Mexico Complied with the North American Agreement on Labor Cooperation?*, 4 TEX. F. ON C.L. & C.R. 235, 253-59 (1999); see also Alicia Ely Yamin & Ma. Pilar Noriega Garcia, *The Absence of the Rule of Law in Mexico: Diagnosis and Implications for a Mexican Transition to Democracy*, 21 LOY. LA. INT'L & COMP. L.J. 467, 497 (1999).

183. See Bernardo Sepúlveda Amor, *International Law and National Sovereignty: The NAFTA and the Claims of Mexican Jurisdiction*, 19 HOUS. J. INT'L L. 565, 573 (1997).

184. See Dávalos, *supra* note 107.

185. *Id.*

186. *Id.*

187. *Id.*

government or *maquiladora* employers from their failure to enforce workers' rights.

The final, and perhaps most compelling, explanation for the Mexican government's failure to enforce its labor laws within *maquiladoras* is that the government focuses on creating and maintaining jobs rather than affirming human rights.<sup>188</sup> In a nation where the unemployment rate has been estimated by some observers to be as high as 25 percent,<sup>189</sup> attracting and retaining opportunities for permanent employment must be a paramount objective of the government. Can people really be worried about such concepts as "human rights" when they are struggling to put food on the table? As Professor Gerhard Erasmus puts it, "[it] will be difficult to convince people in poor countries of the value of any human rights if basic needs are not fulfilled."<sup>190</sup>

While it is undeniable that the economic conditions in Mexico complicate the matter of enforcing and upholding labor rights, women's rights, and human rights in general, these conditions negate neither the obligation nor the ability of the Mexican government to do so. In order to appreciate the ability of the Mexican government to enforce such rights in the face of harsh economic conditions, one must understand the difference between positive and negative rights. Positive rights are those rights that a state has an affirmative duty to "respect, protect, and fulfill."<sup>191</sup> With regard to positive rights, the key inquiry is whether the state is affirmatively acting to meet its obligations. Negative rights can be described as prohibitions against state interference.<sup>192</sup> For negative rights, the key inquiry is whether the state is leaving its citizens alone to exercise their rights.<sup>193</sup> In the context of *maquiladoras*, an example of a positive right which the Mexican government owes to its workers is the protection against occupational safety hazards and dangerous work environments.

188. See, e.g., Jorge A. Vargas, *Privacy Rights Under Mexican Law: Emergence and Legal Configuration of a Panoply of New Rights*, 27 HOUS. J. INT'L L. 73, 116-17 (2004) (noting that due to the sustained demand for jobs in Mexico, the Mexican government's "highest political and economic priority is directed at creating and securing permanent jobs for its incessantly growing population, instead of protecting the privacy rights of workers in the workplace").

189. BACON, *supra* note 1, at 54.

190. Gerhard Erasmus, *Socio-Economic Rights and Their Implementation: The Impact of Domestic and International Instruments*, 32 INT'L J. LEGAL INFO. 243, 245 (2004) ("[P]overty is perhaps the greater violator of human rights").

191. Deena R. Hurwitz, *Lawyering for Justice and the Inevitability of International Human Rights Clinics*, 28 YALE J. INT'L L. 505, 539 (2003).

192. *Id.*

193. See Lance Compa, *Assessing Assessments: A Survey of Efforts to Measure Countries' Compliance with Freedom of Association Standards*, 24 COMP. LAB L. & POL'Y J. 283, 283-284 (2003).

An example of a negative right in this context is the prohibition against government interference with labor unions.

The poor condition of the Mexican economy may make it difficult for the government to provide regulatory schemes that enforce the positive rights of its workers,<sup>194</sup> but that does not preclude the government's recognition of its workers' negative rights. While developing a social or administrative network to regulate occupational safety issues may create significant costs for the government, simply limiting its own involvement in independent labor unions requires the government to shoulder no conspicuous financial burden. In fact, limiting its involvement in this aspect of the private sector may even reduce the operating and administrative costs of the Mexican government. Thus, a claim of economic hardship will not excuse the Mexican government from recognizing such negative rights owed to its workforce. But what about the Mexican government's fear of losing jobs to other developing nations? What about the "race to the bottom?" It certainly is conceivable that holding Mexico to higher labor standards than other developing nations could result in multinational corporations leaving Mexico in search of less stringent policies. However, an international regulatory scheme that focuses on nation-states is not the only option.

#### VII. REGULATION OF MAQUILADORA OWNERS AND OTHER TRANSNATIONAL CORPORATIONS

In August of 2003, the United Nations Commission on Human Rights adopted draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (Norms).<sup>195</sup> The Norms state that within their respective spheres of activity and influence, transnational corporations have the obligation to "promote, secure the fulfillment of, respect, ensure respect of, and protect human rights recognized in international as well as national law."<sup>196</sup> In addition to general

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194. This is not to suggest that the Mexican government is not also required under its international and domestic legal obligations to uphold its workers' positive rights, but simply that economic factors may play a greater role in the government's ability to protect positive rights.

195. Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 13, 2003), available at <http://www1.umn.edu/humanrts/links/norms-Aug2003.html> [hereinafter Norms]; see also Julie Campagna, *United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights: The International Community Asserts Binding Law on the Global Rule Makers*, 37 J. MARSHALL L. REV. 1205, 1206 (2004).

196. Norms, *supra* note 195, at art. 1.

human rights regarding the right to equal opportunity<sup>197</sup> and the right to the security of persons,<sup>198</sup> the Norms require transnational corporations to recognize and uphold workers' rights. In regard to the rights of workers, the Norms obligate transnational corporations to provide a safe and healthy working environment,<sup>199</sup> to pay workers at a level "that ensures an adequate standard of living for them and their families,"<sup>200</sup> and to recognize the right of workers to associate and to bargain collectively without outside interference.<sup>201</sup>

There are three general means by which the provisions of the Norms are to be implemented. Transnational corporations are to "adopt, disseminate, and implement internal rules of operation" that comply with the Norms.<sup>202</sup> These corporations are also subject to periodic monitoring and verification by the United Nations and its existing monitoring bodies.<sup>203</sup> Additionally, nation-states are expected to create "and reinforce the necessary legal and administrative framework for ensuring" corporate compliance with the Norms.<sup>204</sup> Towards this end, the UN Human Rights Commission also instructs that the Norms be applied by national and international tribunals, pursuant to national and international law.<sup>205</sup>

While they are not yet binding international law, the Norms are evidence of a widely accepted international contention that may soon take the form of a binding, *jus cogens* obligation.<sup>206</sup> The emergence of resolutions such as the Norms, which oblige transnational corporations to comply with international human rights regulations, seems to bode well for the future of workers' rights in Mexico's *maquiladora* sector. By holding these corporations accountable, regardless of the developing nation in which they choose to establish an assembly plant, enforceable international declarations and conventions deny corporations the ability to "race to the bottom" in pursuit of less stringent labor and human rights standards. If the corporations themselves are the focus of international regulation, it will not matter where they

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197. *Id.* at art. 2.

198. *Id.* at art. 3.

199. *Id.* at art. 7.

200. *Id.* at art. 8.

201. *Id.* at art. 9.

202. *Id.* at art. 15.

203. *Id.* at art. 16.

204. *Id.* at art. 17.

205. *Id.* at art. 18.

206. All 53 members of the United Nations Commission on Human Rights supported the adoption of the Norms. *See* Campagna, *supra* note 195.

choose to incorporate, as their international *erga omnes*<sup>207</sup> obligations will be due the entire world over.

It is hoped that such universal application of this corporate regulation will end the "race to the bottom" in workers' rights. Regulation of corporations also does not necessitate the consideration of controversial and problematic issues of state sovereignty that are implicit in international regulation of states.<sup>208</sup> Furthermore, unlike developing nation-states such as Mexico, corporations are more restricted in their ability to claim legitimately an economic incapacity to enforce human rights obligations. As declarations such as the Norms acquire the status of binding international law, corporations will be forced to recognize both the positive and negative rights of their workers.

### VIII. CONCLUSION

While the growth of the Mexican *maquiladora* sector has largely accomplished its goals of attracting foreign investment to Mexico and creating jobs for its workers, critics contend that these successes have come at a high price. Particularly in the *maquiladora* sector, labor law violations are perceived to be commonplace. Issues such as substandard working conditions, debilitating health effects, and mandatory pregnancy tests are often a part of the daily life of *maquiladora* workers. The paternalistic overtones of Mexican labor law provide a fertile framework for the recognition of workers' rights. However, with a government that chooses to focus on sustaining employment levels rather than on recognizing workers' rights, and the proliferation of labor unions that are either unable or unwilling to adequately represent the workforce, these laws are not consistently enforced.

It is widely contended that the proposed reforms to Mexican labor law will only serve to further subjugate the rights of Mexico's *maquiladora* workers. But international law may be providing a solution to the complexities of this situation. By regulating the labor practices of multinational corporations, and obligating them to meet their domestic and international obligations, it may be

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207. See *Barcelona Traction, Light and Power Co. Ltd. (Belg. v. Spain)*, 1970 I.C.J. 3, 32 (Feb. 5) (Defining obligations *erga omnes* as "obligations of a state to the international community as a whole").

208. See, e.g., Adeno Addis, *The Thin State in Thick Globalism: Sovereignty in the Information Age*, 37 VAND. J. TRANSNAT'L L. 1, 4 n.4 (2004); Jean Bethke Elshtain, *Sovereign God, Sovereign State, Sovereign Self*, 66 NOTRE DAME L. REV. 1355 (1991); John H. Jackson, *Sovereignty-Modern: A New Approach to an Outdated Concept*, 97 AM. J. INT'L L. 782 (2003); Sepúlveda, *supra* note 185; John R. Worth, Note, *Globalization and the Myth of Absolute National Sovereignty: Reconsidering the "Un-signing" of the Rome Statute and the Legacy of Senator Bricker*, 79 IND. L.J. 245, 258-63 (2004).



possible to improve the working conditions in developing nations such as Mexico and prevent the proliferation of a “race to the bottom” in workers rights. Such a solution can meet the goals of both the Mexican government and the Mexican worker, by maintaining high standards of human rights without compromising foreign investment and economic development. It is towards this “win-win” situation that regulation of Mexico’s *maquiladora* sector must progress in order to ensure that such regulation is beneficial, practicable, and likely to be enforced.