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NUCLEAR WEAPONS, HUMAN SECURITY, AND INTERNATIONAL LAW

VED P. NANDA ¹

I. INTRODUCTION

The end of the Cold War did not remove the threat nuclear weapons pose to human civilization. The danger of mistaken or inadvertent nuclear launching cannot be discounted, nor is there a fail-safe device to ensure that terrorists will not get ahold of nuclear weapons or will not use them if acquired. Numerous experts point to a causal relationship between nuclear weapons and international and national insecurity. A broadened concept of national security includes human security and nuclear weapons are unquestionably a main source of the people's insecurity. The role of international law is to provide a framework for nuclear disarmament, a prerequisite for human security.

President Barack Obama called the future of nuclear weapons in the Twenty-first Century an issue that is “fundamental to the security of our nations and to the peace of the world,” in his remarks at Prague, Czech Republic, on April 5, 2009.² Calling nuclear weapons the “most dangerous legacy” of the Cold War, he emphasized the infinite consequences of a nuclear weapons explosion in any major city “for our global safety, our security, our society, our economy, to our ultimate survival,” stating “clearly and with conviction America’s commitment to seek the peace and security of a world without nuclear weapons.”³ In his words, “as the only nuclear power to have used a nuclear weapon, the United States has a moral responsibility to act.”⁴

A U.S. president’s commitment that America “will take concrete steps towards a world without nuclear weapons . . . [,] will reduce the role of nuclear weapons in our national security strategy, and urge others to do the same[, and] will begin the work of reducing our arsenal”⁵ is indeed a promising development. Just a few days before this, on April 1, President Dmitriy Medvedev of the Russian

1. John Evans Professor, University of Denver, Thompson G. Marsh Professor of Law and Director, International Legal Studies at the University’s Sturm College of Law. I am grateful for the summer research grant from the Sturm College of Law which assisted me in part in completing this essay.

2. President Barack Obama, Remarks at Prague, Czech Republic (April 5, 2009) available at http://www.whitehouse.gov/the_press_office/Remarks-By-President-Barack-Obama-In-Prague-As-Delivered/.

3. *Id.*

4. *Id.*

5. *Id.*

Federation and President Obama discussed nuclear arms control and reduction issues and issued the following joint statement:

As leaders of the two largest nuclear weapons states, we agreed to work together to fulfill our obligations under Article VI of the Treaty on Non-Proliferation of Nuclear Weapons (NPT) and demonstrate leadership in reducing the number of nuclear weapons in the world. We committed our two countries to achieving a nuclear free world, while recognizing that this long-term goal will require a new emphasis on arms control and conflict resolution measures, and their full implementation by all concerned nations. We agreed to pursue new and verifiable reductions in our strategic offensive arsenals in a step-by-step process, beginning by replacing the Strategic Arms Reduction Treaty with a new, equally-binding treaty. We are instructing our negotiators to start talks immediately on this new treaty and to report on results achieved in working out the new agreement by July.⁶

These developments place the issue in the forefront of the international attention.

Thus, I consider it timely to discuss this topic with the next section briefly reviewing the destructive force of nuclear weapons and their utility as instruments of war. This will be followed by a quick look at the new concept of human security. Next, I study the illustrative action the world community—international organizations, especially the United Nations, nongovernmental organizations (NGOs), and individuals—has thus far undertaken to eliminate nuclear weapons. The next section, which precedes the conclusion, discusses the role of international law in the elimination of nuclear weapons.

II. THE DESTRUCTIVE FORCE OF NUCLEAR WEAPONS AND THEIR MINIMUM UTILITY AS INSTRUMENTS OF WAR

A. The Destructive Power of Nuclear Weapons.

Obviously there is no lack of awareness about the death and destruction nuclear weapons cause. The human misery associated with the dropping of atomic bombs over Hiroshima and Nagasaki in early August 1945 is vividly captured in the accounts of horrific, ghastly scenes witnessed by medical and rescue workers.⁷

6. Joint Statement by President Dmitriy Medvedev of the Russian Federation and President Barack Obama of the United States of America (April 1, 2009) available at http://www.whitehouse.gov/the_press_office/Joint-Statement-by-President-Dmitriy-Medvedev-of-the-Russian-Federation-and-President-Barack-Obama-of-the-United-States-of-America/.

7. As one example, a young medical worker's described the scene in the aftermath of the bombing in Hiroshima as follows:

I looked around me. Even though it was morning, the sky was dark as twilight. Then I saw streams of human beings shuffling away from the center of the city. Parts of their bodies were missing. Their eyes had been liquefied. They had blackened skin, and strips of flesh hung like ribbons from their bones. There was an awful stench in the air; the stench of burned flesh. I can't describe that smell, but it was like broiled fish.

VED NANDA & DAVID KRIEGER, NUCLEAR WEAPONS AND THE WORLD COURT 37 (1998) [hereinafter

This was the beginning of the nuclear era.⁸ In his testimony before the International Court of Justice, the Mayor of Nagasaki described the bomb's effects on his city:

Nagasaki became a city of death where not even the sounds of insects could be heard. After a while, countless men, women and children began to gather for a drink of water at the banks of nearby Urakami River, their hair and clothing scorched and their burnt skin hanging off in sheets like rags. Begging for help, they died one after another in the water or in heaps on the banks. Then radiation began to take its toll, killing people like a scourge of death expanding in concentric circles from the hypocenter. Four months after the atomic bombing, 74,000 were dead and 75,000 had suffered injuries, that is, two-third[s] of the city population had fallen victim to this calamity that came upon Nagasaki like a preview of the Apocalypse.⁹

In 2005 then Secretary-General Kofi Annan reminded the world of the destruction in Hiroshima and Nagasaki and warned that a nuclear catastrophe in any city would create chaos, as

[t]ens, if not hundreds, of thousands of people would perish in an instant, and many more would die from exposure to radiation. The global impact would also be grave Hard-won freedoms and human rights could be compromised And world financial markets, trade and transportation could be hard hit, with major economic consequences. This could drive millions of people in poor countries into deeper deprivation and suffering.¹⁰

B. The Minimum Utility of Nuclear Weapons as Instruments of War

Equally important, many security experts have argued that nuclear weapons have minimal utility as instruments of war and that their continued possession has a negative effect on the maintenance of regional and global security.¹¹ To

NUCLEAR WEAPONS AND THE WORLD COURT]. A rescue worker described the scene he witnessed:

In corpses near ground zero the eyeballs were blown outside their heads. The skin was a black tinged yellowish brown, and very dry; it was clear that these persons had died in agony. Many corpses were found at places where there was water -- rivers, old wells, cisterns, ponds, and the like. People who did not die instantly had, it appears, exerted themselves to the limit in their search for water.

Id.

8. Barely three weeks before the U.S. dropped its first atomic bomb on Hiroshima, it had conducted its first ever atomic detonation in the desert a few miles from Los Alamos, New Mexico, at a site called "Trinity" on July 16, 1945. J. Robert Oppenheimer, head of the scientific team for the U.S. atomic bomb program, remarked that at the time of the explosion the following words from the ancient Hindu text, the Bhagavad Gita, flashed through his mind: "I am become Death, the destroyer of worlds." *Id.* at 29.

9. *Id.* at 40.

10. Kofi Annan, Address to the Nuclear Non-Proliferation Treaty Review Conference (May 2, 2005) available at www.un.org/apps/sg/sgstats.asp?nid=1427.

11. See generally Marianne Hanson, *Nuclear Weapons as Obstacles to International Security*, 16

illustrate, in a 2005 article,¹² Robert S. McNamara, U.S. Secretary of Defense under Presidents Kennedy and Johnson, recalled that in 1983 he had decided to “go public” with some information that he “felt was needed to inject reality into these increasingly unreal discussions about the ostensible military utility of nuclear weapons.”¹³ He was referring to the ongoing discussions in the early 1980s regarding how the U.S. could “fight and win a nuclear war” with the Soviets. The information that Robert McNamara referred to was published in a 1983 article that he had written in *Foreign Affairs*:

Having spent seven years as Secretary of Defense dealing with the problems unleashed by the initial nuclear chain reaction 40 years ago, I do not believe we can avoid serious and unacceptable risk of nuclear war until we recognize—and until we base all our military plans, defense budgets, weapons deployments, and arms negotiations on this recognition—that nuclear weapons serve no military purpose whatsoever.¹⁴

McNamara then discussed what he called the “unacceptable risk” of accidental or inadvertent use of nuclear weapons as a result of misjudgment or miscalculation in times of crisis. He explained:

Senior Russian military officials have stated that, due to lack of resources, the Russian nuclear arsenal is increasingly at risk of accidents, theft, and serious malfunction in its command and control systems. As for the risk of inadvertent use of the weapons in a crisis, the Cuban Missile Crisis demonstrated that the United States and the Soviet Union—and indeed the rest of the world—came within a hair’s breadth of a nuclear disaster in October 1962 as a result of misinformation and misjudgment.¹⁵

After analyzing the U.S. policy to sustain and modernize the existing nuclear force, to rely “far into the future” upon the projected deployment of large numbers of strategic nuclear weapons, and to integrate a national ballistic missile defense into its offensive weapons system,¹⁶ McNamara concluded that

we are at a critical moment in human history with respect to offensive nuclear forces. There is a strong temptation to continue the strategies of the past 40 years. Such actions would, in my opinion, be a serious mistake leading to a high risk to all nations across the globe.¹⁷

Int'l Relations 361, 361-62 (2002) [hereinafter Hanson].

12. Robert S. McNamara, *The Folly of U.S. and NATO Nuclear Weapons Policies*, 51 Int'l Affairs (Moscow), No. 3, at 104 (June 2005).

13. *Id.* at 108.

14. *Id.* at 108.

15. *Id.* at 109.

16. *Id.* at 114-16.

17. *Id.* at 118. See also Robert S. McNamara, *Apocalypse Soon*, FOREIGN POL'Y, May/June 2005, at 28.

III. HUMAN SECURITY

A new understanding of the concept of security is emerging in the twenty-first century. The need for a redefinition of the traditional concept of security was eloquently addressed in 2003 by the Commission on Human Security.¹⁸ The Commission, co-chaired by Sadako Ogata, former U.N. High Commissioner for Refugees, and Amartya Sen, Nobel laureate in economics, was launched at the 2000 Millennium Summit convened by then U.N. Secretary-General Kofi Annan and was established at the initiative of the government of Japan.

Contrasted with the traditional focus on state security, the new concept of security is aimed at ensuring protection of the people. As the Commission stated,

the security debate has changed dramatically since the inception of state security advocated in the 17th century. According to that traditional idea, the state would monopolize the rights and means to protect its citizens. But in the 21st century, both the challenges to security and its protectors have become more complex. The state remains the fundamental purveyor. Yet it often fails to fulfill its security obligations—and at times has even become a source of threat to its own people. That is why attention must now shift from the security of the state to the security of the people—to human security.¹⁹

Thus, according to the Commission, the international community “urgently needs a new paradigm of security.”²⁰

Irene Khan, Secretary General of Amnesty International, provides the following grim account as an appropriate context to help us understand why human security needs to supplement the narrow traditional concept of state security. She led an Amnesty delegation to Burundi in September 2002, days after the Burundi army had massacred more than 170 civilians in a remote village, and went to the local hospital to meet the only four survivors. The next day she met the President of Burundi and asked him what action he would take to protect civilians in the internal conflict then raging in his country. He replied: “Madam, you do not understand—we are fighting a war to protect our national security.”²¹

18. Commission on Human Security, *Human Security Now* (2003) [hereinafter *Human Security Now*].

19. *Id.* at 2. In addition to the authorities on human security cited here, see also John F. Jones, *Human Security and Social Development*, 33 DENV. J. INT'L L. & POL'Y 92 (2004); Ved P. Nanda, *Preemptive and Preventive Use of Force, Collective Security, and Human Security*, 2004 Sutton Colloquium: Foreword, 33 DENV. J. INT'L L. & POL'Y 7 (2004); Priyankar Upadhyaya, *Human Security, Humanitarian Intervention and Third World Concerns*, 33 DENV. J. INT'L L. & POL'Y 71 (2004).

20. *Human Security Now*, *supra* note 18, at 2.

21. Irene Khan, *A Human Rights Agenda for Global Security*, in *HUMAN SECURITY FOR ALL: A TRIBUTE TO SERGIO VIEIRA DE MELLO 17* (Kevin M. Cahill ed., 2004). In its 2001 report, the International Commission on Intervention and State Sovereignty expressed its views on the need to think beyond the traditional narrow concept of security:

The traditional, narrow perception of security leaves out the most elementary and legitimate concerns of ordinary people regarding security in their daily lives. It also diverts enormous amounts of national wealth and human resources into

The Human Security Commission's focus is on the empowerment of people, which can help prepare them against severe present and future threats, both natural and societal. In a nutshell it affirms that the traditional view of state security has expanded in the Twenty-first Century to include human security, as well.²²

The focus on human security is to ensure that adequate attention is given to addressing the real sources of insecurity from which so many people all over the world suffer. Nuclear weapons constitute a major source of the people's insecurity. And weapons of mass destruction—nuclear, chemical, and biological—are obviously among the main threats to state security. In 2004, the Secretary General's High-level Panel, which was established to examine new global security threats, enumerated six clusters as threats to international security, which include weapons of mass destruction.²³

The Union of Concerned Scientists has stated that “[n]uclear weapons remain the gravest and most immediate threat to human civilization.”²⁴ In June 2007, speaking at the Council on Foreign Relations, former Senator and co-chairman of the Nuclear Threat Initiative Sam Nunn listed the greatest threats we currently face from nuclear weapons: “[C]atastrophic terrorism, a rise in the number of nuclear

armaments and armed forces, while countries fail to protect their citizens from chronic insecurities of hunger, disease, inadequate shelter, crime, unemployment, social conflict and environmental hazard. When rape is used as an instrument of war and ethnic cleansing, when thousands are killed by floods resulting from a ravaged countryside and when citizens are killed by their own security forces, then it is just insufficient to think of security in terms of national territorial security alone. The concept of human security can and does embrace such diverse circumstances.

INT'L COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT 15 (2001) available at http://www.idrc.ca/openebooks/960-7/#page_15.

22. Among various definitions of human security, Kofi Annan's encompasses “human rights, good governance, access to education and health care, and [to ensure] that each individual has opportunities and choices to fulfill his or her potential.” Press Release, Secretary General Kofi Annan, *Secretary-General Salutes International Workshop on Human Security in Mongolia*, SG/SM/7382 (May 8-10, 2000) available at www.un.org/News/Press/docs/2000/20000508.sgsms7382.doc. The Commission on Human Security defines the concept in the following words:

To protect the vital core of all human lives in ways that enhance human freedoms and human fulfillment. Human security means protecting fundamental freedoms It means protecting people from critical (severe) and pervasive (widespread) threats and situations. It means using processes that build on people's strengths and aspirations. It means creating political, social, environmental, economic, military and cultural systems that together give people the building blocks of survival, livelihood and dignity.

Human Security Now, *supra* note 18, at 4. The emerging common theme is that it enhances human rights and facilitates human development.

23. Secretary-General's High-level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, 23, U.N. Doc. A/59/565/2004 (2004) available at <http://www.un.org/secureworld/>. The other five clusters listed in the report are: economic and social threats, interstate conflict, internal conflict, terrorism, and transnational organized crime.

24. Union of Concerned Scientists, *Nuclear Weapons & Global Security: Nuclear Weapons Overview*, http://www.ucsusa.org/nuclear_weapons_and_global_security/nuclear_weapons/technical_issues/nuclear-weapons-overview.html (last visited May 30, 2009) [hereinafter *Nuclear Weapons & Global Security*].

weapons states, increasing danger of mistaken, accidental or unauthorized nuclear launch”²⁵ He referred to the January 2007 *Wall Street Journal* op-ed piece he had published along with two former Secretaries of State, Henry Kissinger and George Schultz, and former U.S. Secretary of Defense William Perry, in which they had called upon the United States to provide leadership to prevent nuclear weapons’ “proliferation into potentially dangerous hands, and ultimately ending them as a threat to the world.”²⁶

Making the point that terrorist groups are “conceptually outside the bounds of a deterrent strategy,” Senator Nunn and his colleagues stated that the United States will find itself in a nuclear era “more precarious, psychologically disorienting, and economically even more costly than was Cold War deterrence.”²⁷ They also endorsed “setting the goal of a world free of nuclear weapons and working energetically on the actions required to achieve that goal.”²⁸

At the height of the Cold War, President John F. Kennedy had stated in his 1961 address to the United Nations General Assembly: “Every man, woman, and child lives under a nuclear sword of Damocles, hanging by the slenderest of threads, capable of being cut at any moment by accident or by miscalculation or by madness. The weapons of war must be abolished before they abolish us.”²⁹

IV. THE WORLD COMMUNITY’S EFFORTS TO ELIMINATE NUCLEAR WEAPONS

The catastrophic effects of Hiroshima and Nagasaki bombings lead to only one rational solution to nuclear weapons—eliminate them. The move to abolish them began with the very first resolution adopted by the United Nations General Assembly in London in January 1946, entitled “Establishment of a Commission to Deal with the Problems Raised by the Discovery of Atomic Energy.”³⁰ The Resolution, which was adopted unanimously, charged the Commission, inter alia, to make specific proposals “for the elimination from national armaments of atomic weapons and of all other major weapons adaptable to mass destruction.”³¹ This goal has been reaffirmed by the General Assembly in hundreds of subsequent resolutions.

In the latest iteration of its reaffirmation of the goal, the 63rd Session of the General Assembly on December 2, 2008, adopted a Resolution entitled “Nuclear Disarmament,”³² which recognizes in its operative paragraph 1 that “the time is

25. Sam Nunn, *The Mountaintop: A World Free of Nuclear Weapons*, Council on Foreign Relations, 2-3 (June 14, 2007) http://www.nti.org/c_press/speech_samnunn_cfr07.pdf.

26. *Id.* at 3.

27. *Id.* On the risk of nuclear terrorism, see Sue Wareham, *It’s Time to Abolish Nuclear Weapons*, 59 AUST. J. INT’L AFFAIRS 439, 442 (2005).

28. See Nuclear Weapons & Global Security, *supra* note 24.

29. President John F. Kennedy, Address in New York City before the General Assembly of the United Nations, 1 Pub. Papers 618, 620 (September 25, 1961), available at <http://www.jfklibrary.org/Historical+Resources/Archives/Reference+Desk/Speeches/JFK/003POF03UnitedNations09251961.htm>

30. G.A. Res. 1(1), U.N. Doc. A/RES/1(1) (Jan. 24, 1946) available at [http://www.un.org/Docs/journal/asp/ws.asp?m=A/RES/1\(1\)](http://www.un.org/Docs/journal/asp/ws.asp?m=A/RES/1(1)).

31. *Id.* ¶ 5(c).

32. G.A. Res. 63/46, U.N. Doc. A/RES/63/46 (Dec. 2, 2008).

now opportune for all the nuclear-weapon States to take effective disarmament measures to achieve the total elimination of these weapons at the earliest possible time.” Among other recommendations for member states, the resolution urges the nuclear-weapon states “to stop immediately the qualitative improvement, development, production and stockpiling of nuclear warheads and their delivery systems,”³³ and, as an interim measure, “to de-alert and deactivate immediately their nuclear weapons.”³⁴ It calls upon the nuclear-weapon states “to agree on an internationally and legally binding instrument on a joint undertaking not to be the first to use nuclear weapons,” and for all states to give “security assurances of non-use and non-threat of use of nuclear weapons against non-nuclear-weapon States.”³⁵ It also calls upon the Conference on Disarmament to establish “an ad-hoc committee on nuclear disarmament early in 2009 and to commence negotiations on a phased program of nuclear disarmament leading to the total elimination of nuclear weapons with a specific framework of time”³⁶ and for negotiations on a verifiable treaty banning the production of fissile material for nuclear weapons.³⁷

In the preamble to another Resolution passed on the same day, the General Assembly reaffirmed “the commitment of the international community to the goal of the total elimination of nuclear weapons and the creation of a nuclear-weapon-free world,” while convinced that

the continuing existence of nuclear weapons poses a threat to all humanity and that their use would have catastrophic consequences for all life on Earth, and recognizing that the only defence against a nuclear catastrophe is the total elimination of nuclear weapons and the certainty that they will never be produced again.³⁸

The latter Resolution was a follow-up to the 1996 Advisory Opinion of the International Court of Justice on the *Legality of the Threat or Use of Nuclear Weapons*.³⁹ In the final operative paragraph of its Opinion the Court unanimously stated: “There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.”⁴⁰

Several aspects of this paragraph are noteworthy. First, it is an elaboration of certainly one of the most important articles in any arms control measure, article VI

33. *Id.* ¶ 5.

34. *Id.* ¶ 6.

35. *Id.* ¶ 8.

36. *Id.* ¶ 20.

37. *Id.* ¶ 14.

38. G.A. Res. 63/49, U.N. Doc. A/RES/63/49 (Dec. 2, 2008).

39. *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226 (July 8) [hereinafter ICJ Advisory Opinion]. See generally NUCLEAR WEAPONS AND THE WORLD COURT, *supra* note 7; JOHN BURROUGHS, THE LEGALITY OF THREAT OR USE OF NUCLEAR WEAPONS: A GUIDE TO THE HISTORIC OPINION OF THE INTERNATIONAL COURT OF JUSTICE (1997); THE CASE AGAINST THE BOMB (Roger S. Clark & Madeleine Sann eds., 1996); INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE AND NUCLEAR WEAPONS (Laurence Boisson de Chazournes & Philippe Sands eds., 1999).

40. ICJ Advisory Opinion, *supra* note 39, para. 2F.

of the Non-Proliferation Treaty (NPT), under which the commitment by non-nuclear weapon states not to possess nuclear weapons is reciprocated by the commitment of five nuclear-weapon states “to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.”⁴¹ Second, it calls for nuclear disarmament “in all its aspects,” thus differing from article VI of the NPT as it sets forth an obligation not only to “pursue negotiations in good faith” but in addition an obligation to bring the specified negotiations to a conclusion. Third, the nuclear-weapon states’ obligation to pursue negotiations for nuclear disarmament requires international control of the disarmament process. Finally, this obligation stands alone, unlike the requirement under article VI of the NPT that these states also pursue negotiations “on a treaty on general and complete disarmament.” Thus it affirms that the obligation to eliminate nuclear weapons is unconditional, not requiring concurrent progress on conventional disarmament.

Among many other resolutions it has adopted on the issue of nuclear weapons, the General Assembly reiterated its request to the Conference on Disarmament to commence negotiations on an international convention prohibiting the use or threat of use of nuclear weapons.⁴²

At the 1995 Review and Extension Conference of the NPT parties, states parties decided to strengthen the review process for the Treaty and also decided on principles and objectives for nuclear non-proliferation and disarmament.⁴³ The ICJ’s 1996 Advisory Opinion had an influential impact on states parties as they attended the 2000 Review Conference. The participants did not agree “to commence multilateral negotiations leading to the conclusion of a nuclear weapons convention prohibiting the development, testing, production, stockpiling, transfer, use and threat of use of nuclear weapons and providing for their elimination under strict and effective international control,” as recommended by Malaysia and Costa Rica in the working paper they introduced at the Review Conference.⁴⁴ However, they did agree on 13 specific practical steps for progressive and systematic efforts to implement article VI of NPT, that is, to reach the objective of nuclear disarmament leading to the total elimination of nuclear weapons.⁴⁵ These include the urgency of signatures and ratifications, to achieve the early entry into force of

41. Treaty on the Non-Proliferation of Nuclear Weapons, art. VI, July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161.

42. G.A. Res. 63/75, U.N. Doc. A/RES/63/75 (Dec. 2, 2008).

43. Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, April 17-May 12, 1995, *1995 Review and Extension Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons*, U.N. Doc. NPT/Conf.1995/32 (Part I) & Corr. 2, annex..

44. Working paper submitted by Costa Rica & Malaysia, Follow-Up to the International Court of Justice Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, submitted to the Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, U.N. Doc. NPT/CONF.2000/MC.I/SB.I/WP.4 (May 8, 2000).

45. Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, *2000 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons*, April 24-May 19, 2000, U.N. Doc. NPT/CONF.2000/28 (Parts I and II), part I, para. 15.

the Comprehensive Nuclear-Test-Ban Treaty (CTBT), negotiations to conclude a treaty banning the production of fissile material for nuclear weapons, and the necessity of negotiations on nuclear disarmament.⁴⁶ The states parties also reaffirmed that the total elimination of nuclear weapons is the only sure guarantee against the use or threat of use of nuclear weapons.⁴⁷ However, it is disappointing to note that no progress has been made toward the implementation of these agreed-upon specific steps. And the 2005 Review Conference was a huge disappointment as states parties failed to reach agreement on any substantive issues,⁴⁸ it produced no new recommendation for reducing the threat of nuclear proliferation. The then UN Secretary-General Kofi Annan declared that the Conference had “missed a vital opportunity to strengthen our collective security against the many nuclear threats to which all states and all peoples are vulnerable.”⁴⁹

It is also noteworthy that in 1978 at the First Special Session of the General Assembly devoted to disarmament, all member states affirmed by consensus the goal of nuclear disarmament, accorded it their highest priority, and decided on specific concrete steps to achieve that objective.⁵⁰ Twenty-two years later, the United Nations again called for elimination of nuclear weapons in its 2000 Millennium Declaration.⁵¹

Following the 1978 Special Session on Disarmament, the UN established the Conference on Disarmament in 1979, which succeeded the Geneva-based Committee on Disarmament.⁵² In his message to the Conference on Disarmament’s plenary meeting in January 2009, UN Director General Sergei

46. The other steps include a moratorium on nuclear test explosions; the principle of irreversibility to apply to nuclear disarmament; nuclear-weapon-states’ commitment to the total elimination of their nuclear arsenals leading to nuclear disarmament; the early entry into force and full implementation of START II and the conclusion of START III, while preserving and strengthening the ABM treaty; specific enumerated steps by nuclear weapon states leading to nuclear disarmament; arrangements to place excess fissile materials under the control of the International Atomic Energy Agency (IAEA); reaffirmation of the goal of general and complete disarmament; regular reports, within the framework of the NPT strengthened review process; and the further development of the required verification capabilities so as to provide assurance of compliance with nuclear disarmament agreements to achieve a nuclear-weapon-free world. *Id.*

47. *Id.* Vol. I, para. 2. For the final document of the 2000 Review Conference, see Vols. I-III of U.N. Doc. NPT/CONF.2000/28 (Parts I-IV).

48. See Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, *Draft final document of the 2005 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons*, May 2-27, 2005, U.N. Doc. NPT/CONF.2005/DC/1 (2005).

49. Press Release, Secretary-General, As Review Conference for Non-proliferation Treaty Closes Without Agreement Secretary-General Says Vital Opportunity Missed to Strengthen Security, U.N. Doc. SG/SM/9895 (May 27, 2005) available at <http://www.un.org/News/Press/docs/2005/sgsm9895.doc.htm>.

50. General Assembly, Special Sessions devoted to Disarmament, May 1978, (SSOD-I); see also Conference on Disarmament, India: Working Paper on Nuclear Disarmament, U.N. Doc. CD/1816 (Feb. 20, 2007) [hereinafter India’s Working Paper on Nuclear Disarmament].

51. G.A. Res. 55/2, U.N. Doc. A/RES/55/2 (Sept. 8, 2000).

52. The United Nations Office at Geneva, <http://www.unog.ch> (follow “Disarmament” tab then follow “Conference on Disarmament” hyperlink).

Ordzhonikidze referred to the “five point proposal to revitalize the international disarmament agenda” he had issued in October 2008.⁵³ In his words,

[i]ncluded in this proposal were several specific contributions that could be made by the Conference on Disarmament with respect to nuclear disarmament and fissile materials. Indeed, this Conference and its predecessors have an impressive record of achievement, including the Nuclear Non-Proliferation Treaty, the Bacteriological and Toxin Weapons Convention, the Chemical Weapons Convention and the Comprehensive Nuclear-Test-Ban Treaty. These instruments demonstrate the potential of the Conference.⁵⁴

In addition to the efforts at the U.N. toward nuclear disarmament, those advocating the elimination of nuclear weapons include non-nuclear-weapon states and non-state actors—scientists, security experts, politicians, decision-makers, and civilian activists. To illustrate, the final document of the 2006 Conference of Heads of State or Government of Non-aligned Countries called upon the Conference on Disarmament to establish as the highest priority and as soon as possible an ad-hoc committee on nuclear disarmament and to begin negotiations on a phased program for the complete elimination of nuclear weapons with a specific time framework.⁵⁵

Reports on nuclear disarmament by non-nuclear states include those by the Canadian House of Commons in 1998, *Canada and the Nuclear Challenge*,⁵⁶ the Japanese government-sponsored Tokyo Forum for Nuclear Non-Proliferation and Disarmament in 1999,⁵⁷ and the 1996 report of the Canberra Commission on the Elimination of Nuclear Weapons, established by the Australian government and submitted to the Conference on Disarmament in 1997.⁵⁸ In July 2008, the Prime Ministers of Australia and Japan established the International Commission on Nuclear Non-proliferation and Disarmament, co-chaired by the former Foreign Minister of Australia, Gareth Evans, and former Japanese Foreign Minister, Yoriko Kawaguchi.⁵⁹ The Commission will publish a major report by January 2010, in time for the 2010 NPT Review Conference.⁶⁰ Another similar initiative is by the

53. Secretary-General, Message to the Conference on Disarmament, Geneva (January 20, 2009) www.unog.ch (follow “Disarmament” tab, then follow “Conference on Disarmament” hyperlink, then follow Statements at Plenary Meetings 2009 hyperlink).

54. *Id.*

55. U.N. Doc. A/61/472-S/2006/780, Annex 1.

56. *Canada and the Nuclear Challenge: Reducing the Political Value of Nuclear Weapons for the Twenty First Century*, available at www.ccnr.org/scfait_recs.html.

57. The Report of the Tokyo Forum for Nuclear Non-Proliferation and Disarmament, *Part Three: Stopping and Reversing Nuclear Proliferation*, available at www.mofa.go.jp/policy/un/disarmament/forum/tokyo9907/report-3.html.

58. Australian Government Department of Foreign Affairs and Trade, *Report of the Canberra Commission on the Elimination of Nuclear Weapons*, available at <http://www.dfat.gov.au/cc/index.html>

59. International Commission on Nuclear Non-Proliferation and Disarmament, *About the Commission*, available at www.icnnd.org/index.html.

60. International Commission on Nuclear Non-Proliferation and Disarmament, *Joint Statement by Gareth Evans and Yoriko Kawaguchi*, New York, Sept. 25, 2008, available at http://www.icnnd.org/news/releases/080925_js_evans_kawaguchi.html.

New Agenda Coalition, composed of a geographically dispersed group of middle-power countries—Brazil, Egypt, Ireland, Mexico, New Zealand, South Africa, and Sweden.⁶¹

Numerous elected officials and civil society groups have been actively involved in nuclear disarmament issues. The former include the Parliamentarians for Nuclear Non-proliferation and Disarmament,⁶² Mayors for Peace, an international organization which is waging a campaign to ban nuclear weapons by 2020,⁶³ and the Middle Powers Initiative,⁶⁴ which works primarily with middle-power governments on nuclear disarmament issues.

Among influential reports by civil society groups are a 1997 report issued by the Henry L. Stimson Center's 1997 Project on Eliminating Weapons of Mass Destruction, entitled *An American Legacy, Building a Nuclear-Weapon-Free World*,⁶⁵ and a 1997 report released by the National Academy of Sciences, entitled *The Future of Nuclear Weapons Policy*.⁶⁶ A 2007 policy analysis brief was issued by the Stanley Foundation under the title *Overcoming Nuclear Dangers*.⁶⁷

Among several NGOs which are actively engaged in working on nuclear policy issues are Soka Gakkai International (SGI)⁶⁸ and the Nuclear Age Peace Foundation.⁶⁹ The president of Soka Gakkai International, Daisaku Ikeda, has called "for the creation of a U.N. Decade of Action by the World's People for Nuclear Abolition and for the early convening of a World Summit for Nuclear Abolition."⁷⁰ He considers such steps as both reflecting and supporting an emerging international consensus for disarmament. In his words, "[c]rying out in opposition to war and nuclear weapons is neither emotionalism nor self-pity. It is the highest expression of human reason based on an unflinching perception of the dignity of life."⁷¹

SGI's anti-nuclear activities include petition drives for abolition of nuclear weapons and public education, including organizing exhibitions, conferences, and publications.⁷² In 1997, SGI members collected over 13 million signatures as part

61. See *New Agenda Coalition General Debate Statement to the 2008 First Committee*, available at <http://www.mfat.govt.nz/downloads/disarmament/2008-nac-general-statement.pdf>.

62. See Parliamentarians for Nuclear Non-proliferation and Disarmament, <http://www.gsinstitute.org/pnnd/about.html>.

63. See Mayors for Peace, http://www.2020visioncampaign.org/pages/106/About_us/.

64. See Middle Powers Initiative, <http://www.middlepowers.org/about.html>.

65. The Harry L. Stimson Center, Report No. 22 (March 1997) available at <http://www.stimson.org/wmd/pdf/legacy.pdf>.

66. COMMITTEE ON INTERNATIONAL SECURITY AND ARMS CONTROL, NATIONAL ACADEMY OF SCIENCES (National Academy Press 1997) available at www.nap.edu/readingroom/books/fun.

67. DAVID CORTRIGHT, *OVERCOMING NUCLEAR DANGERS* (Stanley Foundation, 2007).

68. See SGI Homepage, <http://sgi.org/>.

69. Nuclear Age Peace Found. Homepage, <http://wagingpeace.org/>.

70. Daisaku Ikeda, *Emerging from the Nuclear Shadow*, NUCLEAR AGE PEACE FOUNDATION, Sept. 14, 2006, at para. 15, available at http://www.wagingpeace.org/articles/2006/09/14_ikeda_emerging.htm.

71. *Id.* at para. 18.

72. See *SGI's Antinuclear Activities*, SGI, <http://www.sgiquarterly.org/assets/images/Jly2007/activities.pdf>.

of the Abolition 2000 petition drive, which were presented the next year to both then Secretary-General Kofi Annan and the chairperson of the Preparatory Committee of the Treaty on the Non-Proliferation of Nuclear Weapons. The Nuclear Age Peace Foundation is primarily committed to working for a world free of nuclear weapons.

A notable arms expert seeking abolition of nuclear weapons, Ambassador Max M. Kampelman, spoke to the Conference on the Implications of the Reykjavik Summit on its 20th Anniversary in October 2006. In his address Kampelman emphatically declared: "There is today no alternative if we wish to secure the safety of our nation and of our families other than the elimination of all nuclear weapons globally along with all other weapons of mass destruction, including biological and chemical weapons."⁷³ He concluded the address with the following exhortation:

It is essential that we lead the world into developing a decisive move from the "is"—a world with a risk of increasing catastrophe—and work toward achieving peace and stability, the 'ought.' It was President John Kennedy who said, ' . . . the world was not meant to be a prison in which man awaits his execution The weapons of war must be abolished before they abolish us.' It was President Ronald Reagan who called for the abolition of 'all nuclear weapons,' which he considered to be 'totally irrational, totally inhumane, good for nothing but killing, . . . destructive of life on earth and civilization.'

The world of science knows this. It is time for the political world to learn it. It is time for us to act.⁷⁴

V. NUCLEAR-WEAPON STATES' RELIANCE UPON NUCLEAR WEAPONS FOR SECURITY

To reiterate, none of the nuclear-weapon states is willing to relinquish its nuclear weapons; instead, all nuclear-weapon states rely upon nuclear weapons for security. How President Obama's administration will shift its policy on this issue should be known in the near future. However, the prior policy embodied in the United States' 2002 Nuclear Posture Review (NPR)⁷⁵ demonstrates clearly that nuclear weapons have been central in U.S. strategic planning. The U.S. is prepared to target non-nuclear weapon states and Iran, Iraq, Syria, North Korea, and Libya are specifically mentioned. It has even indicated the possibility of developing new nuclear weapons.

In its working paper submitted to the Preparatory Committee for the 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear

73. Max Kampelman, *Zero Nuclear Weapons: It is Time for Us to Act*, VITAL SPEECHES OF THE DAY, April 2007, at 148, available at www.vsotd.com.

74. *Id.* at 151.

75. The Bush administration's NPR was issued in January 2002 and partially leaked to the press in March 2002. Union of Concerned Scientists, *Global Security: Nuclear Posture Review*, www.ucsusa.org/global_security/nuclear_weapons/nuclear-posture-review.html.

Weapons,⁷⁶ the United States pointed to a number of complexities as the NPT parties discuss disarmament issues. It encouraged the parties “to debate how to create an international environment in which it would become possible to achieve” the goal of nuclear disarmament.⁷⁷ It noted that “reducing international tension and strengthening trust between States would be” a prerequisite to realizing the goal.⁷⁸ It further stated that “until achievement of the changes in the regional and global security environment called for in the NPT’s preamble, the United States nuclear deterrent will continue to make an important contribution to nuclear non-proliferation.”⁷⁹ Finally, it outlined a list of the conditions that would be necessary to “achieve, and, significantly, to maintain over time, the goal of a world free of nuclear weapons[.]”⁸⁰

China stated its position in the working paper it submitted to the Preparatory Committee:

Nuclear disarmament should be a just and reasonable process of gradual reduction towards a downward balance. States possessing the largest nuclear arsenals bear special responsibility for nuclear disarmament and should take the lead in drastically reducing their nuclear arsenals in a verifiable, irreversible and legally binding way, so as to create conditions for the realization of the final nuclear disarmament in a comprehensive and thorough manner.⁸¹

In order “to promote nuclear disarmament, reduce the danger of nuclear war and diminish the role of nuclear weapons in national security policy,” China recommends the following measures:

- (a) Abandoning the policies of nuclear deterrence based on the first use of nuclear weapons and lowering the threshold for using nuclear weapons;
- (b) Honouring their commitment not to target their nuclear weapons against any countries, nor to list any countries as targets of nuclear strikes;
- (c) Undertaking not to be the first to use nuclear weapons at any time or under any circumstances; to refrain unconditionally from using or threatening to use nuclear weapons against non-nuclear-weapon States or nuclear-weapon-free zones; and to conclude relevant international legal instruments thereupon;
- (d) Supporting efforts of relevant countries and regions to establish

76. United States of America Working Paper, *Achieving and Sustaining Nuclear Weapons Elimination*, Mar. 17, 2007, U.N. Doc. NPT/CONF.2010/PC.1/WP.21 (May 3, 2007).

77. *Id.* ¶ 4.

78. *Id.* ¶ 6.

79. *Id.* ¶ 7.

80. *Id.* ¶ 14.

81. China Working Paper, Preparatory Committee for the 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, *Nuclear Disarmament and Reduction of the Danger of Nuclear War*, ¶ 7, U.N. NPT/CONF.2010/PC.1/WP.46 (May 7, 2007).

nuclear-weapon-free zones and other weapons-of-mass-destruction-free zones in accordance with regional conditions on a basis of voluntary consultation and agreement;

(e) Not developing easy-to-use low-yield nuclear weapons;

(f) Withdrawing and repatriating all nuclear weapons deployed outside their own territories;

(g) Abandoning “nuclear umbrella” and “nuclear sharing” policies and practices;

(h) Taking all necessary steps to avoid accidental or unauthorized launches of nuclear weapons.⁸²

In its working paper submitted to the Preparatory Committee, the United Kingdom noted its absolute commitment “to the principles and practice of multilateral nuclear disarmament.”⁸³ As to its nuclear deterrent, it stated:

At the end of last year we published a White Paper explaining the decision of the United Kingdom Government to maintain a nuclear deterrent. In March, the United Kingdom Parliament voted to support this decision. The United Kingdom has decided to begin the concept and design work required to make possible a replacement for our current submarine fleet; and it decided to participate in a programme to extend the life of the Trident D5 missile system.”⁸⁴

Russia is equally committed to nuclear weapons’ playing an important role in its military planning, as expressed in its 2000 study, *The Concept of National Security of the Russian Federation*.⁸⁵ China continues to modernize its nuclear weapons capability, while Britain and France have given no indication that they might agree to the abolition of nuclear weapons.

India, a non-signatory to NPT and now a nuclear-weapon state, has in its February 2007 working paper submitted to the Conference on Disarmament, urged “the international community to intensify dialogue so as to build a consensus that strengthens the ability of the international community to initiate concrete steps towards achieving the goal of nuclear disarmament.”⁸⁶ It suggested specific steps, including reduction of the salience of nuclear weapons in the security doctrines; measures by nuclear weapon states to reduce nuclear danger, including de-alerting of nuclear weapons; a global agreement on “no-first-use” of nuclear weapons;

82. *Id.* ¶ 12.

83. United Kingdom of Great Britain and Northern Ireland Working Paper, Preparatory Committee for the 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, *Working Paper on Disarmament Submitted by The United Kingdom of Great Britain and Northern Ireland*, ¶ 1, U.N. NPT/CONF.2010/PC.I/WP.59 (May 9, 2007).

84. *Id.* ¶ 3.

85. See, e.g., Daniel Sumner, *Russian Perceptions of Nuclear Weapons*, 44 DISARMAMENT DIPL. 16, 16-21 (2000) available at <http://www.acronym.org.uk/dd/dd44/index.htm>.

86. India Working Paper, Disarmament Commission, *Recommendations for Achieving the Objective of Nuclear Disarmament and Non-Proliferation of Nuclear Weapons*, ¶ 17, U.N. A/CN.10/2007/WG.I/WP.1 (April 9, 2007).

negotiation of a universal, binding agreement on non-use of nuclear weapons against non-nuclear weapon states; negotiation of a convention on the complete prohibition of the use or threat of use of nuclear weapons; and “[n]egotiation of a nuclear weapons convention prohibiting the development, production, stockpiling and use of nuclear weapons and on their destruction, leading to the global, nondiscriminatory and verifiable elimination of nuclear weapons with a specified time frame.”⁸⁷

As already mentioned, there is no practical utility of nuclear weapons as tools of war, although many states still consider them to be a necessary deterrent against nuclear attack by others. But such reliance on deterrence entails serious risks and dangers; there is no consensus that the deterrent qualities of nuclear weapons kept the peace during the Cold War; and miscalculations or misperceptions can certainly lead to deadly nuclear exchanges.⁸⁸ Non-nuclear-weapon states consider it hypocrisy and a double standard on the part of nuclear-weapon states insofar as they have not shown any inclination to implement in good faith the obligation they undertook under article VI of the NPT.⁸⁹

Director-General of the International Atomic Energy Agency, Mohamed El Baradei, has aptly stated: “The very existence of nuclear weapons gives rise to the pursuit of them. They are seen as a source of global influence, and are valued for their perceived deterrent effect. And as long as some countries possess them (or are protected by them in alliance) and others do not, this asymmetry breeds chronic global insecurity.”⁹⁰ Non-nuclear-weapon states equate the existing situation to “nuclear apartheid.” Hence, several of them would like to join the nuclear club, with the result that non-proliferation as a goal remains illusory so long as nuclear-weapon states are unwilling to commit themselves to the goal of nuclear disarmament.

VI. THE UNFINISHED AGENDA

What, then, is the answer? Undoubtedly the only answer lies in nuclear-weapon states’ setting a firm timeframe for the elimination of nuclear weapons and agreeing on specific, concrete steps toward that goal, and to implement them. The Indian workpaper on Nuclear Disarmament outlining such steps provides a good model for consideration.⁹¹ In their working paper presented to the Preparatory Committee, the members of the Group of Non-Aligned States Parties to the NPT stated:

The Group of Non-Aligned States parties to the Treaty reiterates its call for a full implementation of the unequivocal undertaking given by the nuclear-weapon States at the 2000 Review Conference of the Parties to

87. *Id.*

88. *See, e.g.*, Hanson, *supra* note 11, at 371-72.

89. *See, e.g.*, Hugh Gusterson, *A Double Standard on Nuclear Weapons?*, Audit of the Conventional Wisdom (MIT Center for International Studies), April 2006, available at http://web.mit.edu/CIS/pdf/gusterson_audit.pdf.

90. Mohamed ElBaradei, *Towards a Safer World*, *ECONOMIST*, October 18, 2003, at 51.

91. Working Paper Submitted by India, *supra* note 86.

the Treaty on the Non-Proliferation of Nuclear Weapons to accomplish the total elimination of their nuclear arsenals leading to nuclear disarmament. That undertaking should be demonstrated without delay through an accelerated process of negotiations and through the full implementation of the 13 practical steps to advance systematically and progressively towards a nuclear-weapon-free world as agreed to at the 2000 Review Conference.⁹²

The Group further stated that it

remains deeply concerned by the lack of progress towards achieving the total elimination of nuclear weapons despite some reports of bilateral and unilateral reductions. The Group is also concerned by the existence and continued deployment of tens of thousands of such weapons, whose exact number remains unconfirmed, owing to the lack of transparency in various nuclear weapons programmes. While noting the signing of the Treaty between the United States of America and the Russian Federation on Strategic Offensive Reduction on 24 May 2002, the Group stresses that reductions in deployments and in operational status cannot take the place of irreversible cuts in, and the total elimination of, nuclear weapons. The non-entry into force of START II is a setback to the 13 practical steps in the field of nuclear disarmament adopted at the 2000 Review Conference. In that regard, the Group calls for the application of the principles of irreversibility and increased transparency by the nuclear-weapon States regarding nuclear disarmament and nuclear and other related arms control and reduction measures.⁹³

The Group also called for the establishment of a subsidiary body on nuclear disarmament to focus on the issue of fulfillment of the nuclear-weapon States' obligations under article VI of NPT, to pursue in good faith negotiations leading to nuclear disarmament.⁹⁴

A Nuclear Weapons Convention is needed to supplement the NPT, which, as the 2005 Review Conference evidences, has fallen short of achieving its objective of nuclear disarmament, as nuclear-weapon states seem to be unwilling to fulfill their commitment under article VI of the NPT. As far back as in April 1997, the Lawyers' Committee on Nuclear Policy, the U.S. branch of the International Association of Lawyers Against Nuclear Arms, prepared a draft Model Nuclear Weapons Convention.⁹⁵ The Model Convention proposed an international structure for inspection and control paralleling that in the Chemical Weapons

92. Preparatory Committee for the 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, *Working Paper Presented by the Members of the Group of Non-Aligned States Parties to the Treaty on the Non-Proliferation of Nuclear Weapons*, ¶ 3, U.N. NPT/CONF.2010/PC.I/WP.8 (April 27, 2007).

93. *Id.* ¶ 6.

94. *Id.* ¶ 10.

95. See IALANA, *Securing our Survival: The Case for a Nuclear Weapons Conventions* § 2. (1997), available at <http://icanw.org/securing-our-survival>.

Convention. In November 1997, Costa Rica presented the Draft Model Nuclear Weapons Convention at the United Nations General Assembly.⁹⁶

In April 2007, Costa Rica submitted to the 2007 Preparatory Committee for the 2010 NPT Review Conference an updated Model Nuclear Weapons Convention.⁹⁷ Subsequently, on December 17, 2007, Costa Rica and Malaysia wrote to the UN Secretary-General requesting him to circulate the Model Convention as a UN document of the 62nd Session of the General Assembly, which he did.⁹⁸

The Model Convention prohibits the development, testing, production, stockpiling, transfer, use and threat of use of nuclear weapons and mandates their elimination.⁹⁹ States parties to this Model Convention are obligated to destroy all their nuclear arsenals according to a series of phases. The Model Convention also prohibits the production of weapons usable fissile material and requires delivery vehicles to be destroyed or converted to make sure that they are non-nuclear capable.¹⁰⁰ States parties to the Model Convention would be required to declare all nuclear weapons, all nuclear material, all nuclear facilities, all nuclear weapons delivery vehicles they possess or control, and the locations of these vehicles.¹⁰¹

The Model Convention provides for a series of five phases for the elimination of nuclear weapons. These begin with taking nuclear weapons off alert, removing nuclear weapons from deployment, removing all nuclear warheads from their delivery vehicles, disabling the nuclear warheads, removing and disfiguring the "pits" and placing the fissile material under international control. The United States and Russia would be required to make the deepest cuts in their nuclear arsenals, limiting their stockpiles to 1,000 warheads each.¹⁰²

The Model Convention has extensive provisions regarding verification, which include reports and declarations from states, routine and challenge inspections, on-site sensors, satellite photography, and radionuclide sampling and other remote sensors. It also includes information sharing with other organizations and citizen reporting. The Model Convention provides protection to those reporting suspected violations, which includes the right of asylum. It also establishes an International

96. Draft Nuclear Weapons Convention Circulated by Costa Rica, U.N. Doc. A/C.1/52/7 (November 17, 1997).

97. Costa Rica Working Paper, Preparatory Committee for the 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, *Model Nuclear Weapons Convention*, U.N. Doc. NPT/CONF.2010/PC.1/WP.17 (May 1, 2007).

98. Permanent Representatives of Costa Rica and Malaysia, Letter dated December 17, 2007, to the Secretary-General, U.N. Doc. A/62/650 (January 18, 2008) [hereinafter Costa Rica and Malaysia's Letter to the Secretary-General].

99. *Model Nuclear Weapons Convention -- Convention on the Prohibition of the Development, Testing, Production, Stockpiling, Transfer, Use and Threat of Use of Nuclear Weapons and on their Elimination* (updated from the Model Nuclear Weapons Convention circulated in November 1997 as U.N. Doc. A/C.1/52/7), April 2007, attachment to Costa Rica and Malaysia's Letter to the Secretary-General, U.N. Doc. A/62/650, Annex (hereinafter Model Convention).

100. Model Convention, *supra* note 99, at 8.

101. *Id.* at 25-27.

102. *Id.* at 28-31.

Monitoring System to gather information, and such information is to be available through a registry. Information related to commercial secrets or national security is to be kept confidential.¹⁰³ National implementation measures to fulfill states' obligations under the Model Convention include the prosecution of persons committing crimes and protection for those reporting violations.¹⁰⁴

The Model Convention provides for the establishment of an Agency for its implementation.¹⁰⁵ Such Agency is to be responsible for ensuring compliance, verification and decision making, and it is to comprise a Conference of States Parties, an Executive Council, and a Technical Secretariat. The necessary powers and functions and privileges and immunities, and provides for an international monitoring system are also enumerated.

The production of any fissionable or fusionable material which can be used directly to make a nuclear weapon is prohibited under the Model Convention. This includes highly enriched uranium and plutonium other than that in spent fuel. For nuclear energy purposes, low enriched uranium would be permitted.¹⁰⁶ The Model Convention includes detailed provisions for consultation, cooperation, and fact-finding to clarify and resolve issues of interpretation regarding compliance and other matters.¹⁰⁷ States parties by mutual consent may refer a legal dispute to the International Court of Justice. The Agency is also authorized to recommend to the U.N. General Assembly that the Assembly request an advisory opinion from the ICJ on a legal dispute. Eventually, under the Model Convention, there are provisions for sanctions or recourse to the U.N. General Assembly and Security Council for action.

As to financing, nuclear-weapon states are to meet the costs of destruction of their nuclear arsenals. They are also to meet the costs of verification of nuclear facilities under their authority. However, a voluntary international fund is to be established to assist states that may have financial difficulties in meeting their obligations.¹⁰⁸

The Model Convention provides for an optional protocol concerning energy assistance. It does not prohibit the use of nuclear energy for peaceful purposes, but the optional protocol would establish a program of energy assistance for states parties that choose not to develop nuclear energy or to phase out existing nuclear energy programs.¹⁰⁹ It also provides for an optional protocol concerning the compulsory settlement of disputes.¹¹⁰

As a promising development, several nuclear-weapon-free zones have been established under international agreements. As the U.N. General Assembly noted

103. *Id.* at 32-35.

104. *Id.* at 36-37.

105. *Id.* at 40-51.

106. *Id.* at 9.

107. *Id.* at 60-66.

108. *Id.* at 67.

109. *Id.* at 72.

110. *Id.*

in a resolution it adopted in a December 2008 resolution, “the Antarctic Treaty and the treaties of Tlatelolco, Rarotonga, Bangkok, Pelindaba, and Semipalatinsk, as well as Mongolia’s nuclear-weapon-free status, are gradually freeing the entire southern hemisphere and adjacent areas covered by those treaties from nuclear weapons.”¹¹¹

VII. CONCLUSION

During the 1990s significant progress was made in arms control under the leadership of the United States and Russia. Several important initiatives have been undertaken and several important treaties have been negotiated with the objective of building confidence and reducing nuclear armaments. The Conference on Disarmament and the International Atomic Energy Agency has played a vital role in accomplishing these objectives.

These initiatives and treaties notwithstanding, the menace of nuclear weapons continues to threaten national and global security. The only meaningful response will be a nuclear weapons convention, and the General Assembly has called once again upon “all States immediately to fulfill [their obligation under NPT article VI] by commencing multilateral negotiations leading to an early conclusion of a nuclear weapons convention prohibiting the development, production, testing, deployment, stockpiling, transfer, threat or use of nuclear weapons and providing for their elimination.”¹¹²

The 2007 Model Nuclear Weapons Convention proposed by Costa Rica and Malaysia for the 2010 NPT Review Conference is an appropriate starting point. The United States and Russia, as the major nuclear powers, must take the lead to make nuclear weapons history.

111. Follow-up to the advisory opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons, G.A. Res. 63/49, preambular ¶, U.N. Doc. A/RES/63/49 (Dec. 2, 2008).

112. *Id.* ¶ 2.

VICTIMS' PARTICIPATION RIGHTS WITHIN THE INTERNATIONAL CRIMINAL COURT: A CRITICAL OVERVIEW

MIRIAM COHEN*

I. INTRODUCTION

The formation of the International Criminal Court marked an important change in international criminal justice. The *Rome Statute of the International Criminal Court* (hereinafter "Rome Statute")¹ not only established the International Criminal Court (hereinafter the "ICC" or the "Court") as a permanent institution with jurisdiction "over persons for the most serious crimes of international concern,"² but also brought about changes to the international criminal scene,³ namely a completely new system for victims' participation in criminal proceedings⁴ during the trial phase as well as the pre-trial phase.⁵ One of the Court's main function is the establishment of the truth and in this sense participation of victims may contribute to the accomplishment of this goal.⁶

The recognition of victims' participatory rights in criminal proceedings is a novelty in international criminal law.⁷ Victims' right to participate in the

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1. Rome Statute of the International Criminal Court, adopted July 17, 1998, 2187 U.N.T.S. 90, 37 I.L.M. 1002 (entered into force July 1, 2002) [hereinafter *Rome Statute*].

2. *Id.* art. 1.

3. In comparison to the ad hoc international criminal tribunals preceding the *International Criminal Court* [hereinafter *ICC* or the *Court*] the differences are numerous. This study will focus on the provisions relating to participatory rights.

4. See Rome Statute, *supra* note 1, art. 68. See also Carsten Stahn et al., *Participation of Victims in Pre-Trial Proceedings of the ICC*, 4 J. INT'L CRIM. JUST. 219 (2006) [hereinafter *Stahn et al.*]; Gerard J. Mekjian & Mathew C. Varughese, *Hearing the Victim's Voice: Analysis of Victims' Advocate Participation in the Trial Proceeding of the International Criminal Court*, 17 PACE INT'L L. R. 1 (2005) [hereinafter *Mekjian & Varughese*]; Timothy Kuhner, *The Status of Victims in the Enforcement of International Criminal Law*, 6 OR. REV. INT'L L. 95 (2004). See generally Gilbert Bitti & Hakan Friman, *Participation of Victims in the Proceedings*, in THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 456 (Roy S. Lee ed., 2001).

5. In this study, the author will not differentiate between the trial and the pre-trial phase pertaining to victims' participation in proceedings, but rather study the subject in a general approach.

6. David Donat-Cattin, *Article 68 Protection of Victims and Witness and their Participation in the Proceedings*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES ARTICLE BY ARTICLE 1275, 1300 (Otto Triffterer ed., 2d ed. 2008).

7. WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 328 (3d ed. 2007) [hereinafter *SCHABAS*]. See also Emily Haslam, *Victim Participation at the International*

proceedings is one of the main innovative features of the Court, granting victims further rights than testifying as witnesses.⁸ Before the ICC, other international criminal tribunals did not provide victims with significant rights of participation and were mainly concerned with bringing criminals to justice.⁹ In this sense, this participatory scheme is a distinguishing feature between the ICC and other ad hoc international criminal tribunals, such as the *International Criminal Tribunal for the Former Yugoslavia* (hereinafter "ICTY") and the *International Criminal Tribunal for Rwanda* (hereinafter "ICTR") which bear no provisions on victims' participation in proceedings.¹⁰ As far as national criminal law systems are concerned, victims may have participatory rights to a certain degree depending on the jurisdiction in question.¹¹

The adoption of provisions recognizing participatory rights has caused much dissension amongst jurists. The arguments in favor and against victims' participation in proceedings are numerous.¹² Many argue that the recognition of participatory rights represents a great victory in international criminal justice.¹³ Others fear that victim participation in proceedings may conflict with the accused's right to a fair trial¹⁴ and "affect the expeditiousness of proceedings."¹⁵

Criminal Court: A Triumph of Hope Over Experience?, in THE PERMANENT INTERNATIONAL CRIMINAL COURT: LEGAL POLICY AND ISSUES 315 (Dominic McGoldrick et al. eds., 2004) [hereinafter *Haslam*]. See also Antonio Cassese, *The Statute of the International Criminal Court: Some Preliminary Reflections*, 10 EUR. J. INT'L L. 144, 167 (1999).

8. See Haslam, *supra* note 7, at 315. See also Silvia A. Fernández de Gurmendi, *Elaboration of the Rules of Procedure and Evidence*, in THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE 235, 255 (Roy S. Lee ed., 2001).

9. Mekjian & Varughese, *supra* note 4, at 15 (suggesting that in the ICTR victims were granted some minimal participatory rights which consisted of the prosecutor asking the victims as well as witnesses whether some individuals should be investigated for further crimes against humanity).

10. See generally Michael Bachrach, *The Protection of Rights and Victims under International Criminal Law*, 34 INT'L LAW. 7 (2000) (providing a more detailed study on victims' rights under international criminal law) [hereinafter *Bachrach*]. See also David Donat-Cattin, *The Role of Victims in ICC Proceedings*, in COLLECTION OF ESSAYS ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 251, 268 (Flavia Lattanzi & William A. Schabas eds., 1999).

11. See Stahn et al., *supra* note 4, at 220 (discussing the fact that victims' participation rights differ depending on national law system. The authors contend that the participatory scheme within the ICC is aligned with some civil law systems that allow in general for victims' active participation in criminal proceedings). This article does not analyze victims' participatory rights in national systems. See generally MARION ELEONORA INGEBORG BRIENEN & ERNESTINE HENRIETTE HOEGEN, VICTIMS OF CRIME IN 22 EUROPEAN CRIMINAL JUSTICE SYSTEMS (2000) (discussing participatory rights in domestic European systems).

12. This article will examine some of these arguments.

13. See Kristen Boon, *Rape and Forced Pregnancy Under the ICC Statute: Human Dignity, Autonomy, and Consent*, 32 COLUM. HUMAN RTS L. R. 625, 643 (2001). See also Claude Jorda & Jérôme de Hemptinne, *The Status and Role of the Victim*, in 2 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 1387, 1388 (Antonio Cassese et al. eds., 2002) [hereinafter *Jorda & de Hemptinne*].

14. See Mugambi Jouet, *Reconciling the Conflicting Rights of Victims and Defendants at the International Criminal Court*, 26 ST. LOUIS U. PUB. L. REV. 249, 278 (2007).

15. See Prosecutor v. Lubanga, Case No. ICC-01/04-01/06 OA8, Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the "Directions and Decision of the Appeals Chamber" of 2 February 2007, ¶ 12 (June 13, 2007)

It has been asserted that “punishing the criminals is not enough” as there will be no justice without ensuring justice for victims.¹⁶ Moreover, it has been argued that allowing victims to participate in proceedings may preclude them from “taking justice in their own hands” and stop the cycle of violence.¹⁷ Taking part in proceedings only as witnesses before the ICC does not address victims' concerns; as witnesses they are an object in the criminal process.¹⁸ Victims have witnessed the crimes but also live with the consequences of those crimes; therefore their position and rights as victims go beyond that of a witness.

The adoption of provisions that allow victims to participate in proceedings regarding hideous crimes can also represent an achievement in bringing criminals to justice. Victims can provide the Court with knowledge that only those who experienced these crimes can give and “their attendance in person at the trial may help in establishing the truth.”¹⁹ As Claude Jorda and Jérôme de Hemptinne have observed, the ICC “appears to mark a new step forward . . . victims are accorded the double status denied to them by the provisions setting up the *ad hoc* Tribunals.”²⁰ Their participation will ensure that their concerns are taken into account when passing a final judgement on criminals. Nevertheless, victims' participation rights are provided for throughout the proceedings and not only during the trial stage.²¹ After all, crimes were committed not just against the international community but also against people, namely the victims.

As the right to take part in proceedings has been recognized in the Rome Statute, it remains for the different Chambers of the Court to interpret the scope of participatory rights. The jurisprudence concerning the scope and interpretation of participatory rights are currently under development. In order to provide for effective participation, the Rome Statute and the Rules of Procedure and Evidence²² combined establish victims' participation rights. These provisions, although providing for the same objective of giving victims a voice in proceedings, differ in application. On the one hand, articles 15(3) and 19 of the Rome Statute²³ for example recognize very specific rights of participation that apply only in the context prescribed in the text of these provisions. On the other hand, victims are granted a very broad right of participation because article 68(3) recognizes

[hereinafter *The Appeals Chamber Decision on the Joint Applications of Victims*].

16. Fiona McKay, The Victims Rights Working Group, The Conference for the Establishment of an International Criminal Court, Speech on Behalf of the Victims Rights Working Group (June 16, 1998) *available at* <http://www.vrwg.org/Publications/01/1998%20Rome%20Statement%2016%20June1.pdf>.

17. Sam Garkawe, *Victims and the International Criminal Court: Three Major Issues*, 3 INT'L CRIM. L. R. 345, 349-50 (2003).

18. See SCHABAS, *supra* note 7, at 328. In the ICTY and ICTR the roles of victims were merely to provide testimonies as witnesses to the parties. Jorda & de Hemptinne, *supra* note 13, at 1391.

19. Jorda & de Hemptinne, *supra* note 13, at 1388.

20. *Id.*

21. Stahn et al., *supra* note 4, at 237.

22. U.N. Preparatory Comm'n for the Int'l Criminal Court [PCNICC], *Rules of Procedure and Evidence*, U.N. Doc. PCNICC/2000/1/Add. 1 (Nov. 2, 2000) [hereinafter *RPE ICC*].

23. Rome Statute, *supra* note 1, art. 15, paras. 3, 19.

participatory rights in the “proceedings,” making it possible for victims to participate in different phases of the proceedings.²⁴

The extent to which victims can take part in proceedings, as well as the conditions of participation regarding this general right of participation affirmed in article 68(3) will have an impact in the exercise of other specific participatory rights in the proceedings. Accordingly, what is the difference between a situation and a case and what is the status of victims relating to each?²⁵ Is the investigation phase included in the term “proceedings” of article 68(3)? Finally, what are the criteria for eligibility as victims and more specifically what is the conception of “personal interests”, which determines the status of victim to a situation or a case. These questions will be addressed in this article that analyses the compatibility of participatory rights with the rights of the accused.

Victims’ participation may not amount to a second prosecutor²⁶ since it would be against the rights of the accused and contrary to a fair trial (which are in turn conditions to participation pursuant to article 68(3)).²⁷ The Rome Statute grants diverse participatory rights but is not clear as to how these rights may be applied in practice and how conflicting interests might be reconciled. Much is left for judicial interpretation and clarification. The jurisprudence of the Court in this regard is still being developed thus it is not yet entirely clear what role victims might play in the different stages of criminal proceedings and how far their rights can go.²⁸ From the few decisions of the different Chambers of the Court, it can be argued that a common interpretation of participatory rights is being sought.²⁹

The goal of this paper is to give a critical overview of the participatory scheme devised within the ICC. It analyzes the scope of victims’ participation at different stages in the proceedings and the interpretation of participatory rights thus far. It also focuses on examining some specific provisions and the application of article 68(3) at different stages of the proceedings. Although article 68(3) is contained in Part 6 of the Rome Statute concerning “the trial”, as this paper will

24. *Id.* art. 68, para. 3.

25. *See, e.g.*, Stahn et al., *supra* note 4, at 221-23 (concerning the difference between victims of a situation and victims of a case).

26. *See* The Appeals Chamber Decision on the Joint Applications of Victims, *supra* note 15, ¶ 28. *See also id.* ¶ 19 (Pikis, J., concurring) (stating that the “[e]quality of arms is another element of a fair trial, which in the context of the Statute, putting the burden of proof on the Prosecutor, means that the defendant cannot be required to confront more than one accuser. Holding the scales even between the parties with the burden of proof cast upon the Prosecutor rules out a second accuser.”) [hereinafter *Separate Opinion of Judge Pikis*].

27. Rome Statute, *supra* note 1, art. 68, para. 3.

28. *See* Jorda & de Hemptinne, *supra* note 13, at 1388-89. *See also* Julian Fernandez, *Variation sur la victime et la justice pénale internationale*, REVUE DE CIVILISATION CONTEMPORAINE DE L’UNIVERSITÉ DE BRETAGNE OCCIDENTALE 1, 9 (2006) (Fr.) (stating that “Le régime de la CPI dépend encore de sa digestion future par les décisions de la Cour”) available at www.univ-brest.fr/amnis/documents/Fernandez2006.pdf.

29. *See, e.g.*, Situation in Uganda, Prosecution's Application for Leave to Appeal the Decision on Victims' Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, ICC-02/04-103 (Aug. 20, 2007) [hereinafter *Prosecution's Application for Leave to Appeal the Single Judge Decision*].

examine, it has been used in relation to participation at other stages of the proceedings. This paper will also analyze whether equilibrium can be reached in practice between opposing interests of the Prosecution, the accused, and victims.

The analysis in this paper of the different participatory provisions follows the structure of the Rome Statute. It will first focus on certain provisions concerning specific participatory rights -- that allow participation only within the scope of the specific provision and the application of the criteria in article 68(3) to these provisions. Then, it will examine the conditions for the exercise of the broad right of participation pursuant to article 68(3) of the Rome Statute. Finally, the paper will conclude by contending that a balance between contrasting interests can be reached in practice.

II. THE ROAD TO THE ADOPTION OF PARTICIPATORY RIGHTS: AN OVERVIEW OF THE ROLE OF VICTIMS IN THE AD HOC INTERNATIONAL CRIMINAL TRIBUNALS

This section will focus briefly on victims' rights within the framework of *ad hoc* international criminal tribunals in order to illustrate the position of victims in international criminal proceedings prior to the ICC. This section does not intend to give a thorough analysis of the practice and jurisprudence of these tribunals. The aim of this section is to point out the gap that existed prior to the establishment of the ICC in matters relating to participatory rights in order to set the context to examine the groundbreaking system of victims' participation created in the ICC.

Although victims are an inevitable part of an armed conflict, their rights have not been recognized in a satisfactory way in criminal proceedings prior to the establishment of the ICC. Neither in the World War II trials nor in the *ad hoc* tribunals which followed, were victims allowed to participate.³⁰ The Nuremberg and Tokyo trials represented a step forward in international criminal justice by creating a new era for the recognition of war crimes, crimes against humanity, and genocide regarding individuals' accountability for their actions in the international arena.³¹ This beginning of the fight against impunity was crucial for the development of international criminal law as it is today. Just like any new system, however, it needed improvements. One of the changes that needed to be made was in relation to the rights of victims.

After the Second World War tribunals, other conflicts started that generated new international criminal tribunals. This was the case for the ICTR and the ICTY. In spite of the great achievements of the ICTY and ICTR in bringing war criminals to justice and promoting peace in their respective regions, they failed to address victims' concerns.³² As stated above,³³ the ICTY Statute did not include

30. See generally Mekjian & Varughese, *supra* note 4, at 7-15.

31. *Id.* See generally Luc Walleyn, *Victimes et témoins de crimes internationaux: du droit à une protection au droit à la parole*, 84 *Revue internationale de la Croix-Rouge* 51 (2002). In this article, the author analyzes, *inter alia*, the rights granted to victims prior to the ICC in international humanitarian law.

32. See generally Jorda and de Hemptinne, *supra* note 13. In relation to the ICTY, see generally Marie-Bénédicte Dembour and Emily Haslam, *Victim-witnesses at War Crimes Trials: Silencing Hearings?* 15 *EUR. J. INT'L L.* 151 (2004). For a study of victims' rights before the United Nations *ad hoc* criminal tribunals, see Haslam, *supra* note 7, at 317-19.

provisions that recognized participatory rights.³⁴ The ICTR Statute also did not provide for such rights, but, according to Gerard Mekjian and Mathew Varughese, the ICTR did establish some minor participatory rights in very specific circumstances.³⁵ In these tribunals, generally the role that victims play is solely that of a witness. This position is consistent with the view that criminal proceedings are between the Prosecution and the defence. One possible reason for the absence of participatory rights is that, contrary to the ICC, the *ad hoc* tribunals were created by the adoption of Security Council resolutions. Only fifteen member States of the United Nations are members of the Security Council (of which, only five are permanent members).³⁶ Therefore, the creation of these tribunals and the adoption of their regulating statutes did not amount to a representative system where all member states could negotiate the provisions, as was the case for the ICC. This may be one of the underlying reasons that victims' participatory rights were not a concern in the creation of these tribunals and the adoption of their statutes.³⁷

Acting as a witness can be one of the roles of victims, but not its main attribution. Before serving as witnesses of crimes, they suffered the atrocities that took place during conflicts and have to live with the consequences of crimes. As Élisabeth Guigou has affirmed

Victims are not simply witnesses whose participation in proceedings should be limited to gathering the information which they are able to provide. They have a separate role to play, and this must be recognised by the International Criminal Court, as is expressly provided for, moreover, by the Rome Statute.³⁸

Even before the establishment of the ICTY there was pressure from the international community for the creation of a permanent international criminal institution with jurisdiction to judge international crimes such as war crimes, genocide, and crimes against humanity.³⁹ Negotiations amongst States were taking

33. *Supra* note 3.

34. See S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993). This is the Security Council resolution that established the ICTY.

35. See Mekjian & Varughese, *supra* note 4, at 11-15.

36. The U.N. Security Council is composed of five permanent members: China, France, Russian Federation, the United Kingdom and the United States and ten non-permanent members (with year of term's end): Austria (2010), Japan (2010), Uganda (2010), Burkina Faso (2009), Libyan Arab Jamahiriya (2009), Viet Nam (2009), Costa Rica (2009), Mexico (2010), Croatia (2009), Turkey (2010). The General Assembly elected Austria, Japan, Mexico, Turkey, and Uganda to serve as non-permanent members of the Security Council for two-year terms starting on January 1, 2009. The newly elected countries will replace Belgium, Indonesia, Italy, Panama, and South Africa. Current membership information available at <http://www.un.org/sc/members.asp> (last visited Feb. 7, 2009).

37. Other reasons have been suggested for explaining the lack of provisions concerning victims' rights. See Jorda and de Hemptinne, *supra* note 13, at 1391.

38. Élisabeth Guigou, *Address of the Ministry of Justice at the International Colloquium on "L'Accès des victimes à la Cour Pénale Internationale"*, (Apr. 27, 1999), cited in Jorda & de Hemptinne, *supra* note 13, at 1397.

39. See generally WILLIAM SCHABAS, THE UNITED NATIONS INTERNATIONAL CRIMINAL TRIBUNALS: THE FORMER YUGOSLAVIA, RWANDA, AND SIERRA LEONE (2006).

place and soon after the establishment of the ICTY, the International Law Commission (hereinafter "ILC") concluded a draft of the ICC Statute.⁴⁰

The establishment of the ICC changed the situation of victims and their role in international criminal proceedings in various ways. To sum up, it completely modified the position of victims from witnesses of crimes to that of being the subject of rights by granting them specific participatory rights at many stages of the proceedings and a broad right of participation pursuant to article 68(3). In spite of other important rights for victims, this paper will only focus on the participatory rights scheme.

III. SPECIFIC PARTICIPATORY RIGHTS IN PROCEEDINGS WITHIN THE INTERNATIONAL CRIMINAL COURT FRAMEWORK

Before analyzing the provisions that grant victims participatory rights, it is important to address the question of whether the recognition of victims' rights in the Rome Statute is a good initiative in international criminal law. The recognition of a role for victims in proceedings is an achievement that was, amongst other factors, highly influenced by the "advocacy of non-governmental organisations,"⁴¹ which helped ensure that the Rome Statute and Rules of Procedure and Evidence contained strong provisions on victims' rights.⁴² The question that remains is how these rights will be interpreted and applied in practice. In other words, how the rights of victims will affect the rights of the accused and the duties of the Prosecution, trial management and to what extent victims can take part in proceedings. In light of these considerations, this paper will analyze the main provisions that deal with participatory rights.⁴³

As stated above,⁴⁴ victims are granted, throughout the Rome Statute and the Rules of Procedure and Evidence, various opportunities to participate in the ICC proceedings.⁴⁵ The Rome Statute recognizes on many occasions different participatory rights of victims.⁴⁶ It is imperative to analyze them, discuss their differences, and determine in which cases they are applicable in order to understand the ICC victims' participatory scheme. Moreover, it is important to note, from the beginning of this study, that these rights differ greatly from each

40. Report of the International Law Commission on its forty-sixth session, May 2—July 22, 1994, G.A. Res. 10, ¶¶ 42-91, U.N. GAOR, 49th Sess., Supp. No. 10, U.N. Doc. A/49/10 (1994).

41. Haslam, *supra* note 7, at 321.

42. *Id.* See also, Amnesty Int'l, *The International Criminal Court: Ensuring an effective role for victims*, AI Index: IOR 40/10/1999, July 1, 1999, available at <http://asiapacific.amnesty.org/library/Index/ENGIOR400101999?open&of=ENG-385>. See also, Jorda & de Hemptinne, *supra* note 13, at 1400. See also, Amnesty Int'l, *The International Criminal Court: Making the Right Choices Part II*, AI Index: IOR 40/011/1997, July 1, 1997, available at <http://www.amnesty.org/en/library/info/IOR40/011/1997>.

43. This paper will focus on selected provisions contained within the Rome Statute only.

44. Stahn et al., *supra* note 4, at 224-37.

45. See generally Bachrach, *supra* note 10.

46. In this article, the author will focus on participation rights and will not analyze other rights granted to victims within the ICC framework. For a complete study of victims' rights in the ICC Statute, see Sam Garkawe, *The Victim-Related Provisions of the Statute of the International Criminal Court: A Victimological Analysis* 8 Int'l R. of Victimology 269 (2001).

other,⁴⁷ mainly in two ways: the stages at which victims can participate and who can actually participate at each stage.⁴⁸ In this section, this paper will examine some participatory rights acknowledged throughout the Rome Statute that provide for participation at different stages of the proceedings,⁴⁹ which the writer refers to as “specific participatory rights” because their application is limited to situations envisaged within the framework of the articles. This section will first examine article 15(3) of the Rome Statute in the context of the decision of the Prosecution to pursue an investigation. Second, this section will focus on article 19 of the Rome Statute. Finally, this section will analyze articles 53 and 61 of the Rome Statute as well as participation pursuant to articles 56 and 57 of the Rome Statute.

A. Participation Under Part 2 of the Rome Statute

The second Part of the Rome Statute concerns jurisdiction, admissibility and applicable law. It contains important provisions on victims’ participation rights in the pre-trial phase of proceedings. In this context, this section will focus on article 15(3) and article 19 of Part 2 specifically.

1. Decision to Initiate Investigations (Article 15)

Article 15 deals with an important part of prosecutorial proceedings, the decision to initiate investigations. It concerns the power attributed to the Prosecutor to initiate investigations *proprio motu* on the basis of information received.⁵⁰ In many cases the information that leads the Prosecutor to start an investigation *proprio motu* is provided by victims.⁵¹ It may be argued that victims’ participation at this stage of proceedings is important in gathering all the relevant information and understanding what in fact occurred during armed conflicts in order to successfully start and pursue the investigation. For this reason, the Rome Statute allows victims “to make representations” once the Prosecutor decides that there are sufficient grounds to proceed with the investigation.⁵² The scope of their participation is limited to “making representations to the Pre-Trial Chamber” and is concerned only with the request to the Pre-Trial Chamber to start an investigation. However restricted this right may be it is a very important one, since it allows victims to participate at a very early stage of the proceedings, even before the beginning of an investigation, the starting point of criminal proceedings. In this sense, it is not premature at this early stage of proceedings to grant victims rights to participate since the information provided may assist the Pre-Trial Chamber in its decision on whether an investigation should start.

47. The author has divided participatory rights in two groups, specific rights and broad participatory rights. In this section, the focus will be on some provisions that establish specific rights of participation.

48. See Stahn et al., *supra* note 4, at 224-37.

49. This analysis of provisions concerning participatory rights is not exhaustive.

50. See Rome Statute, *supra* note 1, art. 15, para. 1.

51. Morten Bergsmo & Jelena Pejic, *Article 15*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS’ NOTES ARTICLE BY ARTICLE 581, 590 (Otto Triffterer ed., 2d ed. 2008).

52. See Rome Statute, *supra* note 1, art. 15, para. 3.

According to the text of article 15 of the Rome Statute, participation is only permitted on the condition that its exercise is “in accordance with the Rules of Procedure and Evidence”.⁵³ Nevertheless, it is not clear from the text of article 15(3) whether their participation is also submitted to the conditions included in the general participation scheme of article 68(3). This provision states that victims can participate only “where their interests are affected” and the application of article 68(3) relates to “stages of the proceedings determined to be appropriate by the Court.”⁵⁴ If one considers the request for authorization of an investigation to be a stage of the proceedings as pursuant to article 68(3), then whether personal interests are affected becomes a condition to the exercise of victims' participatory rights under article 15(3).

The *Decision on victims' applications for participation in the Uganda Situation* (hereinafter “the *Single Judge Decision*”) is a landmark decision of the ICC concerning victims' participatory rights.⁵⁵ It provided a thorough study of previous decisions of the Court and analyzed various applications for participation pursuant to article 68(3). This decision concerned the application of victims to participate in the pre-trial phase of proceedings in the Uganda situation.

In this decision, the Single Judge has adopted a view that victims' “personal interests” have an impact on the application of participatory rights pursuant to article 15(3). In other words, the Single Judge Decision applied the principle enacted in article 68(3) as a further condition to article 15(3). In fact, the Single Judge Decision concluded that

Article 15, paragraph 3, provides that “victims” may make representations to the Pre-Trial Chamber when the Prosecutor concludes that there is a reasonable basis to proceed with an investigation and, accordingly, submits to the Pre-Trial Chamber a request for authorisation of such an investigation in the absence of referral by a State or the Security Council. In this scenario, the “personal interests” of the alleged victim (or victims) may be affected since victims' representations to the Pre-Trial Chamber can provide factual and legal elements for the decision to authorise the investigation into the situation within which the same victims claim to have suffered harm as a result of the commission of crimes within the jurisdiction of the Court.⁵⁶

A final remark is crucial. Article 15(3) requires the making of representations to be in accordance with the Rules of Procedure and Evidence. It is Rule 50⁵⁷ that

53. Article 15(3) provides that “If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence”. *Id.*

54. *Id.* art. 68, para. 3. This provision will be studied in detail in Part IV of this paper.

55. Situation in Uganda, Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, ICC-02/04-101 (Aug. 20, 2007) [hereinafter the *Single Judge Decision*].

56. *Id.* ¶ 90.

57. On a more practical basis, Rule 50(3) and Rule 50(4) concern the manner in which the

applies to article 15(3). Rule 50(1) states that whenever the Prosecutor decides to start an investigation, he or she must inform victims of this decision or inform the Victims and Witness Unit.⁵⁸ It is important to stress the rather obvious fact that the Prosecutor must inform only the victims of whom he is aware. The notification of victims is an important step since it enables them to make representations as to whether an investigation should take place and provide indications, which might help the conduct of the investigation before it begins.⁵⁹ As it has been stated,⁶⁰ the Prosecution's obligation to inform victims of the intention to start investigations is quite innovative in comparison with the duty of notification in national systems,⁶¹ where the Prosecutor does not always have such an obligation at early stages of the proceedings.⁶²

2. Challenges to the Jurisdiction of the Court or Admissibility of a Case (Article 19)

Article 19(3) in Part 2 of the Rome Statute concerns a crucial issue in ICC proceedings, namely "challenges to the jurisdiction of the Court or the admissibility of a case." Article 19(3) reads as follows:

The Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility. In proceedings with respect to jurisdiction or admissibility, those who have referred the situation under article 13, as well as victims, may also submit observations to the Court.⁶³

participation occurs. As stated in article 15(3), victims may only participate by "making representations," which is explained in rule 50(3) that these must be "in writing" to the Pre-Trial Chamber. Rome Statute, *supra* note 1, art. 15, para. 3. RPE ICC, *supra* note 22, Rule 50, ¶¶ 3-4. However, in the event that the Pre-Trial Chamber decides that it is appropriate it may "hold a hearing" to gather further information or to ask further questions.

58. RPE ICC, *supra* note 22, Rule 50, ¶ 1.

59. As noted by Stahn et al., *supra* note 4, at 226 n. 32, the notification of victims at such an early stage was a recommendation of the Eur. Comm. of Ministers, *Recommendation No. R (85)11 on the Position of the Victim in the Framework of Criminal Law and Procedure*, 387th Mtg. of the Ministers' Deputies, Doc. No. 2269 (1985).

60. See Stahn et al., *supra* note 4, at 227-28.

61. For an overview of the duty of notification in national systems, see *id.*, at 227-28, where the author states that: "France, Greece, Italy, Scotland, Turkey, Italy and Malta, do not formally obligate the police or other criminal justice authorities to notify victims at this early stage. In Austria, Iceland and Portugal, a partial statutory obligation for informing victims has been created, meaning that only certain victims are notified, or only certain information is provided. In Germany and Sweden, legislation recognizes that the victim should be notified at this stage, but does not place an obligation on any party to carry out the task of notification. And while England, Wales, Ireland and the Netherlands impose a duty on police to notify victims at the stage of the initiation of investigations, the duty in each case is a general, non-statutory duty."

62. See THE REDRESS TRUST, ENSURING THE EFFECTIVE PARTICIPATION OF VICTIMS BEFORE THE INTERNATIONAL CRIMINAL COURT: COMMENTS AND RECOMMENDATIONS REGARDING LEGAL REPRESENTATION FOR VICTIMS 4 (2005), available at <http://www.vrwg.org/Publications/02/REDRESS%20-%20Legal%20Representation%20for%20Victims%2023%20May%202005.pdf> (concerning the interest of victims to participate at early stages of the proceedings).

63. Rome Statute, *supra* note 1, art. 19, para. 3.

This provision enacts a right of participation parallel to the duty of the Prosecution with regard to the question of admissibility and jurisdiction. Since victims have an interest that crimes of which they suffered the consequences are admissible under the jurisdiction of the Court, it is fair that they may "submit observations." Here, the scope of the participation is different from that recognized in article 15(3), as the right to make observations pursuant to article 19 is not only recognized for victims but also for those who have referred the situation under article 13. Rule 59 applies to the proceedings pursuant to article 19.

Rule 59 provides for a very specific application of the right as it only allows "the victims who have already communicated with the Court in relation to the case, or their legal representatives" to submit observations.⁶⁴ There are two important points in this Rule. First, it concerns a limited category of victims - those who have previously communicated with the Court - which means that there is an additional practical condition for participation. The sense of "having communicated with the Court" has been explained as "victims that, whilst not having (as yet) been allowed to participate in proceedings, have nevertheless been in contact with the Court."⁶⁵ As concluded in the Single Judge Decision, "having communicated with the Court" applies to victims who have presented the relevant form and duly registered it with the Registry.⁶⁶ Second, and more importantly, Rule 59 refers to "a case" as opposed to "a situation."⁶⁷ In general terms, participation in a case is more restricted than participation in a situation.⁶⁸

This differentiation between "a situation" and "a case" becomes particularly interesting if analyzed in the context of Rule 93, which concerns the power of the Pre-Trial Chamber to seek the views of "victims of a situation."⁶⁹ Using a broad interpretation and applying Rule 93 to the context described in article 19, the Pre-Trial Chamber might allow victims to submit their observations in relation to a situation as well as a case. Be that as it may, this article submits that participation should be limited to victims of a case because the participatory right provided for in article 19 concerns very specific circumstances. Moreover, Rule 59 makes it clear that participation is in relation to a case.

B. Participation Pursuant to Part 5 of the Rome Statute: Investigation and Prosecution

A different regime from that established in Part 2 of the Rome Statute is recognized for proceedings in Part 5, which concerns the "Investigation and Prosecution."⁷⁰ These proceedings are also governed by the Rules of Procedure

64. RPE ICC, *supra* note 22, Rule 59, ¶1.

65. Single Judge Decision, *supra* note 55, ¶ 93.

66. *Id.*

67. For a difference between participation in a situation as opposed to a case, *see* Single Judge Decision, *supra* note 55, ¶¶ 11-21, 96-111.

68. *See* Christopher K. Hall, *Article 19*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES ARTICLE BY ARTICLE 637, 640 (Otto Triffterer ed., 2d ed. 2008).

69. *Id.*

70. Rome Statute, *supra* note 1, arts. 53-61.

and Evidence,⁷¹ which set the path for participation referring to the “initiation of investigation” or the decision not to prosecute⁷² and in relation to the confirmation of charges, pursuant to article 61⁷³ of the Rome Statute. Although the text of article 53 does not specifically concern victims’ right of participation,⁷⁴ it is Rule 92(2) that makes the connection providing that the Court has a duty to notify to victims of the Prosecutor’s decision not to initiate investigations or not to prosecute pursuant to article 53.⁷⁵ Rule 92(2) limits the category of victims to those who have already participated and “those who have communicated with the Court in respect of the situation or case in question.”⁷⁶

The same category of victims is granted a right to participate in the proceedings relating to the Court’s decision to hold a hearing to confirm the charges, pursuant to article 61 of the Rome Statute.⁷⁷ It is Rule 92(3) that establishes the duty of the Court to notify victims “who have communicated with the Court in respect of the case in question” of its decision to hold a hearing to confirm the charges.⁷⁸

Another instance where victims’ participatory rights become important is where evidence is concerned.⁷⁹ More specifically, article 56 of the Rome Statute concerns a “unique investigative opportunity” which may be initiated by a request of the Prosecutor or by the Pre-Trial Chamber itself.⁸⁰ Article 57 concerns *inter alia* the preservation of evidence.⁸¹ Victims’ participatory rights are important at this stage because the preservation of evidence is a crucial point in the proceedings and imperative for the Prosecution in the accomplishment of its duties, therefore participation might affect the conduct of proceedings and trial-management. Within these provisions, participatory rights are not specifically provided for in the text of these articles.⁸² Therefore, participatory rights can only be attached to articles 56 and 57 by the application of article 68(3).

These provisions had an importance especially in regards to the *Prosecution’s Application for Leave to Appeal the Decision on Victims’ Applications for Participation* (hereinafter “*Application for leave to appeal the Single Judge Decision*”).⁸³ The Single Judge Decision makes the connection between the preservation of evidence as provided by articles 56 and 57 and the notion of “personal interests,” pursuant to article 68(3),⁸⁴ making it clear that victims’

71. See Stahn et al., *supra* note 4, at 225.

72. Rome Statute, *supra* note 1, art. 53.

73. *Id.* art. 61.

74. See generally *id.* art. 53.

75. RPE ICC, *supra* note 22, Rule 92, ¶ 2.

76. *Id.*

77. Rome Statute, *supra* note 1, art. 61.

78. RPE ICC, *supra* note 22, Rule 92, ¶ 3.

79. Rome Statute, *supra* note 1, arts. 56-57.

80. *Id.* art. 56.

81. *Id.* art. 57.

82. See generally Rome Statute, *supra* note 1, arts. 56-57.

83. Prosecution’s Application for Leave to Appeal the Single Judge Decision, *supra* note 29.

84. Single Judge Decision, *supra* note 55, ¶ 100.

personal interests must be affected in order for them to be granted participatory rights in proceedings relating to the preservation of evidence. Furthermore, in relation to article 57 of the Rome Statute, the Single Judge Decision refers to the presentation of victims' "views and concerns" as pursuant to article 68(3) of the Rome Statute.⁸⁵ In its Application for leave to appeal the Single Judge Decision, the Prosecutor challenges the Single Judge Decision in relation to victims' rights to participate at the investigation phase of proceedings.⁸⁶ In this regard, the Prosecutor submits

that, on the one hand, the Decision includes extensive participation at the investigative stage, including in activities undertaken pursuant to Articles 56 and 57 of the Statute, and further leaves open the possibility of further (and undefined) participation.⁸⁷

The above-mentioned debate clarifies, pursuant to the Single Judge Decision, that the conditions set out in article 68(3) of the Rome Statute are applicable to other stages of the proceedings such as the investigation stage pursuant to articles 56 and 57 of the Rome Statute,⁸⁸ even where the latter provisions do not expressly establish a right to participate in proceedings. The Prosecution's response to the Single Judge Decision's interpretation of participatory rights submits that the participation of victims in the investigative phase of proceedings may compromise the expeditiousness of the trial.⁸⁹ Furthermore, the Prosecution submits that "such activity can impact the Prosecution's investigations, and thus affects fairness in terms of "respect for the procedural rights of the Prosecutor"."⁹⁰ In spite of the Prosecution's arguments for clarification of the scope of victims' participation in the investigation phase,⁹¹ the Single Judge Decision has maintained the position to allow victims to participate, pursuant to articles 56, 57 and 68(3) of the Rome Statute.⁹²

85. *Id.* ¶ 101.

86. Prosecution's Application for Leave to Appeal the Single Judge Decision, *supra* note 29, ¶ 7.

87. *Id.*

88. Donat-Cattin, *supra* note 6, at 1286-87.

89. In fact the object of the Prosecution's application for Leave to Appeal is to clarify the extent of victims' rights to participate in the investigative phase pursuant to article 68(3) and in relation to articles 56 and 57. Prosecution's Application for Leave to Appeal the Single Judge Decision, *supra* note 29, ¶ 7.

90. *Id.* ¶ 13.

91. The prosecution submits further that in certain areas, such as in Northern Uganda for example, the participation of victims in the investigation phase could have an impact in the outcome of the investigation since external actors' pressure can compromise the fairness of the investigation. Prosecution's Application for Leave to Appeal the Single Judge Decision, *supra* note 29, ¶ 14.

92. Decision on the Prosecution's Application for Leave to Appeal the Decision on Victims' Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, ICC-02/04-112 (Dec. 19, 2007) [hereinafter Decision on Prosecution's Application for Leave to Appeal]. In this decision, the Single Judge denies the Prosecution's application for leave to appeal the Single Judge Decision, *supra* note 26. In fact, the Prosecution's application for leave to appeal concerned mainly the "issue of to what extent and in what manner victims may participate in an investigation, under Article 68(3), including in relation to Articles 56 and 57(3)(c), which [he] submits affects the fair and expeditious conduct of the proceedings." Prosecution's Application for Leave to Appeal the Single Judge Decision, *supra* note 29, ¶ 7.

The Single Judge Decision reiterated in December 2007, in the *Decision on the Prosecution's Application for Leave to Appeal the Decision on Victims' Applications for Participation*⁹³ that victims have a right to participate in the investigative phase of proceedings, only by presenting their "views and concerns," which he classifies as not an "active" intervention.⁹⁴

It is not clear from the text of article 68(3) that it is applicable in this context and articles 56 and 57, which concern the investigation stage, do not expressly provide for victims' participatory rights. Considering the impact of evidence management in the investigation stage and in the entirety of proceedings, profound attention should be given to this phase as it regards victims' participation. In order to maintain a balance between victim's and accused's rights, in certain stages participation may not be appropriate.

IV. A GENERAL PARTICIPATORY RIGHT: PARTICIPATION IN THE PROCEEDINGS PURSUANT TO ARTICLE 68(3) OF THE ROME STATUTE

Article 68(3) concerns the participation of victims in the proceedings without any attachment to a specific stage of the proceedings. The text of the provision reads as follows:

Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and fair and impartial trial.⁹⁵

The Court has not made a general conclusion as to the scope of article 68(3), limiting itself to the application of this article on a case-by-case basis and to certain phases of the proceedings.⁹⁶ In other words, this provision is contained in Part 6 of the Rome Statute, which pertains to "the trial", but the text of the provision does not limit it to the trial phase.⁹⁷ In fact, this provision states that when victims' personal interests are affected, "the Court shall permit their views and concerns to be presented and considered *at stages of the proceedings determined to be appropriate by the Court*" (emphasis added).⁹⁸

On the one hand, the text of article 68(3) does not specify that participation is only permitted in the trial phase. On the other hand, the structure of the Rome

93. *Decision on Prosecution's Application for Leave to Appeal*, *supra* note 92.

94. *Id.* ¶ 31.

95. Rome Statute, *supra* note 1, at art. 68, para. 3.

96. See Stahn et al., *supra* note 4, at 236 (arguing that there are two different approaches to the interpretation of this article: "One might argue that the Pre-Trial Chamber is empowered to permit the views and concerns of victims to be presented and considered at any stage of the proceedings, pursuant to Article 68(3) . . . Article 68(3) might be viewed as a general mandate clause, which needs to be implemented through other specific provisions in the Statute and Rules and does therefore not serve as an independent basis of authority for the Court to allow for broader victims' involvement.").

97. Rome Statute, *supra* note 1, at part VI.

98. *Id.* at art. 68, para. 3.

Statute suggests that the provisions contained in Part 6 refer solely to the trial stage thus the location of article 68(3) in this Part could indicate that it is limited to the trial phase. If the first interpretation is adopted, article 68(3) was misplaced and should not have been included in that part of the Rome Statute, which concerns the trial stage specifically. Those in favor of this approach⁹⁹ rely on the fact that the text of the provision mentions at “stages of the proceedings determined by the Court” which is not limited only to the trial stage otherwise it would only indicate “at the trial stage.” However, in accordance with article 31(1) of the *Vienna Convention on the Law of Treaties* (hereinafter “*VCLT*”),¹⁰⁰ which is the instrument for interpreting treaties such as the Rome Statute, the location of the provision in Part 6 is an important element for the interpretation, indicating an element of context. If article 31(1) of the *VCLT*¹⁰¹ is used to interpret article 68(3) of the Rome Statute, it could be concluded that the latter only concerns the trial stage.

This paper favors the first interpretation for two reasons. First, albeit the title of Part 6 concerns the trial phase, the text of the article provides two literal indications that its application is not limited to the trial phase. The first indication is the word “stage” in the plural, implying that it refers to various stages. If it referred solely to the “trial stage” it would have been specified that their views were to “be presented and considered at the trial stage” (or at least the word “stage” would be in the singular, referring only to the “trial stage”). Second, the use of the word “proceedings” is larger than the trial alone and includes not only the trial phase but also the pre-trial phase.

With this caveat, this paper submits that article 68(3) does not create an unlimited right of participation at any or all stages of the proceedings. The conditions stipulated in this provision play a major role in deciding whether victims should participate in a specific phase but in spite of the broad scope of article 68(3) there are stages of proceedings when it is inappropriate for victims to participate, as for example participation pursuant to articles 56 and 57. Furthermore, the Court’s role is crucial in limiting the application of article 68(3) only to stages of proceedings that are appropriate and not using this provision indiscriminately to allow victims to take part at every phase of the proceedings. In light of these considerations, a thorough analysis of the conditions of article 68(3) is imperative. This will be the object of the next section, which first studies the conditions that triggers the existence of a participatory right and second the scope of the participation.

99. See Jérôme de Hemptinne, *The Creation of Investigating Chambers at the International Criminal Court: An Option Worth Pursuing?*, 5 J. INT’L CRIM. JUST. 408, 412 (2007) (concluding that article 68(3) of the Rome Statute provides for a participatory right at “all phases of the proceedings, from the opening of the investigation until the sentencing.”).

100. Vienna Convention on the Law of Treaties art. 31, ¶ 1, May 23, 1969, 1155 U.N.T.S. 311.

101. *Id.*

A. The Conditions for the Exercise of Participatory Rights Contained in Article 68(3)

1. Definition of Victims Within the ICC Framework

The right to participate in proceedings is not automatic.¹⁰² The first condition for participation is very clearly stated in the text of the article: the participant must qualify as a victim.¹⁰³ The Rome Statute does not define the term “victim”, which is given in Rule 85 of the Rules of Procedure and Evidence of the ICC. Therefore, the first consideration when examining participatory rights is the concept of victim. According to Rule 85:

For the purposes of the Statute and the Rules of Procedure and Evidence:

- (a) “victims” means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the court;
- (b) victims may include organizations or institutions that have sustained direct harm to any of their property¹⁰⁴

The term “victims” is quite vague and it includes not only natural persons but also organizations and institutions (which in practice translate as a greater category of victims who can take part in the proceedings).¹⁰⁵ The scope of the definition of victims, it has been argued, might interfere with the fairness and expeditiousness of the trial since “the definition is too broad and vague allowing for too many victims to participate.”¹⁰⁶ Thus a precise analysis of victims’ applications for participation is crucial.¹⁰⁷

102. Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-925, Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the “Directions and Decision of the Appeals Chamber” of 2 February 2007, ¶ 12 (June 13, 2007) (concluding that a right to participate in an appeal is not automatic and a demonstration that the personal interests are affected is always necessary). *See also*, Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-824, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “*Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo*”, ¶ 43 (Feb. 13 2007) [hereinafter *Judgment on the Appeal of Lubanga Dyilo*] (“In the absence of any express mention of victims within regulations 64 (4) or (5), the Appeals Chamber therefore does not interpret the reference to a “participant” or to the filing of “[t]he response” within those provisions to mean that victims have an automatic right to participate in an interlocutory appeal under article 82 (1) (b) of the Statute”).

103. *See* Single Judge Decision, *supra* note 55, ¶ 9 (implying that the concept of victim should follow the definition given in Rule 85 RPE ICC).

104. RPE ICC, *supra* note 22, at Rule 85.

105. *Compare* RPE ICC, *supra* note 22, at Rule 85 with Int’l Tribunal for the Former Yugoslavia, *Rules of Procedure and Evidence*, 2(a), IT/32/Rev. 37 (Apr. 6, 2006) (providing for a more restricted definition of victim, “Victim: A person against whom a crime over which the Tribunal has jurisdiction has allegedly been committed”).

106. *Requête de la Défense sollicitant l’autorisation d’interjeter appel de la « Decision on Victims’ Participation » rendue le 18 janvier 2008*, ICC-01/04-01/06-1135, ¶ 28-32 (Jan. 28, 2008).

107. *See e.g.* Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-1136, Application for Leave to Appeal Trial Chamber I’s 18 January 2008 Decision on Victims’ Participation, Introduction (Jan. 28, 2008).

This issue has been studied in a decision of the Trial Chamber in the case of *The Prosecutor v. Thomas Lubanga Dyilo*.¹⁰⁸ The Trial Chamber in this decision has taken a very broad approach in granting victim status to persons having suffered harm, allowing an applicant who “suffered any harm as a result of the commission of a crime within the jurisdiction of the Court” to participate in proceedings.¹⁰⁹ This conclusion is controversial and was the object of an application for leave to appeal by both the Defence and Prosecution, which was indeed granted.¹¹⁰

The Appeals Chamber rendered a decision on July 11, 2008.¹¹¹ The Appeals Chamber reversed the Trial Chamber’s decision¹¹² on the extent to which Rule 85 has the effect of restricting participation of victims to crimes contained in the charges confirmed by the Pre-Trial Chamber. In fact, for the purposes of participating in trial proceedings, the Appeals Chamber has made it clear that the “harm alleged by a victim and the concept of personal interests under article 68 (3) of the Statute must be linked with the charges confirmed against the accused.”¹¹³

In the first decision concerning participatory rights, the Pre-Trial Chamber I relying on Rule 85, established a few conditions for applicants to be granted the status of victims in order to participate in proceedings.¹¹⁴ Namely, victim applicants have to: i) be natural persons; ii) persons who have suffered harm; iii) the harm has to have been caused by alleged crimes covered by the ICC’s jurisdiction; and iv) show a causal link between the alleged crimes and the harm.¹¹⁵ The definition of victim is the basis of any application for participatory rights leading one to conclude that it is a general definition and not one that only applies pursuant to article 68(3) of the Rome Statute.

A comment on the definition of “victims” is worth noting. Judge Pikis in a Separate Opinion concluded that the reference to the term “victim” in articles

108. *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-1119, Decision on victims’ participation, ¶ 90-92, (Jan. 18, 2008), [hereinafter *Decision on Victims’ Participation in the Case of Thomas Lubanga Dyilo*].

109. *Id.* ¶ 90.

110. *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-1191, Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims’ Participation of 18 January 2008, ¶ 29-34 (Feb. 26, 2008).

111. *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-1432, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008, Judgment (July 11, 2008.) [hereinafter *Judgment on the Appeals of The Prosecutor and The Defence*].

112. Decision on Victims’ Participation in the Case of Thomas Lubanga Dyilo, *supra* note 108, ¶ 97.

113. Judgment on the Appeals of The Prosecutor and The Defence, *supra* note 111, at Reasons ¶ 2.

114. Situation in the Democratic Republic of Congo, ICC-01/04-101-tEN-Corr, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ¶ 79 (Jan. 17, 2006) [hereinafter *Situation in the Democratic Republic of Congo*].

115. Jérôme de Hemptinne and Francesco Rindi, *ICC Pre-Trial Chamber Allows Victims to Participate in the Investigation Phase of Proceedings*, 4 J. INT’L CRIM. JUST. 342, 345 (2006). See also, Jouet, *supra* note 14, at 260.

43(6), 68(1), (2), (4) and (5) “leave[s] the impression that they are not confined to those immediately affected by pending proceedings.”¹¹⁶

Furthermore, only individuals can be prosecuted for international crimes within the jurisdiction of the Court,¹¹⁷ but victims may include those who are not natural persons, such as organizations or institutions.¹¹⁸ It is also noteworthy that the Single Judge in the situation in Darfur has concluded that the definition of victim cannot include deceased persons within the scope of natural persons.¹¹⁹

2. The Notion of Personal Interest

Qualifying as a victim is not sufficient to participate in proceedings pursuant to article 68(3).¹²⁰ Given that the definition of victim does not seem to cause much ambiguity, participants to proceedings not only have to be victims within the above-mentioned definition pursuant to Rule 85, but must also have their “personal interests affected.”¹²¹ Therefore, the notion of “personal interests” becomes of crucial relevance because it represents the *conditio sine qua non* for the application of this article. Since the article is unclear as to *what* can affect their personal interests, it can be argued that the proceedings in which they wish to take part should affect their “personal interests” and not, in a broad approach, the entire proceedings.¹²² This view is consistent with the Appeals Chamber position that an application is needed for participation in an appeal and that the Appeals Chamber “cannot automatically be bound by the previous determination of the Pre-Trial Chamber that it was appropriate for the victims to participate before the court of first instance.”¹²³

The notion of personal interests has great impact in practice since, depending on the interpretation the Court gives to this concept, the right to participate may be denied. Furthermore, the right is highly dependent on the proceeding the victim may wish to participate in, since in certain proceedings, for example concerning procedural issues, it is difficult to conceive that a victim’s personal interests could be affected.¹²⁴ The notion of personal interests has been given some attention in

116. Separate Opinion of Judge Pikis, *supra* note 26, ¶ 13.

117. Rome Statute, *supra* note 1, at art. 1.

118. RPE ICC, *supra* note 22, at Rule 85.

119. Situation in Darfur, ICC-02/05-111-Corr, Corrigendum to Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07, ¶ 36 (Dec. 14, 2007) [hereinafter *Darfur Situation Decision*].

120. Separate Opinion of Judge Pikis, *supra* note 26, ¶ 13.

121. *Id.*

122. This approach is consistent with the Appeals Chamber position that an application for participation should be filed for each stage. See Judgment on the appeal of Lubanga Dyilo, *supra* note 102, ¶¶ 38-41.

123. *Id.* ¶ 43.

124. *E.g.*, Prosecution’s Response to the Joint Application of Victims, *supra* note 15 (“[O]rdinarily when the issue to be addressed is a narrow and procedural one, like the one relating to whether an appeal against a decision on confirmation may be appealed under Article 82 (1) (b), it will be difficult to sustain a position that the victims’ ‘personal interests’ are affected.”). See also Separate Opinion of Judge Pikis, *supra* note 26, ¶ 1 (“[P]articipation of victims before the Pre-Trial Chamber does not per se confer upon them a right to take part in an appeal mounted by a party against a first-instance decision or any aspect of it.”).

the decisions rendered by the Court.¹²⁵ Therefore, it is necessary to analyze whether the notion has been restrictively or broadly interpreted. Since this criterion is, as stated above, a condition to allow participation, it is important that the decisions of the Court are consistent in the interpretation of this concept in order to provide for certainty and clarity for future proceedings.¹²⁶

As far as the ICC's jurisprudence is concerned, it is not yet very clear whether this notion should receive a restrictive or broad interpretation. The first decision that dealt with article 68(3) and the notion of "personal interests" was a decision from the Pre-Trial Chamber I in January 2006 regarding the situation in the Democratic Republic of Congo.¹²⁷ In this decision, the notion of "personal interests" was defined in general terms at the investigation stage.¹²⁸

In relation to the same question - how victims' "personal interests" must be affected - the Single Judge Decision concluded that this will be dependent "not only upon the nature and scope of the proceeding, but also upon the personal circumstances of the victim in question."¹²⁹ The Single Judge Decision studied thoroughly the issue of victims' participation rights pursuant to article 68(3) and in particular analyzed the notion of "personal interests."¹³⁰ In this regard, the decision studied previous jurisprudence on victims' participation rights¹³¹ and, as stated by the Prosecution on its Application for Leave to Appeal the Single Judge Decision,¹³² it took a different approach in regards to the notion of "personal interests" than that of previous decisions. In fact, the Prosecution submitted that "the Decision involves the issue of the extent to which victims may participate under Article 68(3); specifically, regarding the scope of victims' participation, the decision provides for a definition of the personal interests of victims diverting from the other chambers."¹³³

In light of these considerations, it can be argued that the Single Judge Decision is not unambiguous in relation to the scope of victims' participation. It concluded that victims should participate in proceedings under articles 56 and 57, albeit these provisions do not expressly provide for participation. As the Prosecution has stated,¹³⁴ article 68(3) should not provide for "autonomous procedural rights" as it can be argued from the Single Judge Decision.¹³⁵

125. See Judgment on the Appeal of Lubanga Dyilo, *supra* note 102, ¶43; Single Judge Decision, *supra* note 55, at ¶¶ 9-10; Separate Opinion of Judge Pikis, *supra* note 26, ¶ 13.

126. Prosecution's Application for Leave to Appeal the Single Judge Decision, *supra* note 29, at Introduction.

127. Situation in the Democratic Republic of Congo, *supra* note 114, ¶ 61.

128. *Id.* ¶ 63.

129. Single Judge Decision, *supra* note 55, ¶ 89.

130. *Id.* ¶¶ 8-10.

131. *E.g.* Situation in the Democratic Republic of Congo, *supra* note 114, ¶ 7 (analyzing mainly the Pre-trial Chamber I decision).

132. Prosecution's Application for Leave to Appeal the Single Judge Decision, *supra* note 29, ¶ 6.

133. *Id.*

134. *Id.* ¶ 7.

135. Single Judge Decision, *supra* note 55, ¶ 103.

A more recent decision has also touched on the issue of “personal interests” at the investigation stage. Judge Kuenyehia, in the situation in Darfur has noted:

It is the view of the Single Judge that in accordance with article 68(3) of the Statute and the jurisprudence of the Court, the assessment of the personal interests of the victims in specific proceedings taking place during the investigation of a situation and the pre-trial stage of a case is only to be conducted for the determination of the specific set of procedural rights attached to the procedural status of victim.¹³⁶

By the same token, the Trial Chamber in a January 2008 decision on victims' participation in the case of Thomas Lubanga Dyilo has concluded that a “general interest in the outcome of the case or in the issues or evidence the Chamber will be considering at that stage is likely to be insufficient.”¹³⁷ In contrast, a previous decision of the Pre-Trial Chamber I of January 2006, the first decision concerning participatory rights, stated that “personal interests of victims are affected in general at the investigation stage, since the participation of victims at this stage can serve to clarify the facts, to punish the perpetrators of crimes and to request reparations for the harm suffered.”¹³⁸

As far as the Appeals Chamber is concerned, it has taken a decision of principle and has concluded that decisions on whether victims' personal interests are affected should be made on a case-by-case basis.¹³⁹ It has further urged that extreme caution should be taken in order to avoid confusing victims' personal interests with the role of the Prosecution.¹⁴⁰

In light of the above decisions and taking into account the different interpretations of judges, it is still too soon to conclude on which test should be used in the application of article 68(3) of the Rome Statute in relation to the notion of “personal interests.”¹⁴¹

3. The Appropriateness of Participation

As far as other conditions of article 68(3) are concerned, the appropriateness of participation is an important factor to consider. Once the Court has decided that victims' personal interests are affected by the proceedings in which they wish to participate, their participation is again not automatic. The Court must adjudicate on whether it is appropriate for them to participate at that particular stage of the proceedings.¹⁴²

136. Darfur Situation Decision, *supra* note 119, ¶ 13.

137. Decision on Victims' Participation in the Case of Thomas Lubanga Dyilo, *supra* note 108, ¶ 96.

138. Situation in the Democratic Republic of Congo, *supra* note 114, ¶ 63.

139. The Appeals Chamber Decision on the Joint Applications of Victims, *supra* note 15, ¶ 28 (concluding that the question should be decided on a case-by-case basis, but noting some “clear examples” of situations where the personal interests of victims are affected).

140. *Id.*

141. See Prosecution's Application for Leave to Appeal the Single Judge Decision, *supra* note 29, ¶ 9.

142. The Appeals Chamber Decision on the Joint Applications of Victims, *supra* note 15, at Separate Opinion of Judge Song, ¶ 21.

The question of appropriateness of participation, like that of the notion of personal interests, is to be addressed by the victims in an application seeking leave to participate.¹⁴³ The application should also be decided on a case-by-case basis. Victims will not be granted an automatic right of participation just because their personal interests are affected. This is clearly evidenced by Judge Song in his *Separate Opinion* in the June 2007 Appeals Chamber Decision on the Joint Applications of Victims.¹⁴⁴ He concluded that although the personal interests of victims were affected, an application for leave to appeal a decision pursuant to article 82(1)(b) of the Rome Statute is not the appropriate stage for victims to participate in the proceedings. At this stage of the proceedings, the Appeals Chamber is determining a preliminary issue on whether or not the appeal can be heard.¹⁴⁵

The question of appropriateness of participation is closely related to the rights of the accused and the right to a fair and expeditious trial. Participatory rights should not be granted if the consequence is to cause an undue delay in the proceedings and thus prejudice the rights of the accused. It seems that this is an important consideration the Court will take into account when judging whether participation is appropriate at a certain stage of the proceedings.¹⁴⁶ In his *Separate Opinion*, Judge Song concluded that

[I]n the circumstances of the present case, it would not be appropriate for the Victims to participate at this stage and to submit their views and concerns in relation to the admissibility of the appeal. The proceedings in this appeal have been delayed for several weeks due to the withdrawal of counsel for the Appellant shortly after the appeal had been filed . . . On balance, the participation of the Victims at this stage of the proceedings therefore would be inappropriate.¹⁴⁷

When judging on the appropriateness of participation, the Single Judge Decision noted that this notion is highly connected to the effect on “personal interests”:

[T]he statute makes it clear that the Court’s discretion in determining the appropriateness of a victim’s participation has to be exercised against the criterion of the existence of an impact on the personal interests of the applicant. With regard to each of the victims involved, this determination will then depend not only upon the nature and scope

143. Judgment on the Appeal of Lubanga Dyilo, *supra* note 102, ¶ 38.

144. The Appeals Chamber Decision on the Joint Applications of Victims, *supra* note 15 at Separate Opinion of Judge Song, ¶ 21. Judge Song concluded that “In light of this decision of the Appeals Chamber and in the circumstances of the present case, it would not be appropriate for the Victims to participate at this stage and to submit their views and concerns in relation to the admissibility of the appeal.” *Id.* ¶ 23.

145. *Id.* at Decision, ¶ 26.

146. *Id.* at Decision, ¶ 22.

147. *Id.* at Separate Opinion of Judge Song, ¶ 23.

of the proceeding, but also upon the personal circumstances of the victim in question.¹⁴⁸

In light of the above, whenever the rights of the accused, which are defined in article 67 of the Rome Statute,¹⁴⁹ and the right to a fair and expeditious trial, are in jeopardy, participation will consequently be inappropriate. As noted by Judge Pikis in his *Separate Opinion*,¹⁵⁰ the appropriateness of the participation will depend on the manner in which victims' views and concerns are expressed. To decide on the appropriate stage of the proceedings it is important to analyze in what way the participation is to occur. In the words of Judge Pikis, participation at a stage of the proceedings

[M]ust be at an interval of the proceedings that would be appropriate, regard being had to the norms of a fair and impartial trial and the rights of the accused evaluated within the context of the Statute. An opportune stage at which the views and concerns of participating victims may be presented is at the outset of the proceedings, alerting the Court and the parties to the implications of the case on the personal interests of victims and how best they may be safeguarded.¹⁵¹

It goes without saying that the "presentation of views and concerns" should be in accordance with the rights of the accused, as the text of article 68(3) states.¹⁵² However, in practice how should this participation be exercised? It is a concern to the accused as well as to the Prosecution that the victims are not given a very broad right of participation so as to become a second prosecutor.¹⁵³ Reconciling the broad right of participation which article 68(3) creates and the right of the accused to have only one opponent is a difficult task; therefore, it is crucial to limit the scope of the participation to strictly the presentation of "views and concerns" of the victims and to properly define what this mode of participation consists of.

In this sense, the Prosecutor bears some duties in regards to the accused that the victims do not have. For instance, the Prosecution holds the burden of proof.¹⁵⁴ If participatory rights are unlimited, it may well happen that victims perform duties that are solely incumbent upon the Prosecution and thus affect the notion of "equality of arms."¹⁵⁵ For the equilibrium of the process not to be broken, victims should not concur with the Prosecution in the effort to prove the accused's guilt and get a conviction. Their role should be to provide the Court, the Prosecution,

148. Single Judge Decision, *supra* note 55, ¶ 89.

149. Rome Statute, *supra* note 1, at art. 67.

150. Separate Opinion of Judge Pikis, *supra* note 26, ¶ 17.

151. *Id.* ¶ 20.

152. See Stahn et al., *supra* note 4, at 236.

153. See, e.g., Prosecution's Application for Leave to Appeal the Single Judge Decision, *supra* note 29, ¶ 13, (citing Prosecutor v. Lubanga Dyilo, ICC-01/04-01/06-901-Corr-tEN, Corrigendum to the Response to the Application by Victims a/000 1/06,a/0002/06,a/0003/06 and a/0105/06 for Authorization to Participate in the Appeal Proceedings Relating to the Decision on the Confirmation of Charges, ¶¶ 25, 29-31 (May 16, 2007)).

154. Rome Statute, *supra* note 1, art. 66, para. 2.

155. See, e.g., Separate Opinion of Judge Pikis, *supra* note 26.

and the accused with their concerns. In practice, victims should not be allowed to interfere in any role that by its nature belongs solely to the Prosecution in accordance with its duties pertaining to evidence and conviction. Judge Pikiš in his *Separate Opinion* drew a good illustration of how the equilibrium may be reached in practice. Victims ought not to have the power to make any accusation, nor to present their views and concerns in relation to the evidence, the conduction of the case by the Prosecution or the defence put together by the accused.¹⁵⁶

The purpose of victims' participation is to shed light on the suffering and harm that occurred during or as a consequence of the crime being considered and assist in the discovery of the truth. Furthermore, their views and concerns can bring a voice to the entire community who suffered, if not as direct victims, certainly as indirect victims of the crimes committed. If this is the manner in which participation occurs, it does not conflict with the roles of other parties and may indeed prove beneficial for the conduct of proceedings, since it puts the crimes in perspective by giving an idea of the reality in times of conflict. In this sense, victims' participation can be beneficial to the establishment of the truth since they have "first-hand knowledge of the crimes."¹⁵⁷ Furthermore, their participation as victims and not merely their testimony as witnesses can assist the Court with clarification of the facts of the case. As noted by Claude Jorda and Jérôme de Hemptinne, this role can be a "decisive contribution to the prevention of future crimes."¹⁵⁸

4. The Rights of the Accused and the Notion of a Fair and Impartial Trial

Further conditions imposed by article 68(3), are that participation be done in accordance with the rights of the accused and with a fair and impartial trial. This paper has already discussed these conditions when analyzing the notions of "personal interest" and the "appropriate stage of the proceedings." It is evident from these discussions that it is difficult to untangle them from the other conditions stipulated in article 68(3). Nonetheless, it is still important to give some supplementary attention to these two conditions (the rights of the accused and the notion of fair and impartial trial) which are inseparable.

The rights of the accused are expressly defined in article 67 of the Rome Statute.¹⁵⁹ However, this list is not exhaustive. Other rights can be found throughout various provisions of the Rome Statute. For instance, article 66 enacts the principle of presumption of innocence well-recognized in international criminal law and in many domestic criminal systems.¹⁶⁰ In practical terms, the inclusion of

156. *Id.* ¶ 15-16 (Judge Pikiš draws an analysis of the terms "views and concerns," and in regards to other versions of the Rome Statute he concludes that "[t]he term 'views' in the context of article 68 (3) of the Statute signifies 'opinion', in fact an opinion, stance or position on a subject. In the Russian and Spanish version of article 68 (3) of the Statute the word 'opinion' is used. '[C]oncerns' signify matters of interest to a person; matters that preoccupy him/her. '[P]réoccupations' is precisely the word used in the French text of the Statute.").

157. Jorda & de Hemptinne, *supra* note 13, at 1397.

158. *Id.*

159. Rome Statute, *supra* note 1, at art. 67.

160. *Id.* at art. 66. The author submits that this principle could also be regarded as a component of

the victims in the proceedings cannot in any way interfere with the defendant's presumption of innocence as victims' participation give a different color to the facts which are being presented to the Court. In addition to the rights provided for in the Rome Statute, the Rules of Procedure and Evidence provide for some basic guarantees to the accused.¹⁶¹ Further to the presumption of innocence, there are other guarantees to ensure that the accused receive a just and impartial judgment.¹⁶²

The condition of a fair and impartial trial is a right of the defendant. This notion is particularly linked with an expeditious trial, on which victims' participation can cause a great impact. Participatory rights can be a real threat to the expeditiousness of the trial since in certain cases the number of victims can be very high and thus cause undue delays to the proceedings.¹⁶³ It is thus crucial to define who is eligible to participate and when it is appropriate to participate. It is always important to keep in mind that the positions of victims and that of the accused can be opposed throughout the proceedings.¹⁶⁴ Therefore the views and concerns of victims cannot affect the rights of the accused or the right to a fair and impartial trial.

The right to a "fair and impartial trial," as stated in the Single Judge Decision, includes the notion that the fairness of the proceedings "should be preserved to the benefit of all participants in the proceedings," and that would include victims and Prosecution, as well as the accused *who is the core beneficiary of this right*.¹⁶⁵ It goes without saying that the participation at a certain stage may jeopardize the rights of the accused whereas in other stages it might not.

However broad the participatory rights granted in article 68(3) may be,¹⁶⁶ the accused is also granted many rights and guarantees. The aim is then to balance those rights. From the decisions of the ICC interpreting participatory rights in light of the rights of the accused, this balance is being sought.

The Court should not be carried away with the undeniable need for participatory rights and all arguments in favor of broad participation, if that is to the detriment of the rights of the accused. To reach the "balance of conflicting interests", victim's rights should be limited at certain stages of the proceedings where their participation could put at risk the accused's rights. These stages where participation may infringe the accused's rights are, for example, stages where the

the right to a fair and impartial trial.

161. See, e.g., RPE ICC, *supra* note 22, at rule 141(2) (allowing the accused to have the last word at the end of the trial). This right is particularly important since victims can have the right to express the effect of the evidence on their personal interests at the end of the trial, as noted by Judge Pikis, Separate Opinion of Judge Pikis, *supra* note 26, ¶ 21.

162. E.g. Rome Statute, *supra* note 1, at art. 63 (stating that trial should be in the presence of the accused).

163. See Jorda & de Hemptinne, *supra* note 13, at 1408.

164. Jouet, *supra* note 14, at 250.

165. Decision on Prosecution's Application for Leave to Appeal, *supra* note 92, ¶ 27.

166. Rome Statute, *supra* note 1, at art. 68, para. 3. Other more specific rights are granted to victims in article 15(3), 19 and others. However, article 68(3) enacts a very broad right of participation in the sense that it refers to participation in proceedings, which has a very broad definition.

question is purely procedural¹⁶⁷ or stages where their participation might interfere with the duties that belong solely to the Prosecution with regard to the case, e.g. in instances of evidence management.¹⁶⁸

B. The Scope of Participatory Rights Pursuant to Section 68(3) of the Rome Statute

This section will briefly analyze the scope of participation in the proceedings. First, it will examine participation in a case as opposed to a situation. Second, it will analyze the mode of participation, such as the presentation of “views and concerns” pursuant to article 68(3) of the Rome Statute and other types of participation. The analysis in this part of the essay will be fairly short as the question of the scope of participation has been touched upon to a certain extent previously in this paper.

On a preliminary note, in terms of the manner in which participation may occur, it is important to first examine the general form of participation established in article 68(3) which applies to participation pursuant to other articles of the Rome Statute, such as articles 56 and 57 of the Rome Statute, as has been discussed.¹⁶⁹ The manner in which participation may occur has an impact in practice depending on whether this participation occurs by presenting their views and concerns¹⁷⁰ or whether it is by “submit[ting] observations to the Court”¹⁷¹ or even by “mak[ing] representations to the Pre-Trial Chamber.”¹⁷²

The text of article 68(3) does not specifically provide an explanation of whether it refers to victims of a situation or victims of a case.¹⁷³ Since this provision concerns participation at stages of the “proceedings,” it serves as a general provision for participation at different phases, as stated above. This was the interpretation adopted by the Pre-Trial Chamber I in the ICC’s first decision concerning victims’ participation.¹⁷⁴ This decision makes it clear that the wording

167. Prosecution's Response to the Joint Application of Victims, *supra* note 15, ¶ 3.

168. Prosecution's Application for Leave to Appeal the Single Judge Decision, *supra* note 29, ¶ 12.

169. See discussion *supra* Part III.

170. See Rome Statute, *supra* note 1, at art. 68, para. 3.

171. See *id.* at art. 19, para. 3.

172. See *id.* at art. 15, para. 3.

173. See Stahn et al., *supra* note 4, at 221-22. The author affirms that “the Statute and Rules fail to specify clearly if and where participatory rights are linked to ‘victims of a situation’ (e.g. all natural persons, organizations and institutions that have suffered harm as a result of the commission of crimes within the jurisdiction of the Court in a specific territory) or confined to ‘victims of a case’ (e.g. natural persons, organizations and institutions that have suffered harm as a result of the conduct of one or several identified accused or suspects).” Furthermore, he suggests two possible interpretations for the notion of victims: “broad approach . . . in relation to the territorial and temporal scope of the ‘situation’.” This position receives some support from the broad definition of victims under Rule 85 and the fact that the protection of the interests of victims is a principle which applies, in general, at all stages of the proceedings Moreover, the concept of ‘victims of the situation’ is expressly embedded in specific provisions of the ICC system.”

174. See Situation in the Democratic Republic of Congo, *supra* note 114, at ¶¶ 72-75 (recognizing victims’ participatory rights at the investigation stage, in the context of a situation, and concluding that participation pursuant to article 68(3) could entitle victims with a right to take part in proceedings relating to articles 56 and 57 of the Rome Statute).

of article 68(3) of the Rome Statute was interpreted broadly enough to allow for (i) participation in the investigation stage of proceedings¹⁷⁵ and (ii) allow for participation in the investigation of a situation.¹⁷⁶ This position has been questioned by the Prosecution;¹⁷⁷ however the Pre-Trial Chamber I denied the Prosecution's application for leave to appeal this decision.¹⁷⁸ Moreover, this interpretation was reaffirmed by the Single Judge Decision.¹⁷⁹ A decision in the situation in the Democratic Republic of Congo has confirmed that participation in the investigation stage is permitted pursuant to article 68(3) and that it is possible to be granted the status of victim to participate in proceedings before the Pre-Trial Chambers.¹⁸⁰

As far as the mode of participation is concerned, Judge Pikiš in his *Separate Opinion* presents an interesting approach.¹⁸¹ He proceeds to an interpretation of the terms "views and concerns." He concludes that this mode of participation is a very strict one and does not provide victims with a right to become a party to the proceedings.¹⁸² Furthermore, he pursues an analysis on the significance of the term "views" and concludes that victims' views are their opinions, their position in relation to a subject and their "concerns" means their preoccupations, something that bothers them.¹⁸³

Finally, it is worth noting that once all the conditions of article 68(3) are met, the Court has to permit victims' views and concerns to be presented, since the text of the article uses the word "shall" and not "may" as it was a matter of discussion and negotiation.¹⁸⁴

175. *Id.* ¶ 72. For an analysis of participation at the investigation stage, see David Lounici & Damien Scaliá, *Première Décision de la Cour Pénale Internationale Relative aux Victimes: Etat des Lieux et Interrogations*, 76 REVUE INTERNATIONALE DE DROIT PÉNALE 375 (2005).

176. See Situation in the Democratic Republic of Congo, *supra* note 114, at ¶¶ 65-66.

177. Situation in Uganda, ICC-02/04-85, Prosecution's Reply under Rule 89(1) to the Applications for Participation of Applicants a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06 in the Uganda Situation, ¶¶ 20-21 (Feb. 28, 2007). The Prosecution is of the view that the text of article 68(3) is not broad enough to include participation in the investigation of a situation.

178. Situation in the Democratic Republic of The Congo, ICC-01/04-135, Decision on the Prosecution's Application for Leave to Appeal the Chamber's Decision of 17 January 2006 on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 (March 31, 2006).

179. Single Judge Decision, *supra* note 55, at ¶¶ 88-90.

180. Situation in the Democratic Republic of the Congo, ICC-01/04-423, Corrigendum to the Decision on the Applications for Participation Filed in Connection with the Investigation in the Democratic Republic of the Congo by a/0004/06 to a/0009/06, a/0016/06 to a/0063/06, a/0071/06 to a/0080/06 and a/0105/06 to a/0110/06, a/0188/06, a/0128/06 to a/0162/06, a/0199/06, a/0203/06, a/0209/06, a/0214/06, a/0220/06 to a/0222/06, a/0224/06, a/0227/06 to a/0230/06, a/0234/06 to a/0236/06, a/0240/06, a/0225/06, a/0226/06, a/0231/06 to a/0233/06, a/0237/06 to a/0239/06 and a/0241/06 to a/0250/06, Introduction (Jan. 31, 2008).

181. Separate Opinion of Judge Pikiš, *supra* note 26, ¶ 14-17.

182. *Id.* ¶ 15.

183. *Id.*

184. See United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Committee of the Whole, Working Group on Procedural Matters, Rome,

V. CONCLUSION

Hideous crimes are a major concern for the entire international community. The need to prevent these crimes from happening as well as to punish the criminals is the endeavor of international criminal justice. However, a justice system cannot be complete without taking into account the existence of victims of crimes and what they have to say about the violence they have experienced during conflict situations.

Hearing the victims' voice¹⁸⁵ is the beginning of a process of reconstructing societies destroyed by international crimes and providing for their reintegration. With the establishment of the ICC as a permanent court to try the gravest crimes, victims' rights are now rooted in its legal documents. This represents a historic event. This paper has addressed whether participatory rights pits victims' against the accused by compromising the latter's rights. This paper has argued that victims' participatory rights do not necessarily have to conflict with the rights of the accused and a fair and expeditious trial.

The ICC system can become a system of justice¹⁸⁶ that moves away from times when suffering was regarded as a tool for punishing criminals to a system where pain brings the right to participation and restoration. The threat of turning victims into a second prosecutor against the accused does not have to become real. This article has argued that the equilibrium can be reached in practice if victims are not granted participation rights at stages when their participation is not appropriate (e.g. at the investigation phase) and are granted limited rights at early stages of the proceedings (thus avoiding undue delays in the proceedings).

Much depends on the current development of the jurisprudence of the ICC in the interpretation and application of these provisions. The manner in which judges of the Court will interpret and apply these provisions is under current development. Competing rights need not necessarily be opposed and it is for the Court to provide for harmony amongst opposing interests. It remains to be seen whether the provisions concerning participatory rights will amount to a "charter of victims' rights", that also takes into consideration opposing rights and interests.

Italy, June 15-July 17, 1998, *Proposal Submitted by Canada*, ¶ 3, A/CONF.183/C.1/WGPM/L.58 (July 6, 1998) (showing that both terms were suggested for article 68(3) of the Rome Statute).

185. As suggested by the authors Mekjian & Varughese in the title of their article, "Hearing the Victim's Voice: Analysis of Victims' Advocate Participation in the Trial Proceeding of the International Criminal Court", *supra* note 4.

186. *But see* Donat-Cattin, *supra* note 10 (stating that the right to participate in proceedings is a true "justice for victims"). The author disagrees with the idea of "justice for victims," since justice is a notion that can only be achieved by the considerations of all parties involved, the community as a whole.

HAWALA, MONEY LAUNDERING, AND TERRORISM FINANCE: MICRO-LENDING AS AN END TO ILLICIT REMITTANCE

CHARLES B. BOWERS*

I. INTRODUCTION

“Hawala”, in Arabic, means “to transfer;”¹ it is also known as “Hundi,” meaning “to collect” - from Sanskrit root.² Though the term might be a new addition to the western lexicon, it is used quite readily the world-over in some form. A traveler’s check, for example, is known as “hawala safir” from parts of Africa to Asia and throughout the Middle East.³ This paper, as interlocutor, seeks to introduce (to re-introduce to some) not only the term hawala, but the unique security challenges this concept - that of an informal, and less than transparent, value transfer system - presents. Beyond examining the role of hawala in money laundering and terrorism finance, the objective of this work is to weigh the effectiveness of current efforts in addressing these issues, both at the street-level and in the legislative realm, post September 11, 2001 (9/11). Lastly, the author offers recommendations based on US, UAE, Turkey, and Netherlands-based research coupled with numerous interviews with various subject-matter experts ranging from international bankers to legislators to diplomats to federal agents.

II. THE HAWALA TRANSACTION

Hawala, in its most basic delineation, is “money transfer without money movement,”⁴ without movement in formal financial institutions that is. Upon customer request, a US-based hawaladar - a hawala operator - will call, fax, or email their hawaladar associate in Pakistan, for example, with the specifics of the transaction (i.e. amount and password only - no names are used). This Pakistan-based hawaladar will then pay the requested amount out of his/her own funds, and in local currency, upon receiving the agreed upon password from the recipient. The only paper trail might be a notation, often encoded or in a little-known dialect

* An attorney living in Washington, D.C. Special thanks to FinCEN, the Grameen Foundation, professor Marilyn Cane, and Mr. John Cassara.

1. Samuel Munzele Maimbo, *The Money Exchange Dealers of Kabul: A Study of the Hawala Systems in Afghanistan* v n.1 (World Bank Publication, Working Paper No. 13, 2003).

2. Saeed Al-Hamiz, *Hawala: U.A.E. Perspective*, in REGULATORY FRAMEWORKS FOR HAWALA AND OTHER REMITTANCE SYSTEMS 30, 31 (Int’l Monetary Fund, 2005).

3. *Id.*

4. JOHN A. CASSARA, *HIDE & SEEK: INTELLIGENCE, LAW ENFORCEMENT, AND THE STALLED WAR ON TERRORIST FINANCE* 145 (Potomac Books 2006).

(e.g. Gujarati⁵ or Memoni⁶), of the debt obligation in internal books. The funds are distributed, often delivered right to the door of the intended recipient, all within a course of minutes,⁷ without receipts or paperwork, and all outside of formal financial institutions.

Theoretically, payments between hawaladars operate both ways. In our example the Pakistani hawaladar could just as easily request that his US colleague pay out X to a US recipient. As is typically the case, however, flows tend to be asymmetrical (i.e., money leaves more developed nations bound for least developed nations in the form of remittances). It is clear, however, that this trade is not simply bilateral. Our US and Pakistani hawaladars would be dealing concurrently with operators in Dhaka, Muscat, Istanbul, London, etc.

Hundreds or thousands of these transactions are bundled together over the course of weeks or months with consolidation taking place at various levels. Mid-level hawaladars act as clearing houses for small scale operators, larger hawaladars act as clearing houses for those in the middle, and so on. In Dubai, at the mega-level, tranches of value worth £100,000 are the minimum units of trade in each hawala swap.⁸ Despite this layering, eventually balance sheet positions, even at the lowest levels, have to be settled.

Some settlement occurs within traditional banking channels, but much of this balancing of the accounts takes place through alternative channels like cash couriers.⁹ Despite Reports of International Transactions of Currency or Monetary Instruments (CMIR) reporting requirements,¹⁰ money is effectively smuggled across our borders in this fashion every day. In fact, in the US State Department's 1998 International Narcotics Control Strategy Report, bulk cash smuggling was deemed one of the most utilized money laundering techniques in the United States and around the world. In the same report, a decade later, the same holds true: "The smuggling of bulk currency out of the United States is the largest and most significant . . . money laundering threat facing law enforcement. Deterring direct access to US financial institutions by criminals does not prevent money laundering if illicit proceeds can still reach US accounts through indirect means."¹¹

The principal drawback of using couriers is one of logistics. One million dollars in "street cash" (i.e. bills in \$5, \$10, and \$20 denominations) weighs

5. Patrick M. Jost & Harjit Singh Sandhu, *The Hawala Alternative Remittance System and its Role in Money Laundering* 20 n.13 (A FinCEN/Interpol Paper, 2000).

6. Memoni, often classified as a dialect of Sindhi, is spoken by roughly 500,000 people - most of whom live in Karachi. NationMaster Encyclopedia, Languages of Pakistan, <http://www.nationmaster.com/encyclopedia/Languages-of-Pakistan> (last visited Feb. 16, 2009).

7. Some hawaladars guarantee receipt of payment within 10 minutes. Interview with hawaladars, in Sharjah, Dubai, & Abu Dhabi (June 22-30, 2008).

8. Roger Ballard, *Hawala: Criminal Haven or Vital Financial Network?* Newsletter of the Int'l Inst. of Asian Studies (Int'l Inst. of Asian Studies, Univ. of Leiden), Oct. 2005, at 5.

9. CASSARA, *supra* note 4, at 146.

10. 31 U.S.C. § 5316 (2007); 31 C.F.R. § 103.23 (2009); 31 C.F.R. § 103.27 (2009).

11. U.S. DEP'T OF STATE, BUREAU FOR INT'L NARCOTICS AND LAW ENFORCEMENT AFFAIRS, INTERNATIONAL NARCOTICS CONTROL STRATEGY REPORT: VOLUME II MONEY LAUNDERING AND FINANCIAL CRIMES 5 (2008) [hereinafter DEP'T OF STATE].

approximately 256 pounds.¹² Therefore, in larger transactions, some hawaladars (or their associates) utilize import/export businesses. Through these companies, “countervaluation” the settling of accounts through trade rather than transfer occurs.¹³ Countervaluation is done either by the underinvoicing or overinvoicing of product flows between these import/export businesses.¹⁴ For example, if a hawaladar owed \$25,000 to a colleague in Bishkek, he might overinvoice a shipment of carpets. The carpets, having a true value of \$25,000 would be invoiced at \$50,000; \$25,000 would cover the legitimate cost of goods and the remaining \$25,000 would settle his/her debt. As John Cassara, former CIA officer and US Customs agent, notes, “The cover of the business transaction and the documentation involved wash the money clean . . . [A] customs inspector is hard-pressed to spot moderate discrepancies in invoice pricing and product description.”¹⁵ Whether carpets or gold, it’s simply unrealistic to expect customs agents to wade through mountains of pile verifying knots per square inch or the purported purity of gold; is it solid gold or simply gold-plated; is it 18-carat or 22-carat?

The products involved in countervaluation present tracking challenges in and of themselves. Though the principle focus of this paper is on the hawala transaction, the use of goods in the countervaluation process makes the mention of trade-based money laundering a necessity. And, gold, in particular, presents one of the most challenging set of security concerns. In fact, some, like Mr. Cassara, argue that for the role gold plays in ethnic-based alternative remittance systems, it should be classified as an alternative remittance system itself (more on this later).¹⁶

III. VALUABLE REMITTANCE TOOL OR NATIONAL SECURITY THREAT?

Remittances - the money that migrant workers send back to their countries of origin¹⁷ - play a large and ever growing role in the global economy. As far back as the 1990’s, “[D]eposits from emigrants . . . represented almost 20 percent of total deposits in the Portuguese banking system.”¹⁸ Skip ahead a few years, and in 2002 remittances from the US to Latin America averaged \$200-300 per month per person while monthly sums to Pakistan and India were nearly three times that amount per person.¹⁹ As a result, by 2003, developing countries were receiving \$96 billion in remittance inflows.²⁰ This sum accounted for more than 5 percent of

12. CASSARA, *supra* note 4, at 131.

13. *Id.* at 146.

14. *Id.*

15. *Id.*

16. *Id.* at 150.

17. Manuel Orozco, Worker Remittances in an International Scope 1 (Multilateral Inv. Fund of the Inter-Am. Dev. Bank, Working Paper, 2003), available at http://www.microlinks.org/ev_en.php?ID=7777_201&ID2=DO_TOPIC.

18. *Id.* at 8.

19. *Id.* at 9.

20. Jose de Luna Martinez, *Workers’ Remittances to Developing Countries: A Survey with Central Banks on Selected Public Policy Issues 4* (World Bank Policy Research, Working Paper No. 3638, 2005), available at <http://go.worldbank.org/F43572F110>.

the 2003 GDPs for 25 developing countries,²¹ and nearly 7.5 percent of the GDP and 160 percent of the Foreign Direct Investment (FDI) of Vietnam.²² By 2005, global remittances passing through formal channels exceeded a staggering \$233 billion.²³

I pause to stress two points here, the first being that the above-mentioned figures are indeed estimates. There are many reasons, but two in particular, that suggest why these numbers should be viewed with a modicum of skepticism. Firstly, there is a lack of uniformity in remittance classification. In many countries, companies which would otherwise be classified as money transmitters are considered commercial entities rather than financial institutions, and are, therefore, exempt from many of the regulatory, oversight, and reporting requirements.²⁴ In addition, remittances which are paid through post offices are seldom reported to financial authorities (as is the case in the US).²⁵ As such, those transactions also escape inclusion in remittance data. Secondly, the levels of reporting, and thus the adequacy of the data collected, vary from country to country. For example, even where money transfer companies are required to register as financial institutions, they often fail to report both the number and value of remittance transactions.²⁶

Another point that needs to be emphasized is that these figures represent only those flows passing through formal channels. While “most countries do not measure remittances that occur through informal channels,”²⁷ international bodies do, and their figures are in the tens of billions of dollars.²⁸ Some commentators, like professor Roger Ballard, place international levels higher still: “[u]nrecorded flows moving through informal channels . . . are conservatively estimated to amount to at least 50 percent of recorded flows.”²⁹ If that statement is accurate, informal flows would amount to roughly \$115 billion annually. In Pakistan alone, “[o]fficials . . . estimate that more than \$7 billion flow into the nation through hawala channels each year.”³⁰ To put these numbers into perspective, the sum of formal and informal remittance flows is somewhere around \$350 billion per year,³¹ while 2007 CIA Factbook figures list China’s budget revenues at just \$450 billion.³²

21. *Id.*

22. Raul Hernandez-Coss, *The Canada-Vietnam Remittance Corridor: Lessons on Shifting from Informal to Formal Transfer Systems* 4 (World Bank, Working Paper No. 48, 2005), available at <http://go.worldbank.org/TUUN6HHHE0>.

23. Ballard, *supra* note 8, at 3.

24. Martinez, *supra* note 20, at 8.

25. *Id.* at 9.

26. *Id.* at 8-9.

27. *Id.* at 12.

28. U.S. TREASURY DEP'T, CONTRIBUTIONS BY THE DEP'T OF THE TREASURY TO THE FINANCIAL WAR ON TERRORISM, Fact Sheet 15 (2002).

29. Ballard, *supra* note 8, at 3.

30. U.S. TREASURY DEP'T, *supra* note 28, at 15.

31. Ballard, *supra* note 8, at 3.

32. CENTRAL INTELLIGENCE AGENCY [CIA], THE WORLD FACTBOOK (2007), available at <https://www.cia.gov/library/publications/the-world-factbook/>.

Cautionary notes aside, no matter how broad the discrepancies between the actual figures and the estimates above, and between reporting methodologies and the actual data, two things are clear. First, give or take hundreds of thousands of dollars, or tens of billions of dollars for that matter, and the numbers involved are still enormous. Second, there is a clear bifurcation of preference among remitters. Some choose to utilize the formal sector while others, often at risk of criminal prosecution, opt for the informal.

Why is that the case? Why would one prefer to send money through a hawaladar? There are four basic incentives that seem to fuel this choice: (1) the absence of formal sector alternatives, (2) cultural familiarity, (3) affordability, and (4) anonymity.

“[H]awalada continues to be the best option for most immigrants and the only one for those coming from regions devastated by civil conflict and disasters.”³³ In Afghanistan, in the absence of traditional financial institutions, hawaladars provided the only viable commercial banking services while the Taliban held power.³⁴ Even after the ousting of the Taliban, what banks there were, “were plagued by significant weaknesses, among them, weak corporate governance . . . , unskilled human resources, outdated technolog[y] . . . , and grave problems of liquidity and solvency,”³⁵ not to mention corruption and outright theft.

Traditional banks and wire services were, and still are, simply reluctant to risk the capital and personnel required to set up shop in regions like Afghanistan and the tribal areas of Pakistan. Yes, traditional financial institutions do exist in the urban centers, but keep in mind that hawala is attractive not only to the un-serviced, but to the under-serviced as well. Just because bank X might have a branch in Karachi, does not mean that it is either expedient or safe to travel for hours through rough neighborhoods, cash in hand, to do business. Hawaladars, as a “safe” alternative, offer to deliver payments to the doors of recipients, even to those in rural areas - areas that are disproportionately victimized by the violence of radicals, tribal chieftans, and warlords.

Our second incentive, that of cultural familiarity, or what professor Nikos Passas, of Northeastern University, terms “cultural inertia,” also plays a significant role.³⁶ Saeed al-Hamiz, Executive Director of the Banking Supervision and Examination Department of the Central Bank of the UAE, tries to explain the cultural/historical significance of hawala as follows:

33. Nikos Passas, *Formalizing the Informal: Problems in the National and International Regulation of Hawala*, in REGULATORY FRAMEWORKS FOR HAWALA AND OTHER REMITTANCE SYSTEMS 7, 9 (International Monetary Fund, 2005).

34. Maimbo, *supra* note 1, at 1.

35. Samuel Maimbo, *Challenges of Regulating and Supervising the Hawaladars of Kabul*, in REGULATORY FRAMEWORKS FOR HAWALA AND OTHER REMITTANCE SYSTEMS 47, 51 (IMF, 2005).

36. Passas, *supra* note 33, at 10.

Hawala . . . predates bank transfers by hundreds of years. During the twelfth and thirteenth centuries, the development of trade between regions called for the establishment of reliable and trustworthy instruments to finance those transactions . . . Hawala . . . operated within tight-knit extended families that were based in two or more major trading centers.³⁷

At the operator level, not much has changed since the twelfth century. For example, within many hawala networks, and other informal remittance systems, the core of trust among operators still consists of familial ties. Further, they continue to be ethnically exclusive in the services they provide (e.g. you must be Vietnamese to access the Vietnamese system).³⁸ This exclusion by force of habit and community tradition acts as a formidable obstacle to commercial competition from the outside. In that sense our second incentive simply reinforces incentive one. And, again, this is particularly true in rural areas where rarer dialects, lesser known traditions, and a general distrust of outsiders act as further barriers to entry.

Despite this fairly high level of service, hawaladars manage to keep their costs, and thus their prices (i.e. a fee in the form of a percentage of the amount remitted, often only 1-2 percent),³⁹ low - our third incentive. Remittance fees (e.g. 8.3-13 percent from NY to Bangladesh, Pakistan, or Sri Lanka) can be extremely expensive, comparatively, when utilizing formal sector avenues. Unlike stand-alone banks and wire services that have to pass their high overhead costs on to their customers, hawaladars, which are often integrated with other businesses, share the costs of infrastructure.⁴⁰ Further, these businesses provide cover for illicit money transmitters whom subsequently save additional monies by avoiding registration and reporting requirements. In addition, many of these entities are family owned and operated.⁴¹ As such, insurance, retirement plans, and minimum wage are often ignored. As an added bonus, as these businesses (e.g. ethnic grocers, foreign exchange houses, rug dealers, travel agencies, etc.) tend to cater to ethnic populations, they provide hawaladars with steady streams of potential clientele.

Lastly, the real savings that is passed on to customers is created via currency speculation. "Hawala-type transactions . . . provide special advantages in situations where the remitting country has a convertible currency and no capital controls,⁴² and the receiving country has inconvertible currency and/or a black

37. Al-Hamiz, *supra* note 2, at 30-31.

38. Hernandez-Coss, *supra* note 22, at 29.

39. Jost, *supra* 5, at 6.

40. U.S. DEP'T OF THE TREASURY & U.S. DEP'T OF JUSTICE, 2002 NATIONAL MONEY LAUNDERING STRATEGY 22 (2002), available at <http://www.treasury.gov/offices/enforcement/publications/ml2002.pdf>.

41. Al-Hamiz, *supra* note 2, at 31.

42. Capital Controls are government mandated conversion of foreign currency into local currency, often at unfavorable rates -- think Cuba or the former Soviet Union. CTR. FOR POPULAR ECONOMICS, CONTROLLING CAPITAL 2 (2006).

market exchange rate.”⁴³ Given the low overhead costs of hawala operations, as discussed above, hawaladars can profit from the slimmest of margins alone. A US hawaladar was quoted as saying that his business could still make money on just a 2 percent exchange rate margin.⁴⁴

Ultimately, further “discounts” may be passed on to unwitting remitters by hawaladars that are willing to circulate counterfeit notes. Given that hawaladars live and die on the basis of trust, this is, admittedly, a rare thing. But, it does happen. In 2003, for example, “substantial volumes of freshly printed, shrink-wrapped Afghani notes,” of Russian origin and of questionable authenticity, were discovered in Afghanistan and were only made “available to dealers selling dollars.”⁴⁵

Anonymity, our fourth and last incentive, should come as no surprise given that hawala is illegal in many countries,⁴⁶ and given that hawala owes much of its affordability to illegal currency speculation and other questionable business practices. This point is best illustrated by the fact that even in the United Arab Emirates (the “UAE”), where hawala is legal to the extreme, hawaladars refused to come forward in order to attend the Abu Dhabi “International Conference on Hawala.”⁴⁷ As a further, and more comical, illustration, in 2002, US Treasury Secretary Paul O’Neil’s advance security team visited a Dubai hawala in preparation for his visit the following day.⁴⁸ When Secretary O’Neil arrived for his meeting he found that not only were the hawaladars missing, but that the entire storefront had been removed the night before.⁴⁹

Again, with all that we know about hawala these accounts might not be surprising. What might be surprising, however, is that this desire for secrecy extends to the remitters themselves, and not just to the obvious, *viz* money launderers, tax evaders, and terrorist organizations. Throughout their working lives, migrant workers the world-over tend to fluctuate in their legal status. Some may enter one country illegally and then subsequently “earn” the right to stay, while others might initially enter through legal channels but overstay their visas. While this legal fragility might do little to temper the flow of immigrants, or the flow of money home for that matter, what it does is create a fear of all government and quasi-government institutions post offices, banks, etc. As a result, and coupled with the incentives above, what emerges is a natural inclination to opt for the informal versions of necessary services. In the context of money transmitters, this would be hawaladars.

43. John F. Wilson, *Hawala and Other Informal Payment Systems: An Economic Perspective* 4 (IMF Working Paper, 2002).

44. Jost, *supra* note 5, at 7.

45. Maimbo, *supra* note 35, at 17.

46. Passas, *supra* note 33, at 13.

47. *Id.*

48. JOHN B. TAYLOR, *GLOBAL FINANCIAL WARRIORS: THE UNTOLD STORY OF INTERNATIONAL FINANCE IN THE POST-9/11 WORLD* 24 (2007).

49. *Id.*

Lastly, as an addendum to our fourth incentive, I include something that I call “anonymity by default.” In Pakistan and Yemen illiteracy stands at 50 percent, while in Somalia and Afghanistan the figures are 60 percent and 70 percent respectively.⁵⁰ Given both the high emigration totals for countries with lower levels of education and the high rates of immigration for countries employing manual laborers, one can deduce that many remittance senders are, at best, poorly educated. Many can neither read nor write their own names, much less fill out and/or decipher account statements, deposit slips, and transfer orders. Consequently, for this segment of the population, the need for identification means little more than an invitation for ridicule. As such, the ease by which one can send money through a hawaladar by simply verbalizing a password is attractive in that it masks a lack of education; anonymity is simply an added bonus.

Despite how attractive these incentives are, and ironically due to how attractive these incentives are, hawala does have a darker potentiality. Though popular media has only recently discovered hawala and its dark side, the potential for abuse has appeared on the radars of both the law enforcement and intelligence communities for years before September the 11th, 2001. Though before 9/11, as Senior Economist of the International Monetary Fund's Middle Eastern Department John Wilson states, “This [analysis] was generally in the context of money laundering and underground banking activities. For instance, hawala has been commonly mentioned in the periodic typologies of money laundering systems prepared by the Financial Action Task Force (FATF), by FATF-affiliates such as the Asia Pacific Group on Money Laundering.”⁵¹

Only after the attacks on the Twin Towers and the Pentagon did knee-jerk speculation by various federal agencies bring the presumed relationship between hawala and terrorism finance to the forefront.⁵² This, despite the fact that hawaladars played only a minor role in the 9/11 attacks;⁵³ “most of the identified funding was transferred via cash, wire-transfers, and travelers' checks”⁵⁴ - the bulk of funds passing through SunTrust Bank accounts in Venice, Florida.⁵⁵ Further, neither method nor amount triggered Bank Secrecy Act (BSA) Suspicious Activity Reports (SARs), Currency Transaction Reports (CTRs), or Reports of International Transactions of Currency or Monetary Instruments (CMIRs).⁵⁶

All that said, hawala has, on multiple occasions, been used to finance terrorist activities. A senior Indian law enforcement official even went so far as to say that all terrorist attacks in India are financed through hawala.⁵⁷ While certainly an overstatement, Interpol has reported verifiable accounts of terrorist funds passing

50. See CIA, *supra* note 32.

51. Wilson, *supra* note 44, at 1.

52. Mark Butler & Rachele Boyle, *Alternative Remittance Regulation Implementation Package 5* (Asia/Pacific Group on Money Laundering Paper, 2003).

53. Passas, *supra* note 33, at 14.

54. CASSARA, *supra* note 4, at 176.

55. Ballard, *supra* note 8, at 2.

56. See CASSARA, *supra* note 4, at 190.

57. *Id.* at 178.

through hawaladars in India and elsewhere. The military hardware used to assassinate an important Indian politician was purchased with hawala funding.⁵⁸ The requisite explosives used in the bombing of a major Indian city in 1993 were purchased with funds flowing through hawala operators in the U.K., Dubai, and India.⁵⁹ And, al-Qaeda operatives, via the Saudi-based charity al-Haramain⁶⁰ (more on this later), responsible for the attacks on the US embassies in Nairobi and Dar es Salaam were funded, in part, through local hawaladars,⁶¹ just to name a few.

While of course it is true that most of the estimated \$115 billion in informal remittances is spent in harmless ways, this should bring little comfort given that terrorist operations cost so little in relative terms. The 9/11 attacks, for example, are estimated to have cost \$300,000-\$500,000.⁶² This is quite a small sum when one considers the more than \$1,000,000,000 in damage caused.⁶³ That fact is particularly troubling when one recognizes that the 9/11 attacks were an anomaly in terms of operational costs, most terrorist events cost far less than \$100,000.⁶⁴

[A]ccording to the UN it is believed that the 1998 simultaneous truck bombings of US embassies in Kenya and Tanzania cost less than \$50,000; the October 2000 attack on the USS *Cole* in Aden is estimated to have cost less than \$10,000; the Bali bombings in October 2002 cost less than \$50,000; the 2003 bombing of the Marriott Hotel in Jakarta cost about \$30,000; the attacks in Istanbul in November 2003 cost less than \$40,000; the March 2004 Madrid train attacks cost about \$10,000;⁶⁵

[and the London bombings in July 2005 cost 8,000 British pounds].⁶⁶

In sum, though the concept of hawala is fairly straightforward, what should have been made clear by this discussion is that the role that it plays on the international stage is anything but straightforward. Is it a valuable remittance tool or is it a national security threat? The answer, as frustrating as it may be, is that it is both. And, it is precisely this duality – simultaneously an affordable remittance option to the unbanked and nefarious funding vehicle to terrorists and money launderers – that makes regulation both so tricky and so unattractive to politicians. There is, understandably, a reluctance in poorer countries to close the tap through which vital monies flow. But, there is an equally compelling, or perhaps more compelling, security interest in favor of regulating these informal channels (we

58. Jost, *supra* note 5, at 14.

59. *Id.*

60. Taylor, *supra* note 49, at 22.

61. Ballard, *supra* note 8, at 2.

62. CASSARA, *supra* note 4, at 176.

63. The Institute for the Analysis of Global Security, *How much did the September 11 terrorist attack cost America?* <http://www.iags.org/costof911.html> (last visited Feb. 10, 2009).

64. CASSARA, *supra* note 4, at 190.

65. *Id.*

66. United Kingdom Home Office 2006 Press Release 7 (FATF/GAFI Working Paper on Terrorist Financing, 2008).

examine some of these regulatory efforts in the following sections). This is especially true when (1) there is a proven track record of abuse, and (2) there may be viable alternatives to hawala in the formal sector that we have yet to utilize.

IV. THE EFFICACY OF REGULATION EFFORTS

A. International Regulation

Prior to the September the 11th attacks the international community was well aware of the potential abuse of alternative remittance avenues in the context of money laundering. This is hardly a surprise given the sheer scale of laundered funds globally; according to International Monetary Fund (IMF) estimates, laundered funds account for as much as 5 percent of the global GDP, or \$3.6 trillion a year.⁶⁷ In fact, “every FATF typologies report since 1996 has noted the use of alternative remittance systems by criminal groups to launder money.”⁶⁸ Note: despite the ambiguity in this FATF reference to the laundering of funds by “criminal groups,” the bulk of these laundered funds, and consequently the bulk of attention paid by the international community, was/is attributed to the illicit sale of narcotics.⁶⁹

Terrorism finance on the other hand, when juxtaposed with this mountain of narco-money, seems rather inconsequential. The UN dollar estimates for terrorist events, cited above, represent the direct operational costs of the attacks themselves. But, even when one also includes recruiting costs, sustenance costs, training costs, propaganda costs, etc., as one must to reach a more accurate number, the figures still pale in comparison. This statement of course assumes that within this vast pool of black money one can readily distinguish terrorist funds from those of the cartels, illegal arms brokers, car thieves, etc. This author doesn't think it is that easy given that obfuscation is built into the system at every level.

In fact, to illustrate just how tough this categorization actually is, I again cite to the US Department of State's International Narcotics Control Strategy Report. In the March 2008 edition, the report lists over fifty countries and territories that have been given the “Major money laundering countries” designation.⁷⁰ Major money laundering countries are defined in section 481(e)(7) of the Foreign Assistance Act of 1961 as one “whose financial institutions engage in currency transactions involving significant amounts of proceeds from international narcotics trafficking.”⁷¹

Without more, the insufficiency of this definition, akin to the very first international conventions on money laundering which made drug trafficking acts the only predicate offenses – the underlying crimes that produce the proceeds which, when laundered, lead to the offense of money laundering⁷² is obvious.

67. U.S. DEP'T. OF STATE, *supra* note 11.

68. Butler & Justice, *supra* note 53, at 7.

69. See Matthew S. Morgan, *Money Laundering: The American Law and Its Global Significance*, 3-SUM NAFTA: L. & BUS. REV. AM. 24, 24-25 (1997).

70. U.S. DEP'T OF STATE, *supra* note 11, at 12.

71. *Id.* at 11.

72. PAUL ALLAN SCHOTT, REFERENCE GUIDE TO ANTI-MONEY LAUNDERING AND COMBATING

Thankfully, however, the 2008 report continues with the following inclusive notes:

[T]he complex nature of money laundering transactions today makes it difficult in many cases to distinguish the proceeds of narcotics trafficking from the proceeds of other serious crime . . . [Therefore t]his year's list of major money laundering countries recognizes this relationship by including all countries and other jurisdictions whose financial institutions engage in transactions involving significant amounts of proceeds from all serious crime.⁷³

Just as the US was compelled to expand its definition of "major money laundering countries" so too was the international community forced to adopt additional predicate offenses in recognition of this difficulty in divining the source and end-use of these funds.⁷⁴ After all, the same dollar, or peso, or lira that can buy cocaine today can buy a rocket-propelled grenade launcher tomorrow. In fact, the term 'narcoterrorism,' as best illustrated by groups like the *Fuerzas Armadas Revolucionarias de Colombia* (FARC) aptly describes this cross-miscegenation. Whether the proceeds from coca or the opium poppy, a portion of these monies are recycled back into the security/terrorist apparatus necessary to cultivate, protect, move, and push their product. Bottom-line: to chip away at money laundering is to indirectly combat terrorism finance and vice versa.

B. Terrorism Finance Treaties & the 1267 Committee

In 1999, the UN adopted the International Convention for the Suppression of the Financing of Terrorism, "[n]oting that the number and seriousness of acts of international terrorism depend on the financing that terrorists may obtain."⁷⁵ Article 2(1) of the convention states the following:

Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out:

(a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex.⁷⁶

Given the lack of agreement in the international legal community regarding the definition of 'terrorism,' the highlighted verbiage in Article 2(1)(a) is important. As such, I here provide the list of annexed conventions in its entirety. Convention for the Suppression of Unlawful Seizure of Aircraft (1970);⁷⁷

THE FINANCING OF TERRORISM III-1 (2d ed. 2006).

73. U.S. DEP'T OF STATE, *supra* note 11, at 11-12.

74. SCHOTT, *supra* note 73, at III-1.

75. International Convention for the Suppression of the Financing of Terrorism, G.A. Res. 109, at 3, U.N. GAOR, 54th Sess., Supp. No. 49, U.N. Doc. A/54/49 (Vol. I) (1999) (emphasis added) [hereinafter Terrorism Financing Convention].

76. *Id.* art. 2(1)(a) (emphasis added).

77. Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105.

Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (1971);⁷⁸ Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents (1973);⁷⁹ International Convention Against the Taking of Hostages (1979);⁸⁰ Convention on the Physical Protection of Nuclear Material (1980);⁸¹ Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation (1988);⁸² Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (1988);⁸³ Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf (1988);⁸⁴ and the International Convention for the Suppression of Terrorist Bombings (1997).⁸⁵

As biting as Article 2 may first appear there are several problems with this convention, the first being the form of the instrument itself. As a convention, further action (e.g. ratification) is required by member States before recommendations take legal effect at the domestic level. Even then (even if signed and ratified) there are several escape clauses within the convention that hinder full implementation. Article 2(2)(b) of the International Convention for the Suppression of the Financing of Terrorism, for instance, allows for the selective adoption of the treaties annexed to this convention the very same treaties that define the crime to which this convention speaks.⁸⁶ By allowing limited adherence to these treaties one may effectively manage (i.e. limit) the scope of the crime as applied to his/her country.

Yet another escape clause emerges in the form of Article 8 which states that "Each State Party shall take appropriate measures . . . for the identification, detection and freezing or seizure of any funds used or allocated for the purpose of committing the offences set forth in Article 2 as well as the proceeds derived from such offences, for purposes of possible forfeiture."⁸⁷ Again, this language sounds

78. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 564, 974 U.N.T.S. 177.

79. Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167.

80. International Convention Against the Taking of Hostages, Dec. 17, 1979, T.I.A.S. No. 11,081, 1316 U.N.T.S. 205.

81. Convention on the Physical Protection of Nuclear Material, Oct. 26, 1979, T.I.A.S. No. 11,080, 1456 U.N.T.S. 124.

82. Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Feb. 24, 1988, 1589 U.N.T.S. 474.

83. Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 1678 U.N.T.S. 201.

84. Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, Mar. 10, 1988, 1678 U.N.T.S. 304.

85. International Convention for the Suppression of Terrorist Bombings, Dec. 15, 1997, 2149 U.N.T.S. 256.

86. Terrorism Financing Convention, *supra* note 76, art. 2(2)(b).

87. *Id.* art. 8(1).

as tough as did Article 2, initially. But, Article 8 implementation is prefaced by the phrase “in accordance with [Member States’] domestic legal principles.”⁸⁸

The Francois, duc de la Rochefoucauld maxim “Truth does not do as much good in the world as the semblance of truth does evil”⁸⁹ is certainly applicable here where international mandates are qualified by “domestic legal principles.”⁹⁰ Countries are thus allowed to choose how enforcement will occur at home, if at all, all the while receiving kudos for having signed an international treaty against terrorism. In reality, problem states freeze suspect assets, thereby facially complying with the law, but then refuse to prosecute based on domestic legal principles that are often antiquated, apathetic, religiously-biased, and/or altogether lacking. This inaction allows respective statutes of limitations to run, thus barring prosecution and resulting in the eventual release of the previously frozen funds.

This is exactly what hampered both the investigation and prosecution of the Saudi charity al-Haramain Islamic Foundation (AHF). According to the US Treasury’s Office of Terrorism and Financial Intelligence, the US branch of AHF, headquartered in Oregon, was involved in tax evasion and money laundering in an attempt to disguise funds bound for Chechen fighters.⁹¹ In addition, it was discovered that the Somali and Bosnian branch offices had a long running association with both al-Itihaad al-Islamiya (AIAI) and al-Qaeda.⁹²

Despite a US terrorism designation on September 9th, 2004 and a UN designation under UNSCR 1267 (see below) on September 28th, the Saudi government consistently refused, and still refuses, to prosecute its nationals, citing an insufficiency of evidence.⁹³ As the most blatant instance of this noncooperation, Suliman al-Buthe, AHF USA’s former attorney and senior executive, despite having been specially designated as a global terrorist by INTERPOL,⁹⁴ was given a position in the Saudi Health Ministry for his troubles.⁹⁵ In fact, al-Buthe felt so comfortable that he gave an interview to the BBC, from his apartment in Riyadh, in which he laughed off his special designation status.⁹⁶

88. *Id.*

89. FRANÇOIS DE LA ROCHEFOUCAULD, *MAXIMS* ¶ 64 (Leonard Tancock trans., Penguin Classics 1988) (1665).

90. Terrorism Financing Convention, *supra* note 76, art. 8(1).

91. Press Release, U.S. Dep’t of the Treasury, U.S.-Based Branch of Al Haramain Foundation Linked to Terror Treasury Designates U.S. Branch, Director (Sept. 9, 2004), *available at* <http://www.treas.gov/press/releases/js1895.htm>.

92. Press Release, U.S. Dep’t of the Treasury, Fact Sheet: Contributions by the Dep’t of the Treasury to the Fin. War on Terrorism (Sept. 2002), *available at* <http://www.treas.gov/press/releases/reports/2002910184556291211.pdf>.

93. *Jihad and the Petrodollar: Programme Two* (BBC News Internet podcast Nov. 2007), *available at* http://news.bbc.co.uk/2/hi/programmes/documentary_archive/7108987.stm.

94. *Id.*

95. *Id.*

96. *Id.*

In 1999, as a compliment to the International Convention for the Suppression of the Financing of Terrorism, the UN Security Council passed Resolution 1267.⁹⁷ Resolution 1267 “require[s] member States to freeze the assets of the Taliban, Osama Bin Laden and al-Qaeda and entities owned or controlled by them, as designated by the ‘Sanctions Committee’ (now called the 1267 Committee).”⁹⁸ While an improvement in terms of the power of the instrument - 1267 is a Chapter VII (i.e., legally binding) Resolution which requires no further action on behalf of member States to take legal effect – the same issues of subjective application and prosecution remain. While Resolution 1267 requires the freezing of suspect assets, it does not speak to the ultimate disposition of those funds after the initial freezing. Are they to be returned to those whom have been wrongly accused of having links to the Taliban, Osama Bin Laden, and al-Qaeda? Are they to be returned upon a failure to prosecute (for any reason)? Are portions to be returned if the suspect agrees to “gift” the remainder to the government or to a religious charity?

C. Financial Action Task Force (FATF) Recommendations

In an attempt to address some of the questions above, and to provide badly needed uniformity, the Financial Action Task Force (FATF) – originally created in 1989 by the G-7 to combat money laundering⁹⁹ expanded its mission to include combating the financing of terrorism (CFT). In October of 2001, just a month after the 9/11 terrorist attacks, the FATF issued 8 *Special Recommendations on Terrorist Financing*, adopting a 9th in 2004.¹⁰⁰ When combined with its 40 *Recommendations on Money Laundering*, originally released in 1990,¹⁰¹ the recommendations serve as a body of international mandates with regards to AML/CFT programming.

Special Recommendation 1: Ratification and implementation of UN instruments. The FATF calls for the adoption of the above-mentioned International Convention for the Suppression of the Financing of Terrorism and UNSCR 1373.¹⁰² In addition, countries are urged to implement all “resolutions relating to the prevention and suppression of the financing of terrorist acts.”¹⁰³

Special Recommendation 2: Criminalizing the financing of terrorism and associated money laundering. While the title is self-explanatory, the meat of this recommendation comes in the call to expand predicate offenses. This is significant because the concepts of terrorism finance and money laundering are new editions to many legal systems in the Middle East and in South Asia. In fact, “in the early

97. G.A. Res. 1267, U.N. Doc. S/RES/1267 (Oct. 15, 1999).

98. SCHOTT, *supra* note 73, at III-5.

99. *Id.* at III-7 to III-8.

100. Fin. Action Task Force [FATF], 9 *Special Recommendations on Terrorist Financing* (Oct. 24, 2004), http://www.fatf-gafi.org/document/9/0,3343,en_32250379_32236920_34032073_1_1_1_1,00.html.

101. FATF, *The 40 Recommendations* (June 2003), http://www.fatf-gafi.org/document/28/0,3343,en_32250379_32236930_33658140_1_1_1_1,00.html.

102. SCHOTT, *supra* note 73, at Annex V-1.

103. *Id.*

1990s fewer than two dozen nations had criminalized money laundering.”¹⁰⁴ Today that number has increased nearly eight fold.¹⁰⁵ By the end of 2007, reflecting a comparable upward trend, the number of jurisdictions that had criminalized terrorist financing reached 137.¹⁰⁶

Special Recommendation 3: Freezing and confiscating terrorist assets. Recommendation 3 calls not only for the freezing and confiscation of terrorist assets, it targets the proceeds and assets purchased with the proceeds of such activities as well, no matter how removed. If applied in broad strokes, the incentive for legitimate companies (e.g. ethnic grocers) to allow illicit remittance operations to piggyback on their infrastructure, for example, is substantively decreased. Grocers who might receive a few hundred dollars in ‘hush-money’ each month now have to contemplate losing their entire business, their home, their cars, their accounts, anything that that money was either spent on or comingled with.

Special Recommendation 4: Reporting suspicious transactions related to terrorism. Recommendation 4 calls for “financial institutions, or other businesses or entities subject to anti-money laundering obligations” to report suspect transactions.¹⁰⁷ Suspicion alone is apparently the standard of proof which sets into motion this reporting requirement.

Special Recommendation 5: International cooperation. Countries shall ensure territorial integrity with regard to terrorists, terrorist organizations, and terrorist financiers. That is to say, countries shall not provide, nor acquiesce in being used as, a terrorist safe haven.

Special Recommendation 6: Alternative remittance. All countries should require either the licensing or registration of all formal and informal money/value transfer services. In addition, both formal and informal money/value transfer services should be subject to the FATF *40 Recommendations*. Lastly, failure to comply should result in appropriate sanction.

Special Recommendation 7: Wire transfers. Financial institutions of all stripes are required to supply “meaningful originator information (name, address, and account number)”. Further, they are either to refuse or to scrutinize transfers that contain incomplete originator information.

Special Recommendation 8: Non-profit organizations. In recognition of the particular ease by which criminal elements can masquerade as non-profits, countries are called on to strengthen applicable transparency laws (e.g. auditing requirements, governance, etc.). In addition, countries are called on to prevent the exploitation of legitimate entities by nefarious organizations.

Special Recommendation 9: Cash couriers. “Countries should have measures in place to detect the physical cross-border transportation of currency and bearer

104. CASSARA, *supra* note 4, at 139.

105. *Id.*

106. U.S. DEP’T OF STATE, *supra* note 11, at 4.

107. SCHOTT, *supra* note 73, at Annex V-2.

negotiable instruments” Further, in the case of detection, authorities should be granted the power to confiscate suspect currency or monetary instruments.

The initial international cohesion that FATF Special Recommendations provided, post 9/11, was certainly needed. However, as now applied, these recommendations are of limited value. This is principally because the FATF is merely an intergovernmental policy group. As such, it has no enforcement capability whatsoever, which, despite global notoriety, is exactly why FATF intellectual products are termed “recommendations.” Without an enforcement mandate, countries are free to trim, or altogether ignore, policy implementation.

At the individual level, Special Recommendation 1 does nothing more than incorporate UN instruments that, as discussed above, can be gamed to the point of being rendered ineffectual. And, while in theory, Special Recommendation 2 is a welcomed broadening of predicate offenses, in practice, it was difficult to get countries excited about enforcement when there were only a handful of applicable offenses. Now, complements of Recommendation 2, policing agencies abroad face expanding responsibilities without commensurate increases in enforcement budgets. A wider net alone does not guarantee a larger catch if one lacks either the will or the strength to hoist the net back into the boat.

Special Recommendations 3 and 4 both suffer from qualitative enforcement issues. As to Recommendation 3, the freezing and seizure of assets means very little if an eventual prosecution does not follow. Funds are all too often allowed to thaw and assets are all too often returned. As to Recommendation 4, the reporting of suspicious transactions applies only to financial institutions and to those entities that are subject to anti-money laundering obligations. As discussed in the Valuable Remittance Tool or National Security Threat section,¹⁰⁸ in many countries, businesses that would otherwise be classified as financial institutions are considered mere commercial entities. As such, they often escape both the definitional stigma of ‘financial institution’ and the subjection to anti-money laundering obligations. Further, even when financial institutions and money transfer services are subject to such obligations they are incentivized by the absence of enforcement to underreport both the value and numeracy of legitimate transfers, let alone suspicious transactions - which would bring unwanted regulatory attention.

Special Recommendation 5 calls for the denial of safe havens to terrorists, terrorist organizations, and terrorist financiers. Below is just a sampling of the many instances where reality veers from legislative idealism. I again cite to the Al Haramain case above, and to the following: ETA continues to operate in the Basque areas of Spain and in southern France,¹⁰⁹ Jemaah Islamiyah and Abu Sayyaf Group fighters continue to shelter in both the Philippines and Indonesia,¹¹⁰

108. *See supra* pp. 10-11.

109. OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, DEP'T OF STATE, COUNTRY REPORTS ON TERRORISM ch. 8 (2006), available at <http://www.state.gov/s/ct/rls/crt/2005/65275.htm>.

110. *Id.*

the PKK is alive and well in northern Iraq,¹¹¹ Hezbollah thrives in Lebanon,¹¹² Ittihad al Islami hides in Somalia,¹¹³ Hamas owns the Palestinian Territories,¹¹⁴ the Sadrists train in Iraq,¹¹⁵ the IMU and Hizb ut-Tahrir continue to operate in the Tajik, Uzbek, and Kyrgyz part of the Ferghana Valley,¹¹⁶ and a significant amount of al-Qaeda senior leadership now lives in the tribal areas of Pakistan and Afghanistan.¹¹⁷ I digress.

Special Recommendation 6 calls for the licensing or registration of all formal and informal money/value transfer services. According to the Interpretive Note to Special Recommendation 6, ‘licensing’ means “a requirement to obtain permission from a designated competent authority in order to operate”¹¹⁸ ‘Registration’, on the other hand, simply means “a requirement to . . . declare to a designated competent authority the existence of” a money/value transfer business.¹¹⁹ Between the two approaches, registration, for obvious reasons, is far less intrusive.

It should be of little surprise then that the UAE opts for registration alone. In 2003, the Central Bank of the UAE issued “Regulation Concerning Hawaladars (Hawala Brokers) for Registration and Reporting.”¹²⁰ Through various announcements in local newspapers, hawaladars were “*invit[ed]* . . . to register with the Central Bank and obtain a free-of-charge certificate.”¹²¹ By the end of this registration drive only 184 hawaladars applied for certification.¹²² Perspective: there are 600 plus Starbucks locations in Florida alone,¹²³ and yet in the hawala capital of the world only 184 hawaladars registered. Certainly there are more, and yet Special Recommendation 6 calls for the licensing or registration of *all* formal and informal money/value transfer services (more on UAE noncompliance later).

As with the Special Recommendations collectively, Special Recommendation 6 and 7 suffer from a simple lack of follow-through. If wire transfers are not scrutinized or altogether refused for containing insufficient originator information, what exactly is the penalty? All too often, the answer is nothing. In fact, even here at home, it’s readily admitted that “most money service businesses do not comply with . . . requirements and there is little enforcement of the regulations.”¹²⁴

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. CIA, *supra* note 32.

116. OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, *supra* note 110.

117. *Id.*

118. SCHOTT, *supra* note 73, at Annex VI-15.

119. *Id.* at Annex VI-16.

120. CENTRAL BANK OF THE UNITED ARAB EMIRATES, LAWS REGULATIONS AND PROCEDURES IMPLEMENTED IN THE UNITED ARAB EMIRATES FOR ANTI-MONEY LAUNDERING AND COMBATING TERRORISM 9 (2005), available at <http://centralbank.ae/pdf/AMLSU/RegulationSummary-2005.pdf>.

121. *Id.* at 9-10 (emphasis added) (reference ANNEX for original U.A.E. registration documents).

122. *Id.* at 10.

123. Starbucks, <http://www.starbucks.com/retail/locator/ViewAll.aspx?a=1&CountryID=244&StateID=5&FC=RETAIL&City> (last visited Feb. 6, 2009).

124. DEP’T OF STATE, *supra* note 11, at 13.

For a variety of reasons (discussed in detail in the Disincentivized Cooperation section), enforcement efforts behind Recommendation 8 are not, and I believe never will be, complied with in the Middle East and in parts of Asia. The Pakistan-based al-Rashid Trust – a group which provided funding for both the Taliban and al-Qaeda via the Global Jihad Fund, supported the Jaish Mohammed terrorist group, and was directly linked to the kidnapping and subsequent murder of Wall Street Journal reporter Daniel Pearl¹²⁵ for example, was designated as a terrorist facilitator/financier by the UN in October of 2001.¹²⁶ Initially, and in facial compliance with UNSCR 1267, the Pakistani Interior Ministry banned al-Rashid and ordered the freezing of its assets.¹²⁷ Two points: (1) the ban did not take effect until well after the designation,¹²⁸ thus allowing the terrorists precious time in which to drain their accounts; and (2) the Sindh High Court (SHT) has since ordered the government to lift the ban on the charity.¹²⁹ Lastly, in an article by Naveed Siddiqui of Pakistan's Daily Times, Rashid Trust organizers - free from arrest or prosecution - stated that they would continue their work by simply renaming their charity the Al Amin Welfare Trust.¹³⁰

Little that has been done with respect to Recommendation 9 has been effective in stopping money laundering, generally, and terrorism finance, in particular. Volume II of the 2008 International Narcotics Control Strategy Report states that bulk cash (and I would add gold) smuggling continues to be one the most utilized money laundering techniques in the world.¹³¹ This is due, in part, to the high levels of currency required to trigger the international equivalents of Reports of International Transactions of Currency or Monetary Instruments (CMIRs). In the US, one has to declare cash only when in excess of \$10,000, in South Africa 175,000 rand (approximately \$24,600),¹³² and in Moldova 10,000 euros (approximately \$14,160).¹³³ Given that terrorists regularly utilize cash couriers to transit funds, and given that attacks cost so little in relative terms, I would argue that these figures are too high.

In addition, I would suggest that bulk cash smuggling provisions are circumvented by smuggling more compact, and less overt, forms of value (e.g., jewelry). However, even in countries where one must declare the value of precious stones and metals being carried, the trigger value amounts are still much too large. In Saudi Arabia, for example, one must only report the carrying of gold

125. Press Release, U.S. Dep't of Treasury Office of Terrorism and Fin. Intelligence, Al Rashid Trust (Sept. 23, 2001), available at http://www.treas.gov/offices/enforcement/keyissues/protecting/charities_execorder_13224-a.shtml.

126. *Id.*

127. Naveed Siddiqui, *Al-Rashid Trust Plans to Work Under New Name*, DAILY TIMES (Pak.), Apr. 29, 2007, available at http://www.dailytimes.com.pk/default.asp?page=2007\04\29\story_29-4-2007_pg7_3.

128. *Id.*

129. *Id.*

130. *Id.*

131. U.S. DEP'T OF STATE, *supra* note 11, at 5.

132. *Id.* at 419.

133. *Id.* at 334.

and jewels if the value amount exceeds 60,000 Saudi riyals (\$16,000 approx.).¹³⁴ As such, a large family could simply walk across the border with nearly \$100,000 in unreported, untraceable value.

In his book *Hide & Seek*, John Cassara provides a brief illustration of the tracing complications that gold presents in what is known as ‘The Gold Cycle.’¹³⁵ Switzerland, for its infamous secrecy in banking and the glut of cash accumulated thereby, has emerged as one of the top manufacturers of gold bars.¹³⁶ From Switzerland, the gold is shipped to Italy. The gold is then transformed, for resale, into what amounts to hundreds of tons of gold rope and chain each year, thus making Italy “the largest exporter of worked gold in the world.”¹³⁷ From Italy, with the gold now in a form that is more readily transported without question, it is taken by couriers – under falsified shippers export documents – or by smugglers (posing as casual tourists) into other countries.

The amount gained by avoiding taxation on export/import is the laundered value. Any gold that is not resold can be melted back into ingot form and used as currency that escapes account freezes and Bank Secrecy Act (more on this later) detection. The proceeds from sale, however, can be divvied up into multiple currencies and sent either to offshore bank accounts or back to Switzerland to purchase more gold to start the cycle again.

D. The Egmont Group of FIUs

In 1995, at the Egmont-Arenberg Palace in Brussels, various Financial Intelligence Units (FIUs) met to discuss the strengthening of national AML/CFT programs.¹³⁸ Thereafter, the group became known as the Egmont Group of FIUs.¹³⁹ The group’s official definition of an FIU serves both as an explanatory and as a barrier to entry; in order to become a member, a country must first be able to satisfy the definition below.

[A] central, national agency responsible for receiving (and, as permitted, requesting), analyzing and disseminating to the competent authorities, disclosures of financial information:

(i) concerning suspected proceeds of crime and potential financing of terrorism, or

(ii) required by national regulation, in order to counter money laundering and terrorist financing.¹⁴⁰

134. *Id.* at 6.

135. CASSARA, *supra* note 4, at 73-74.

136. *Id.* at 74.

137. *Id.*

138. Press Release, Egmont Group, Major Meeting of FIU’s in Korea Progresses the Fight Against Money Laundering and Terrorist Fin. (May 29, 2008), available at http://www.egmontgroup.org/PRESS_RELEASE_version_27_MAY_2008_G.pdf.

139. The Egmont Group, Financial Intelligence Units (FIUs), http://www.egmontgroup.org/about_egmont.pdf (last visited Feb.5, 2009).

140. The Egmont Group, Interpretive Note Concerning the Egmont Definition of a Financial Intelligence Unit, http://www.egmontgroup.org/files/library_egmont_docs/egmont_final_

FIUs serve as repositories of suspect financial information.¹⁴¹ This information is analyzed and shared through a secured web server – the Egmont Secure Web (ESW) –and through multiple working group meetings held throughout the year.¹⁴² FIUs pride themselves in this ability to rapidly disseminate financial intelligence both to their peers and to nonmember states. I, however, question the wisdom of information sharing with countries that appear to be more a part of the problem than the solution. The US State Department admits that “far too many countries that boast solid AML/CFT standards and infrastructures are still simply not enforcing their laws.”¹⁴³ The statement continues, “In some cases the lack of enforcement is due to a lack of capacity, but in far too many others it is due to a lack of political will.”¹⁴⁴

My concern is twofold. First, I worry that problem states can hide beneath a patina of legitimacy while doing nothing substantive in the line of enforcement. By having AML/CFT legislation on the books, regimes can claim that they are in full compliance with international standards (e.g. the Egmont criteria), regardless of follow-through. The Nigerians, for example, were placed on the FATF’s list of non-cooperative countries and territories (NCCT) in 2001.¹⁴⁵ However, within one year the FATF claimed that “Nigeria enacted two pieces of legislation to remedy the deficiencies.”¹⁴⁶ How can the passage of legislation without any enforcement intent remedy deficiencies? As a result, and without any genuine effort, Nigeria, an Egmont member despite ranking 147 out of 180 – 180 being the worst – on Transparency International’s 2007 Corruption Perceptions Index,¹⁴⁷ now has leverage to fend off its critics that push for verifiable reform.

This leverage also enables individuals to broadcast questionable assurances to the financial community-at-large. In a 2008 article in the Khaleej Times, Abdulrahim Mohamed al-Awadi Assistant Executive Director and Head of the Anti-Money Laundering and Suspicious Cases Unit (AMLSCU) at the Central Bank of the UAE - stated that “[t]he U.A.E. has a very robust AML/CFT regime,”¹⁴⁸ therefore, banks should not hesitate in allowing money exchanges to open “Nostro Accounts.”¹⁴⁹ I am not saying that Mr. al-Awadi is a liar, nor am I

interpretive.pdf (last visited Feb. 5, 2009).

141. See INT’L MONETARY FUND, FIN. INTELLIGENCE UNITS: AN OVERVIEW 2 (2004), available at <http://www.imf.org/external/pubs/ft/fiu/fiu.pdf>.

142. The Egmont Group, Information Paper on Financial Intelligence Units and the Egmont Group 6, http://www.egmontgroup.org/info_paper_final_oct_2004.pdf (last visited Feb. 5, 2009).

143. DEP’T OF STATE, *supra* note 11, at 9.

144. *Id.* at 10.

145. FATF, *Review to Identify, Non-Cooperative Country Territories: Increasing the Worldwide Effectiveness of Anti-Money Laundering Measures* (June 22, 2001), available at <http://www.fatf-gafi.org/dataoecd/56/41/33922055.pdf>.

146. DEP’T OF STATE, *supra* note 11, at 351.

147. Transparency International, Corruption Perceptions Index 2007, http://transparency.org/policy_research/surveys_indices/cpi/2007 (last visited Feb. 5, 2009).

148. Issac John, *Remove Curds on Nostro Accounts, Central Bank Tells Overseas Banks*, KHALEEJ TIMES Apr. 29, 2008, available at http://www.khaleejtimes.com/DisplayArticleNew.asp?section=business&xfile=data/business/2008/april/business_april875.xml.

149. Nostro accounts enable foreign entities to hold, abroad, large amounts of a particular country’s

suggesting that the UAE lacks AML/CFT standards (of some sort). What I am saying, however, is that the existence of an AML/CFT regime, that may or may not ever be enforced, should not be the sole basis by which banks decide to do business.

By touting compliance at some level, countries also argue that they are entitled to training and information sharing. This brings me to my second concern. By training some of the most corrupt governments on the planet, are we not simply making them more sophisticated transgressors? Moldova, for example, recently received advanced financial investigative techniques training by the IRS's Criminal Investigation Division.¹⁵⁰ This, despite a move towards establishing an Offshore Financial Center (OFC) in the face of US opposition,¹⁵¹ despite the fact that out of 165,199 suspicious activity reports only 4 criminal cases bearing money laundering charges were initiated (up from 0 in 2006),¹⁵² and despite 0 arrests and/or prosecutions involving terrorist financing.¹⁵³

Access to resources and sensitive information continues to be granted to the Romanian FIU – *Oficiul National de Prevenire si Combatere a Spalarii Banilor* (ONPCSB)¹⁵⁴ – despite the fact that “investigations have resulted in only a handful of successful prosecutions to date.”¹⁵⁵ Training was extended to Azerbaijan and Congo, who rank 150 and 168 out of 180, respectively, on Transparency International's Corruption Perceptions Index.¹⁵⁶ And, Pakistan continues to receive support despite a 2007 Asia/Pacific Group threat to suspend membership for noncompliance,¹⁵⁷ and despite the fact that the current president, Mr. Asif Ali Zardari (a.k.a. “Mr. 10%”), has himself served an 11 year jail term on corruption charges.¹⁵⁸

Lastly, the South African Financial Intelligence Centre (FIC),¹⁵⁹ an Egmont member amazingly enough, continues to have access to the secure server. I say “amazingly enough” because despite a high density of Nigerian, Pakistani, and Indian drug traffickers, and Russian, Israeli, Lebanese, Chinese, and Taiwanese organized crime syndicates, “the number of money laundering and terrorist finance investigations, prosecutions, and convictions is . . . very low.”¹⁶⁰ Further still,

currency. *See id.*

150. U.S. DEP'T OF STATE, INT'L NARCOTICS CONTROL STRATEGY REPORT (2006), available at <http://www.state.gov/p/inl/rls/nrcrpt/2006/vol2/html/62136.htm>.

151. DEP'T OF STATE, *supra* note 11, at 7.

152. *Id.* at 332.

153. *Id.* at 333.

154. The Egmont Group, Financial Intelligence Units of the World (May 2008), http://www.egmontgroup.org/files/library_egmont_docs/list_current_egmont_members.pdf [hereinafter Egmont].

155. DEP'T OF STATE, *supra* note 11, at 398.

156. Transparency, *supra* note 148.

157. DEP'T OF STATE, *supra* note 11, at 356.

158. Jane Perlez, *From Prison to Zenith of Politics in Pakistan*, N.Y. TIMES, Mar. 11, 2008, available at <http://www.nytimes.com/2008/03/11/world/asia/11pstan.html?pagewanted=print>.

159. Egmont, *supra* note 155.

160. DEP'T OF STATE, *supra* note 11, at 417-18.

despite country-specific FATF recommendations made in 2003, to this day South Africa has all but ignored implementation – including the requirement to report its significant volume of internal hawala-type transactions.¹⁶¹

E. United States Regulation: Formal Sector

Less than one month after the September 11, 2001 attacks on the United States, the domestic machinery of the intelligence, law enforcement, and financial communities began scrambling a counterattack. Then-Treasury Secretary Paul O'Neill, on September the 24, 2001 voiced this aggressive urgency as follows:

If you have any involvement in the financing of the al Qaida organization, you have two choices: cooperate in this fight, or we will freeze your US assets; we will punish you for providing the resources that make these evil acts possible. We will succeed in starving the terrorists of funding and shutting down the institutions that support or facilitate terrorism.¹⁶²

On the same day, President Bush announced Executive Order 13224 which authorizes both the freezing of assets within the US and the denial of access to US financial markets.¹⁶³ When coupled with UNSCRs 1267, 1373, and 1390, the order, in theory, imposes AML/CFT and cooperative duties on our “partners” abroad.¹⁶⁴

On October of the same year, the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act was signed into law.¹⁶⁵ “The Patriot Act” calls for harsher penalties, an expansion of investigative and designation powers, and an enhancement of information sharing among law enforcement communities, between law enforcement and private financial institutions, and within the financial sector itself.¹⁶⁶ In addition, the Patriot Act calls for a retooling of Bank Secrecy Act (BSA) provisions.¹⁶⁷

The BSA (31 USC §§ 5311-5330) was originally established in 1970 to fight tax evasion and organized crime.¹⁶⁸ Though there was a revamp in 1992 which expanded BSA application to financial institutions other than banks,¹⁶⁹ real ballooning of the regulatory regime did not occur until after 9/11. Section 358 of the Patriot Act expanded “the scope of BSA to include intelligence and counterintelligence to protect against international terrorism.”¹⁷⁰

161. DEP'T OF STATE, *supra* note 11, at 419.

162. TREASURY DEP'T, *supra* note 28, at 2.

163. *Id.* at 5.

164. *Id.* at 17.

165. *Id.* at 10.

166. *Id.*

167. THE SEC'Y. OF THE TREASURY, THE BD. OF GOVERNORS OF THE FED. RESERVE SYS., THE SEC. AND EXCH. COMM'N, A REPORT TO CONGRESS IN ACCORDANCE WITH 356(C) OF THE USA PATRIOT ACT 2 n.2 (2002), available at <http://www.treasury.gov/press/releases/reports/356report.pdf>.

168. *Id.* at 2.

169. *Id.*

170. THE SEC'Y OF THE TREASURY, *supra* note 168.

This expanded mission is carried out by Treasury's Financial Crimes Enforcement Network (FinCEN), the US FIU. FinCEN is tasked with three principal service missions: (1) to analyze financial intelligence, (2) to control BSA implementation, and (3) to oversee international financial intelligence collection.¹⁷¹ That said, the core of FinCEN's contribution stems from the collection, sorting, and analysis of BSA reports.

"BSA requires many financial institutions to create 'paper trails' by keeping records and filing reports on certain transactions."¹⁷² These paper linkages allow law enforcement to trace illicit funds back to their source. Currency Transaction Reports (CTRs), for example, must be filed for any exchange with the same customer in the same day which exceeds \$10,000.¹⁷³ And, Currency and Monetary Instrument Reports (CMIRs) must be filed for cross-border movement of cash and bearer negotiable instruments of \$10,000 or more.¹⁷⁴

Suspicious Activity Reports (SARs) are to be filed if the transaction involves \$2,000 (in individual or aggregate form) and appears to be "suspicious" in nature.¹⁷⁵ Suspicious activities include an attempt to structure (a.k.a. "smurf") transactions to avoid CTR reporting requirements.¹⁷⁶ Smurfing is accomplished by breaking a large transaction into multiple, smaller transactions which would fall below the \$10,000 CTR threshold. Another red flag might be a transaction(s) that appears to lack any business purpose: higher than normal levels of account activity, for example the cycling of funds between various accounts, and same-day deposits and withdrawals without any reasonable explanation might suggest illicit activity. Lastly, and obviously, any proceeds that are blatantly of criminal generation must be reported.¹⁷⁷

With nearly 50 data fields, SARs are really the key to combating terrorism finance in the formal financial sector.¹⁷⁸ In fact, a former director of FinCEN is quoted as saying "With SARs, it is now like having a haystack full of needles."¹⁷⁹ The informational value that SARs forms provide stems not only from the breadth of detail solicited, but also from the breadth of institutions that are required to file.

171. CASSARA, *supra* note 4, at 132.

172. FIN. CRIMES ENFORCEMENT NETWORK, U.S. DEP'T OF THE TREASURY, BANK SECRECY ACT REQUIREMENTS, A QUICK REFERENCE GUIDE FOR MONEY SERVICES BUSINESSES 1, *available at* http://www.msb.gov/materials/en/bank_reference.pdf [hereinafter BANK].

173. *Id.*

174. BANK, *supra* note 173.

175. FIN. CRIMES ENFORCEMENT NETWORK, U.S. DEP'T OF THE TREASURY, REPORTING SUSPICIOUS ACTIVITY, A QUICK REFERENCE GUIDE FOR MONEY SERVICE BUSINESSES, *available at* http://www.msb.gov/materials/en/report_reference.pdf [hereinafter REPORTING].

176. *Id.*

177. *Id.*

178. *See* ANNEX, pp. 82-84.

179. CASSARA, *supra* note 4, at 136.

'Financial institutions' (a term which US Treasury uses to include banks, savings and loans, credit unions, and other depository institutions)¹⁸⁰ are, of course, under BSA purview, but so too are nontraditional financial institutions (e.g. casinos and brokers and dealers in securities). Money Service Businesses (MSBs) are also grouped under this latter category. Money Service Businesses are defined as:

Any person doing business, whether or not on a regular basis or as an organized business concern, providing one or more of the following services:

money orders, traveler's checks, check cashing, currency dealing or exchange, stored value, AND

Conducts more than \$1,000 in money service business activity:

with one person, in one or more transactions (in one type of activity), on any one day, OR

Provides money transfers [a Money Transmitter] in any amount.¹⁸¹

Money Transmitters are defined as:

A person that engages as a business in the transfer of funds through a financial institution is a money transmitter and an MSB, regardless of the amount of transfer activity. Generally, the acceptance and transmission of funds as an integral part of a transaction other than the funds transmission itself (for example, in connection with the sale of securities or other property), will not cause a person to be a money transmitter.¹⁸²

Generally, MSBs, in accordance with 31 CFR Part 103.41, must register with FinCEN within 180 days of establishment.¹⁸³ This brings us to what I call 'Loophole 1'. What would stop an individual from closing shop on day 179 and then reopening the following week? This is not simply your author playing devil's advocate. Our record for securing guilty verdicts when it comes to prosecution on terrorism finance charges is very poor.¹⁸⁴ Therefore, identifying and eliminating loopholes which allow these characters to flirt with criminality while technically following the letter of the law is quite important.

180. FIN. CRIMES ENFORCEMENT NETWORK, U.S. DEP'T OF TREASURY, MONEY LAUNDERING PREVENTION: A MONEY SERVICE BUSINESS GUIDE 4, available at http://www.fincen.gov/statutes_regs/guidance/pdf/msb_prevention_guide.pdf [hereinafter MONEY].

181. *Id.* at 45.

182. *Id.* at 45.

183. *Id.* at 6.

184. IBRAHIM WARDE, THE PRICE OF FEAR: THE TRUTH BEHIND THE FINANCIAL WAR ON TERROR 95-97 (University of California Press 2007); U.S. v. Benevolence Int'l. Found. No. 02 CR 414, 2002 WL 31050156 (N.D.Ill. Sept. 13, 2002).

Further, the weakness of this provision comes in the form of accountability, or rather the lack thereof. If confronted, what prevents a savvy, unregistered MSB that has been operating for years from claiming that they just opened for business last month? Are we really to believe that our monitoring efforts are so substantial today that we know, and more importantly can prove in a court of law, when exactly this 180 day period began? We simply cannot count on MSBs to report (or to report accurately) to FinCEN. We must police them better.

And, while I understand that the FBI may have the monopoly on terrorism finance investigations within the United States, the Bureau simply lacks the resources to tackle an issue of this magnitude alone. Our local law enforcement officials must be trained to spot suspect businesses. Whether this occurs within a specially designated branch or as part of a larger Counter-terrorism (CT) contingent under city or county jurisdiction, it must occur. At a minimum, numerical superiority puts officers/detectives in a unique position to provide quantitative tactical intelligence through contact. If at a later stage the FBI takes over the case, great, but the Bureau will never make that case without the assistance of these feeder-cells. There are some that would suggest that security would be compromised by an expansion of those 'in the circle'. This is simply not the case. There would be no 'circle' to speak of; information would flow in a unidirectional, linear fashion (i.e. towards the Bureau and FinCEN as end-users).

Loophole 2: While BSA requires MSBs to establish written Anti-Money Laundering (AML) procedures, such programs need not be reviewed by outside consultants. "Such review may be conducted by an officer or employee of the money service business"¹⁸⁵ This is quite troubling to say the least when the objective of the review is to "determine whether the business is operating in compliance with the requirements of the Bank Secrecy Act"¹⁸⁶ Why is a compliance determination, one with potential national security ramifications, not considered a nondelagable duty? Borrowing from Professors Prosser and Keeton, a nondelagable duty is defined as one in which "the responsibility is so important to the community that the employer [the US government] should not be permitted to transfer it to another."¹⁸⁷

Perhaps this shocking approach stems from the 2004 Second International Conference on Hawala. The 'Conference Statement' from that session states the desire to "avoid over-regulation that might drive [Informal Funds Transfer systems] operations underground."¹⁸⁸ Two comments: (1) the criminal elements

185. 31 C.F.R. § 103.125(d)(4) (2002).

186. FIN. CRIMES ENFORCEMENT NETWORK, U.S. DEP'T OF THE TREASURY, FIN-2006-G012, FREQUENTLY ASKED QUESTIONS: CONDUCTING INDEPENDENT REVIEWS OF MONEY SERVICE BUSINESS ANTI-MONEY LAUNDERING PROGRAMS 1 (2006), available at http://www.msb.gov/pdf/Guidance_MSB_Independent_Audits9-21.pdf.

187. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 512 (West Publ'g Co. 1984) (1941).

188. Int'l Monetary Fund, *Second Int'l. Conference on Hawala, Abu Dhabi* (Apr. 5, 2004), in REGULATORY FRAMEWORKS FOR HAWALA AND OTHER REMITTANCE SYSTEMS at 97 (International Monetary Fund 2005).

that both own and use these MSBs/IFTs/IVTs already operate underground, and (2) when has it ever been the policy of law enforcement officials to allow criminal activity to continue in fear that a crackdown might force criminals to work harder at their craft? If anything, we need to ramp up enforcement efforts, thus exacting additional risks/costs on these services. Once those risks/costs eat into profit margins, those using these informal transmission services for mere economical reasons will go elsewhere when such costs are inevitably passed on the customer. The only clients remaining will be the malefactors that are willing to pay higher rates for the continued promise of secrecy. As such, analytical teams could then narrow their focus to these specific individuals. There is a very large caveat here: before such a crackdown there must be a place, a well regulated culturally sensitive place, for the affected to go.¹⁸⁹

Bottom-line: agnostic to source (of such bad policy), if such delegation is truly the prevailing mentality of government today then why stop there? Why not disband the IRS and simply have taxpayers audit and then fine themselves? Why not get rid of all corporate and securities statutes and have companies like Enron and Lehman decide what's best to report? The answer to all the above is, of course, because: (1) people (both natural and juridical) are rational actors that will take advantage of any given system if allowed to do so, and (2) the core function of government is to govern.

I am not calling for larger government or for more legislation, I am simply calling for enforcement of the laws and policies that we already have. For example, in a commissioned study done in the mid-1990's MSBs in the US were estimated to number nearly 200,000, and yet despite our registration requirement, by the end of 2004 only 22,000 had registered.¹⁹⁰ More recently, in a 2006 report by the World Bank's Ole Andreassen, competition from the informal sector (i.e. unregistered MSBs) is cited as a chief obstacle to those running legitimate remittances businesses in the US.¹⁹¹ If we *don't* do better, we risk sending a signal that reads we *can't* do better. As such, it is only logical for MSBs to join their informal peers.

With examples like these, and there are more, how can we be so involved in training and in funding AML/CFT programs abroad in nations that refuse anything beyond superficial institution of policy while so poorly performing at home? If the difficulty is in the identification of illegal remitters, perhaps we could take notice of how the formal remitters garner business. In the same Andreassen article, the following data was presented: “[m]ost firms market their service through newspaper advertisements (47.83 percent), radio (37.88 percent),

189. See Int'l Monetary Fund, *Combating the Abuse of Alternative Remittance Systems: International Best Practices Annex 4*, in REGULATORY FRAMEWORKS FOR HAWALA AND OTHER REMITTANCE SYSTEMS 102, 105 (International Monetary Fund 2005).

190. CASSARA, *supra* note 4, at 201.

191. Ole E. Andreassen, Fin. Sector, The World Bank, *Remittance Service Providers in the United States: How Remittance Firms Operate and How They Perceive Their Business Environment*, at i., (June 2006).

and community events (40.91 percent) [and word of mouth (19.4 percent)].”¹⁹² I am willing to bet that illegal remitters use the very same methodologies as their legal counterparts. As such, to find these individuals we need to listen to the local AM radio stations, read ethnic newspapers, and get out into the community. All of the above, however, requires personnel, which in turn requires funding. And, to be frank, I’m not sure that we are that dedicated to this mission.

I don’t mean to suggest that the US government has failed since 9/11. Any attempt to paint the situation as such would be a blatant mischaracterization. In fact, just 3 years ago, in the “Final Report on 9/11 Commission Recommendations,” the war against terrorist financing was the only category to receive an ‘A’ grade.¹⁹³ Despite these accomplishments, however, what worries me now is the level to which this once urgent push to stamp out terrorism finance has been both tempered by initial successes and sidetracked by disconnects between senior level managers and agents. As George Friedman – the founder of Strategic Forecasting Inc. (better known as Stratfor) – once said “The weakness of the US is not our soldiers, nor their numbers, but the vast distance that separates American leaders from those who fight.”¹⁹⁴

In 2002, for example, then-Treasury Secretary Paul O’Neill flew halfway across the world to visit a Citibank branch in Bahrain that specialized in Islamic finance.¹⁹⁵ As an aside, this is not an industry that needs our promotional assistance given that (1) by 2004, Islamic banks boasted \$260 billion in assets and another \$400 billion in investments,¹⁹⁶ and (2) lax sectoral regulation continues to be a major security gap globally. Regardless, in the words of then-Treasury Under Secretary for International Affairs, John Taylor, “The *fanfare* of a cabinet member’s visit helped us publicize . . . what Islamic finance was all about.”¹⁹⁷ While I’m sure at the policy-level this fanfare - along with the establishment of a “visiting scholar in Islamic Finance” chair and the institution of an “Islamic Finance 101” class at Treasury to promote understanding was trumpeted in the name of political correctness, at the agent-level these things are seen for what they really are, distractions to enforcement objectives.

Also at the senior management level, and with more damning consequence, I again point to the disappearance of initiative once FATF Special Recommendations were purportedly adopted abroad. Particular leaders have apparently formed the view that good legislation is equivalent to good result so long as specious public efforts are demonstrated. Problem states that “aspire” to adopt the recommendations are forgiven for failure of implementation as long as they agree to host a hawala conference, or chair an event on Islamic finance, or promote “outreach.” Shaukat Aziz, both former Pakistani finance minister and

192. *Id.* at 29.

193. TAYLOR, *supra* note 49, at 27.

194. GEORGE FRIEDMAN, AMERICA’S SECRET WAR: INSIDE THE HIDDEN WORLDWIDE STRUGGLE BETWEEN AMERICA AND ITS ENEMIES 339 (Doubleday 2004).

195. TAYLOR, *supra* note 49, at 25.

196. CASSARA, *supra* note 4, at 205.

197. TAYLOR, *supra* note 49, at 25 (emphasis added).

prime minister, was lauded for chairing just such an outreach event in Washington in April 2002;¹⁹⁸ clearly the Pakistanis have cracked down on hawala since that day, right? Sultan Bin Nasser al-Suwaidi, governor of the Central Bank of the United Arab Emirates, was praised for his willingness to host regional initiatives to talk about illicit remittance;¹⁹⁹ clearly the UAE is no longer a corridor for terrorist funds, right? The Saudi government in June 2004 promised to shut down all charities abroad and to establish a "Charity Commission" to regulate the export of all funds;²⁰⁰ surely, four years after that announcement, that Commission is up and running, right?

With regard to our initial successes, many millions of dollars have indeed been frozen in the formal financial system since 9/11.²⁰¹ True, some of those funds can be considered the low-hanging fruit of the financial underworld, but many of those dollars –the hard targets – were captured by creative, groundbreaking efforts by Treasury and others. One such program was the SWIFT operation. SWIFT: the Society for Worldwide Interbank Financial Telecommunication, is a Brussels-based banking consortium that routes 11 million transactions a day between banks, brokerage houses, and stock exchanges.²⁰² By monitoring the \$6 trillion a day and the more than 7,800 financial institutions that use this service, the Treasury Department, the FBI, and the CIA were able to identify multiple terrorist cells both in the US and abroad.²⁰³

Unfortunately, the *New York Times*, in 2006, chose to publish a story exposing this ongoing, highly classified program.²⁰⁴ Believe it or not, the bad guys read *The Times* too. As such, the program was effectively hamstrung by this irresponsible decision to go to print. And, if this disclosure was not demoralizing enough, we acquiesced in the establishment of an external audit to ensure that collection programs were not "inappropriate."²⁰⁵ Perspective: we place external audit requirements on ourselves and yet we allow MSBs to self-regulate.

F. U.S. Regulation: Informal Sector

Despite unavoidable overlap, thus far we have focused on formal sector regulation. However, Section 359 of the Patriot Act also includes informal value transfer systems (IVTSs).²⁰⁶ IVTSs operate either in parallel to the formal sector – through underground banking and money transmission services or in tandem with the formal sector through the holding of "settling accounts" in traditional financial institutions. The latter form offers tremendous insight into the

198. *Id.* at 17.

199. *Id.* at 60.

200. Dan Murphy, *Saudi Crackdown on Charities Seen as Incomplete*, CHRISTIAN SCI. MONITOR, June 9, 2004.

201. See Eric Lichtblau & James Risen, *Bank Data is Sifted by U.S. in Secret to Block Terror*, N.Y. TIMES, June 23, 2006.

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. 31 U.S.C.A. § 5312 (2001).

complacency and, at times, overt criminality of the formal financial sector, e.g. BCCI and Banco Delta Asia (more on this later). The former, which include alternative remittance systems like hawala, are much more difficult to deal with, for by avoiding the formal sector altogether they avoid BSA freezing, despite the fact that BSA requirements are still applicable. In fact, Osama bin Laden, in a Pakistani press interview, is quoted as saying, "Al Qaeda is comprised of modern, educated young people who are as aware of the cracks in the Western financial system as they are of the lines in their own hands. These are the very flaws in the Western financial system which is becoming a noose for it."²⁰⁷

Recently, we have begun to adopt more creative monitoring programs to cement these "cracks" (e.g. trade-based money laundering). Trade Transparency Unities (TTUs), for example, now analyze import/export data in search of discrepancies in documentation and actual trade volumes.²⁰⁸ "By comparing specific declared imports and exports from both sides, determining indications of possible overinvoicing, underinvoicing, fraudulent trading practices, export incentive fraud, and other illegal techniques is a relatively simple process."²⁰⁹ This is particularly helpful in a world in which spot checks from customs agents have to compete with "rush delivery" services from FedEx to UPS to freight forwarders to free trade zone (FTZ) expeditors. Analysis after-the-fact thus enables the discovery of discrepancies that were not made patent to customs agents in real-time.

TTUs are indeed likely to help in the tracking of everything from textiles to diamonds to gold. However, even here efficacy is premised upon cooperation by foreign customs agencies and assumptions that diamonds and gold, for example, are traded, rather than smuggled, across borders. Further, the effectiveness of TTUs depends not only upon the willingness of foreign governments to share information, but on their ability to accurately collect and communicate that data. In poorer countries, countries that are disproportionately using underground banking and trade-based value manipulation, limitations with regard to both technology and personnel are very real obstacles. Lastly, import/export data obfuscation, willfully or accidentally, through comingling and/or mislabeling in FTZs, for example, furthers potential inaccuracies.

With regards to cash couriers, little has changed for the better. Yes, technology has been employed at entrance and exit points to detect large quantities of currency. And, yes, CMIRs provide hefty penalties for not reporting the cross-border movement of cash or bearer negotiable instruments (e.g. stocks, bonds, etc.), but only if such amounts are greater than \$10,000.²¹⁰ As stated above, I feel this amount is far too high for a blanket approach.

207. CASSARA, *supra* note 4, at 179.

208. *Id.* at 226.

209. *Id.* at 225.

210. 31 C.F.R. §103.30 (2009).

At a minimum, risk modeling needs to be incorporated with regards to the end-destination of each voyage. The amount of money that a private individual can carry on his/her person from the US to Singapore should not be the same allowable amount for travel to Sudan, for example. The money, which is badly needed in many of these regions I concede, can still reach these countries, but through the financial system. Further, I was careful to distinguish private individuals from not-for-profit workers and other governmental and quasi-governmental groups.

Ultimately, yes, a criminal/terrorist could fly to a "safe" country with \$10,000 in tow only to then hop on another plane headed to Syria or Iran. But, that criminal/terrorist now has to purchase two plane tickets (a layover would not suffice, for the focus would be on the end-destination), thus doubling both his/her operational cost and paper-trail. Doubling the paperwork alone increases the chance of eventual detection and apprehension.

With regard to the abuse of charities, the IRS and the FBI are making very real progress.²¹¹ Their efforts, however, are hampered by both noncooperation abroad (as mentioned supra) and by the complexities involved. For example, in a case coming out of Russia, a foreign national gave money to a charity, a company (receiving money from other charities) also gave money to that same charity, that charity then gave money to other charities (both legitimate and illegitimate), and one of those recipient charities then finally distributed the money to individuals in cash, wire transfer, courier, and goods form.²¹²

With this level of intentional confusion, one can imagine just how tough of a task investigation really is, much less prosecution. Add to this, the cross-border transmissions of funds. Sophisticated criminals utilize nation-states, failed states, and even Indian (Native American) reservations to take advantage of any perceived jurisdictional tolerance. Any international dimension then increases tracking difficulties in orders of magnitude. This holds true even when dealing with cooperative, technically capable countries.

V. CONCLUSION

A. *Disincentivized Cooperation*

There is a section in FinCEN's Money Laundering Prevention: A Money Services Business Guide entitled "MSBs Can Help Fight Money Laundering."²¹³ This section title, in my opinion, is a perfect summation of US/Jeffersonian dogma. We assume that MSBs *want* to help fight money laundering when it is, in fact, in their financial interest not to. Given an absence of enforcement, this holds true even in the face of hefty civil and criminal penalties for noncompliance. Regulatory hurdles cost time and money (e.g. registration in the UK costs £60

211. Paul O'Neill, Secretary, U.S. Dep't of the Treasury, Remarks on Next Terrorist Asset List (Jan. 9, 2002), <http://www.treas.gov/press/releases/po910.htm>.

212. FATF, TERRORIST FINANCING 26 (Financial Action Task Force/Organization for Economic Cooperation and Development 2008), <http://www.fatf-gafi.org/dataoecd/28/43/40285899.pdf>.

213. MONEY, *supra* note 181, at 10.

pounds – approximately \$113 – per premises),²¹⁴ and auditors bring unwanted attention. This attention then scares off clients that seek anonymity both for cultural and criminal reasons.

In a similar vein we assume that countries in the Persian Gulf, for example, *want* to cooperate on AML/CFT initiatives when, in fact, it is in their political (domestic and regional), religious, and financial interests not to. In Saudi Arabia, for example, “the financial sinews of al-Qaeda [flow] from numerous supporters in the Kingdom, and the Saudi government [is] loath to trigger the consequences of restraining these supporters.”²¹⁵ This is true both in the context of direct support and in terms of more peripheral contributions via charitable giving. In fact, the fragility of Saudi desire/ability to manage the latter is particularly vacant for a variety of religious and historical reasons.

In 1744, Muhammad Abd al-Wahhab and Ibn Sa’ud formed a ruling coalition.²¹⁶ The Saudi royal family, for its part, agreed to uphold a particularly virulent, uber-conservative Wahhabi jurisprudence. The Wahhabis, also known as “the asserters of the divine unity (*al-Muwahhidun* or *Ahl al-Tawhid*),”²¹⁷ in upholding their portion of the bargain, agreed to provide religious legitimacy to the crown so long as *shari’a* - Islamic law - remained supreme.²¹⁸

Under Saudi law, the Nizam Asasi (“Basic Regulation”), a constitutional equivalent – actual constitutions are avoided so as not to offend the Wahhabi ban on manmade legislation,²¹⁹ - governs, not UNSCRs not FATF recommendations and not even Saudi royal decrees in many instances. Article 7 explicitly states as much: “[T]he Prophet’s tradition and the Qur’an and Sunnah reign supreme over all other state regulations.”²²⁰ While Article 48 later cedes some discretionary authority to the ruler, it too is qualified, “The system of judges which is applied to all cases presented before it is shari’a rules according to the teachings of the Holy Qur’an, the Sunnah, and the regulations set by the ruler, *provided they do not contradict the Holy Qur’an and the Sunnah* (alteration in original).”²²¹

214. See David Faulkner, *U.K. Regulation of Money Service Businesses*, in REGULATORY FRAMEWORKS FOR HAWALA AND OTHER REMITTANCE SYSTEMS 42, 44 (International Monetary Fund 2005).

215. See CASSARA, *supra* note 4, at 233.

216. NATANA J. DELONG-BAS, *WAHHABI ISLAM: FROM REVIVAL AND REFORM TO GLOBAL JIHAD* 34 (Oxford University Press 2004).

217. SHAYKH JAMAAL AL DIN ZARABOZO, *THE LIFE, TEACHINGS AND INFLUENCE OF MUHAMMAD IBN ABDUL-WAHHAB* 280 (Ministry of Islamic Affairs 2005), available at <http://www.sultan.org/books/wahhabism.pdf>.

218. See generally DELONG-BAS, *supra* note 217.

219. LIAM GEARON, *HUMAN RIGHTS & RELIGION: A READER* 139 (Sussex Academic Press 2002).

220. FRANK E. VOGEL, *ISLAMIC LAW AND LEGAL SYSTEM: STUDIES OF SAUDI ARABIA* 3 (Ruud Peters & Bernard Weiss eds., Brill 2000).

221. *Id.*

Charitable giving (*zakat*) is not only encouraged under shari'a, it is mandated as one of the five pillars of Islam.²²² This, as previously mentioned, is exactly what makes regulation so contentious in the eyes of the proletariat – those especially susceptible to radical Islamic messages and, more importantly, to the powerful Wahhabi leadership - the authors of those extremist messages. This is particularly true when the US - seen as a Christian (rather than secular) country in the Middle East - is painted as targeting Saudi charities with religious connotations (e.g. *Al Haramain*, meaning “the two holy places,”²²³ i.e. Mecca and Medina).

As such, and as made frighteningly clear by the May 2003 al-Qaeda attack in Riyadh, the Saudi royal family is in no position to impose regulations that may be deemed a violation of Qur'anic teachings. Lastly, even if the Saudis established the long-promised Charity Commission, thus moving beyond superficial condemnation of charitable exploitation, two obstacles remain. The first: citizens would be free to ignore such attempts at regulation under Article 48 of the Nizam Asasi, upon direction from their religious leaders.²²⁴ The second: no amount of hypothetical regulation would keep a wealthy Saudi businessman from personally writing checks, so to speak, to individuals or organizations of his choosing.

The Emirates, on the other hand, appear to fight full compliance in the name of profit margins and regional sensitivities rather than religious fervor. As an example, at a soi-disant Islamic bank I was told that I could not open an account without a residence permit. A permit, however, as it was made clear to me, could materialize for a small fee. From May 15 to 16, 2002, the UAE hosted the Abu Dhabi Declaration on Hawala.²²⁵ That meeting was followed by the Second International Conference on Hawala in April of 2004.²²⁶ In both instances the UAE was applauded for their “efforts.”²²⁷ Upon the June 2008 announcement of the addition of 13 new AML/CFT regulations, the following appeared in the *Financial Times*: “Western officials have lauded the UAE’s move to regulate hawala”²²⁸ Unconditional praise continued even after a curiously timed - the day before the World Customs Organization (WCO) was to meet – declaration by the director general of the UAE’s Federal Customs Authority which voiced an “urgent need” for regional ports to combat smugglers.²²⁹

222. DELONG-BAS, *supra* note 217, at 247; *see also Five Pillars of Islam*, BBC Religion & Ethics (2002), <http://www.bbc.co.uk/religion/religions/islam/practices/fivepillars.shtml>.

223. *See* Saudi-US-Relations.org, Saudi-US Relations Information Service, The Hajj in Perspective: A Conversation with David Long (Jan. 23, 2005), <http://www.saudi-us-relations.org/newsletter2005/saudi-relations-interest-01-23.html> (last visited Feb. 5, 2009); *see also* OXFORD DICTIONARY OF ISLAM (2007-08), *available at* http://www.oxfordislamicstudies.com/article/opr/t125/e810?_hi=1&_pos=13.

224. GEARON, *supra* note 220.

225. *See* Faulkner, *supra* note 215, at 94.

226. *Id.* at 96.

227. *See id.*

228. Simeon Kerr, *UAE Brings in New Rules to Fight Money Laundering*, FIN. TIMES, June 23, 2008, at 8, *available at* <http://www.ft.com/cms/s/0/bdbfd4dc-40bb-11dd-bd48-0000779fd2ac.html>.

229. Gregor McClenaghan, *Customs Combine to Fight Crime and Facilitate Trade*, THE NAT'L, June 25, 2008, <http://thenational.ae/article/20080624/NATIONAL/680171428>.

And yet, Dubai was the transit route of much of the funding for the September 11, 2001 attacks, and served as both A.Q. Khan's – the "godfather" of the Pakistani nuclear bomb – equipment source and cubbyhole for illicit profits.²³⁰ The infamous al-Barakaat remittance service was headquartered in Dubai,²³¹ and Dubai's Gold Souq - the largest in Arabia²³² - is widely known for its use in money laundering.²³³ The Petroline FZC company – used to pay the Iraqi government millions of dollars in bribes to secure "oil for food contracts," thus circumventing UN sanctions – was based in the UAE.²³⁴ So too were the backers of the Bank of Credit and Commerce International (BCCI): Sheik Zayed bin Sultan al-Nahyan (Ruler of Abu Dhabi and 77 percent owner of the bank), Sheik Khalifa bin Zayed al-Nahyan (son of Sheik Zayed), Sheik Mohammed bin Zayed al-Nahyan (son of Sheik Zayed), and Kemal Adham (former head of Saudi intelligence).²³⁵

BCCI, the largest Muslim bank in the world at the time, essentially institutionalized hawala; "the bank arranged for a deposit in the local currency at one end and a withdrawal in a different currency at the other, without an audit trial or paperwork – a basic form of money laundering."²³⁶ As lax regulation began attracting the money of more sophisticated criminals like Abu Nidal, Manuel Noriega, Munther Bilbeisi, and intelligence operatives, BCCI added more layers and shells to accommodate. To illustrate:

[A] subsidiary called BCCI Overseas, based in the Cayman Islands, was 100 percent owned by BCCI Holdings in Luxembourg. The senior Cayman company was a British charity, called ICIC Foundation, which owned an investment company, ICIC Foundation Cayman, which owned 35 percent of BCCI's Geneva-based bank, Banque de Commerce et Placements (the rest was owned by BCCI Holdings S.A. - the main Luxembourg company - and Union Bank of Switzerland). The ICIC Foundation also was an investor in BCCI; it borrowed \$74 million from an affiliated company, ICIC Overseas, to acquire 9 percent of BCCI shares. Other Cayman investors in BCCI Holdings were the ICIC Staff Benefit Trust and the ICIC Staff Benefit Fund - pension funds for BCCI²³⁷

In 2008, the US Commodity Futures Trading Commission (CFTC) warned the Dubai Mercantile Exchange for its lack of adequate reporting and transparency.²³⁸ Many authors have written about the abuse of FTZs in the UAE

230. See CASSARA, *supra* note 4, at 123.

231. WARDE, *supra* note 185, at 97.

232. TERRY CARTER & LARA DUNSTON, DUBAI 17 (Lonely Planet 2007).

233. See *generally* Dubai: Hawala's Law Hooray?, World Money Laundering Report Online (Feb. 26, 2007), http://bankinginsurancesecurities.com/WMLRO.Com/Articles/world_money_laundering_report_online_news/Dubai-hawala-s-last-hooray (last visited Feb. 5, 2009).

234. Richard Lawson, Foreign Cases that Could Haunt Bhutto, BBC News (Oct. 29, 2007), http://news.bbc.co.uk/2/hi/south_asia/7064052.stm (last visited Feb. 5, 2009).

235. MARK POTTS ET AL., DIRTY MONEY 10-11 (National Press Books 1992).

236. *Id.* at 57.

237. *Id.* at 61.

238. See CFTC Limits, FIN. TIMES, July 8, 2008, at 2, available at <http://www.ft.com/cms/s/0/>

generally, and Dubai's Jebel Ali in particular.²³⁹ And, as best illustrated in a recent *Portfolio* article by Christopher Stewart, smuggling, with government acquiescence, continues unabated despite the UAE Federal Customs Authority director general's "urgent" call for action.²⁴⁰

According to the article, 30 to 40 percent of the \$11 billion in goods sent from the US to the UAE make their way to Iran – in violation of both US and UN sanctions.²⁴¹ "Some exports are innocuous, like refrigerators and stoves; others, such as high-speed computer chips, military hardware, and nuclear components, are more ominous."²⁴² As Michael Jacobson, senior fellow at the Washington Institute's Stein Program on Counterterrorism and Intelligence, puts it "[t]hey're reluctant to go too far, in part out of fear of antagonizing Iran, but mainly because of the bottom line."²⁴³

The Stewart article is important here beyond simply chronicling just how little meaning sanctions have to our allies. It also illustrates, yet again, this disjuncture between the efficacy of freezes and designations in the formal sector compared with that of the informal sector. For example, the Treasury Department designated Bank Saderat and Bank Sepah for funding Hezbollah and facilitating Iranian missile procurement, respectively.²⁴⁴ One might assume that this pair of designations would cripple these institutions, as such a designation did to Banco Delta Asia, thereby precipitating a crisis of sorts in Iran. That assumption, however, would be wrong. Such designations, while painful, are blunted by informal "solutions" (e.g. the smuggling of goods and the usage of hawala).

In a 2008 *Financial Times* (Tehran) article, Daniel Glaser, the deputy assistant secretary of terrorist financing at US Treasury, claimed that the fact that hawala business is booming is proof positive that sanctions are working.²⁴⁵ This is a bit like bragging about how sturdy your three-sided fortress is; what about the back door? Secretary Glaser continued: "[i]f what our sanctions and the international sanctions have done is to push organizations like the Quds force [an elite, self-funded Iranian unit that perpetuates terrorist movements abroad] out of the international financial system and into costlier, riskier and less efficient systems, then that is a good thing."²⁴⁶ I would counter that statement by asking if that's what our sanctions have in fact done. Arguably, hawala is cheaper (not costlier), just as safe, and more efficient in terms of time and paperwork.

9d7ab8ea-4c87-11dd-96bb-000077b07658.html.

239. See generally Christopher S. Stewart, *The Axis of Commerce*, PORTFOLIO MAG., Sept. 2008, available at <http://www.portfolio.com/news-markets/international-news/portfolio/2008/08/13/US-Trades-With-Iran-Via-Dubai>.

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

244. Andrew Davenport, *Draining the Financial Swamp*, 12 THE J. OF INT'L SECURITY AFF. 27 (2007), available at <http://www.securityaffairs.org/issues/2007/12/davenport.php>.

245. Anna Fifield, *How Iranians are Avoiding Sanctions*, FIN. TIMES, Apr. 14, 2008, available at <http://www.ft.com/cms/s/0/6ca69788-0a48-11dd-b5b1-0000779fd2ac.html>.

246. *Id.*

Note: my intention in this section was not to single out Saudi Arabia and the UAE for reproach. In fact, if not for page limitations, I could write volumes on the current apathy and duplicity of our “allies” abroad. Doing so, however, would be redundant with regard to this central premise: the system, as-is and as presented, is broken. Otherwise-friendly nations in the Middle East and in Asia have very little incentive to cooperate with our AML/CFT programs, period.

B. Incentivized Cooperation

The US and European partners must find alternatives to financially contentious AML/CFT program implementation. In theory, while individuals in poorer nations benefit from informal flows (in cash, courier, or trade form), the governments of those nations do not. In fact, hawala-type systems were developed, in part, to avoid perceived corruption by circumventing officialdom. As such, one would imagine that these governments are eager to recapture this lost revenue by cracking down on the informal sector, but this does not appear to be the case. Perhaps the problem is that governments fail to see just how profitable regulation could be.

As a first step, one might point out the extent of lost revenue, thus motivating cash-strapped governments to commit to often substantial enforcement expenditures. In Bangladesh, for example, 40-50 percent of annual government revenues are generated through customs duties.²⁴⁷ In dollar terms, that’s approximately \$3.4 billion.²⁴⁸ One would assume that these kinds of figures would demonstrate to the Bangladeshi government, for example, that by allowing duty manipulation/avoidance (commonly used in the settling stage of the hawala process) a primary source of their funding is threatened.

On the other hand, governments may very well be aware of the extent to which informal financial systems thrive in their countries. There is even evidence to suggest that they may be encouraging, for a price, such sub-rosa activity. In a 2005 survey of 73 official remittance firms (i.e. those that have registered and presumably comply with all additional MSB regulations) in the US, nearly half of those operators cite recipient country corruption as a major obstacle to business.²⁴⁹ By extension, if corruption is that prevalent in official circles, the “hush money” required of illegal operators must be greater in both occurrence and amount.

In the same 2005 survey, the median firm processed \$5 million in transactions per month.²⁵⁰ In strictly financial terms, with numbers this large it’s obvious just how profitable graft, even in small percentages, could be for non-cooperative governments. Further, and in the social policy context, by allowing injections of unregulated, untaxed dollars to reach their populations, regimes feel freed, to some extent, from having to provide public services to their people. This is particularly

247. DEP’T OF STATE, *supra* note 11, at 6.

248. *See* CIA, *supra* note 32.

249. Andreassen, *supra* note 192, at 5, 11.

250. *Id.* at 15.

true when, as in the case of Afghanistan, 80 percent of all healthcare and educational services are provided by NGOs.²⁵¹

A second way to entice non-cooperative governments to enforce AML/CFT policy is to have them partner with formal financial institutions in the private sector. This is precisely what occurred between the United States and Mexico. I argue, however, that the institutionalization of the MEX/US remittance corridor, this formalizing the informal, isn't replicable. This is principally so because the sheer volume of money, and thus the incentive for the private sector to participate, doesn't exist in any other bilateral relationship.

"In 2002, Mexico was the largest recipient of formal remittances flows in the world."²⁵² By 2003, remittance flows reached \$13 billion, thus surpassing both foreign direct investment (FDI) to Mexico and tourism-related revenues.²⁵³ This was made possible because policymakers at the highest levels insisted on regulatory harmonization. This coordination was so involved that an FDIC-Consulate General of Mexico joint task force was even established to educate migrant workers on their remittance options.²⁵⁴

At the individual level, on the US side, the Treasury Department "asked the Federal Reserve to work with Mexico to improve the payments system between the countries, which it did. At [Treasury's] suggestion the World Bank also got involved . . ."²⁵⁵ The Mexicans, for their part, simultaneously strengthened the security of, and access to, Mexican Consular I.D. Cards (*Matricula Consular de Alta Seguridad*). With Treasury and the Fed on board, and with the Mexican government guaranteeing the fidelity of new security features on the cards, Wells Fargo, Citibank, Bank of America, US Bank, HSBC, Washington Mutual, Banco Popular, and others all facilitated remittance senders.²⁵⁶ Ultimately, remittance volumes encouraged harmonization which encouraged broad competition for business which sent the prices for such services plummeting. As a result, workers stopped using the informal sector in droves.²⁵⁷

This corridor formalization is exactly what the World Bank's Sam Maimbo has called for: "an effective strategy for isolating illicit funds being transferred through the hawala system is to encourage legal transfers to migrate to conventional financial instruments."²⁵⁸ That said, Mr. Maimbo admits the following: "[t]he effectiveness of this strategy depends on the ability of formal

251. Michael A. Cohen, Maria Figueroa Küpcü & Parag Khanna, *The New Colonialists*, 167 FOREIGN POL'Y 74, 74 (2008).

252. Raul Hernandez-Coss, *Comparing Mature and Nascent Remittance Corridors*, in REGULATORY FRAMEWORKS FOR HAWALA AND OTHER REMITTANCE SYSTEMS 17, 18 (International Monetary Fund 2005).

253. Raul Hernandez-Coss, *Lessons from the US-Mexico Remittance Corridor on Shifting from Informal to Formal Transfer Systems* 5 (World Bank Publications 2005) [hereinafter *Lessons*].

254. *Id.* at 14.

255. TAYLOR, *supra* note 49, at 27.

256. *Lessons*, *supra* note 254, at 11.

257. *Id.* at 21.

258. Maimbo, *supra* note 35, at 62.

financial instruments to compete with the hawala dealers with respect to exchange rates, speedy service, and coverage of areas that now lack banking services.”²⁵⁹ As stated earlier, trade volumes are simply too low elsewhere to create this kind of extraordinary bilateral facilitation. And, without such governmental support, traditional financial institutions are unlikely to invest the time and money to induce the kind of migration to conventional financial instruments that Maimbo is calling for. Further, even where substantial flows might exist, the security challenges involved automatically rule out involvement by the likes of HSBC, Bank of America, and other majors.

It must be noted that even in the case of the US/MEX corridor, coverage areas are still limited principally to urban centers. Thus, the draw of door-to-door hawala delivery still remains for underserved rural communities even where there is extraordinary governmental cooperation. It must also be noted that any US, World Bank, and IMF involvement automatically complicates program acceptance in the Middle East and in South Asia.

Dr. Hamed El-Said and Dr. Jane Harrigan summarize the reasons for this in their 2006 Middle East Journal article “Globalization, International Finance, and Political Islam in the Arab World.”²⁶⁰ Point one: the conditions attached to international aid stemming from “official organizations, particularly those based in Washington” often demand a decline in social welfare spending.²⁶¹ Point two: Islamist groups are eager to fill the gap by providing their own support through religious charities.²⁶² Point three: Islamist groups then exploit the withdrawal of the state from the welfare sphere, thus calling into question the political legitimacy of the regime.²⁶³ As an aside, this is particularly troubling given that US foreign policy promotes democracy worldwide. As such, the results of those democratic elections, if/when held, are sure to reflect such charitable giving – or lack thereof.

In sum, NGOs are not the answer because “none . . . is anxious to perform so well that it works itself out of a job.”²⁶⁴ Traditional financial institutions in the private sector are not the answer for the dearth of incentives and plethora of security challenges aforementioned. And, perhaps the World Bank and the IMF are excludable for the way in which they are allegedly perceived in the Muslim world. All of that being said, what alternatives then remain to incentivize (financially, culturally, religiously, politically) governments to push business away from hawaladars? Answer: micro-lenders.

259. *Id.*

260. Hamed El-Said & Jane Harrigan, *Globalization, International Finance, and Political Islam in the Arab World*, 60 THE MIDDLE E. J. 444, 446-47 (2006).

261. *Id.* at 446.

262. *Id.*

263. *Id.* at 446-47.

264. Cohen, *supra* note 252, at 74.

C. *Micro-Lenders as an Alternative*

In 1983, Muhammad Yunus, with the support of the Bangladeshi government, founded Grameen Bank.²⁶⁵ Grameen, as a micro-credit institution, lent very small, uncollateralized sums to the poorest of individuals – to women in particular – in rural communities.²⁶⁶ Distributions were hand-delivered by bankers that lived in the surrounding areas, spoke the local dialects, and lived by the same cultural norms.²⁶⁷ Dispersals were not contingent upon skills training and nor were they hampered by superfluous administration and consultancy.²⁶⁸ In fact, micromanagement enmity led young Grameen to butt heads with the World Bank on more than one occasion. There was even a public rebuke of then-World Bank president Barber Conable during a televised conference in 1986.²⁶⁹

While the World Bank did end up funding the Grameen Replicator Trust – a fund to establish Grameen-type programs globally, the Polli Karma Sahayak Foundation – a micro-credit wholesaler, and Consultative Group to Assist the Poor (CGAP) and other Grameen initiatives,²⁷⁰ this initial confrontation actually bought Grameen a bit of “street credit” with poorer nations that may or may not have shared the concerns listed in the Said-Harrigan article. And, while US officials like Jimmy Carter and Hillary Clinton did eventually visit Grameen branches, only Bengali officials were in attendance at the opening ceremony. Further, the ceremony, held in Jamurki, Tangail, was begun with recitations from the Qu’ran.²⁷¹

A note on sharia compliance. With an ultraconservative Iranian regime now in power, it is of particular interest that an adviser to Ahmadinejad on women’s affairs said the following: “There is nothing in shariah law or the Qu’ran against what [Grameen is] doing.”²⁷² Many Islamic scholars feel that Grameen is exempted from the religious injunction on charging interest (*riba*) because those being charged interest also own stakes in the bank.²⁷³ “The purpose of the religious injunction against interest is to protect the poor from usury, but where the poor own their own bank, the interest is in effect paid to the company they own, and therefore to themselves.”²⁷⁴

This theatre, whether by design or not, earned our Nobel Laureate vast cultural and religious dividends. Yunus was able to neutralize the concerns of Drs. El-Said and Harrigan with nothing more than a low key opening ceremony and a superficial tiff with a World Bank official. By allying with the government of Bangladesh – the government at one point owned 60 percent of the bank – Grameen was able to ensure its political survival. With an equity position, the

265. Muhammad Yunus, *BANKER TO THE POOR* 119 (Public Affairs 2003) (1999).

266. *Id.* at 57-58, 71.

267. *See id.* at 100-01, 106.

268. *Id.* at 140-41.

269. *Id.* at 142-43.

270. *Id.* at 164, 166, 168.

271. *Id.* at 123.

272. *Id.* at 110.

273. *Id.*

274. *Id.*

government was incentivized to make the project work, to ensure economic success. Simultaneously, by underwriting the project, the government reaps the benefit of appearing empathetic and effectual.

With a proven track record in not only Bangladesh, but in India, Nepal, Vietnam, China, Latin America, and Africa, I suggest that we encourage micro-credit organizations to expand into the remittance field. We can promote these groups as official alternatives to hawala. Micro-lenders, as with hawaladars, are in a unique position to address all four informal sector incentives: (1) the absence of formal sector alternatives, (2) cultural familiarity, (3) affordability, and (4) anonymity. Further, as these micro-lender-MSB hybrids (MLMSBs) pair up with their respective government partners, thus linking their financial fates, one would expect to see a crackdown on market competitors (i.e. the informal sector). Market dominance would replace any revenue (think bribes) that would be lost in AML/CFT enforcement, and would bolster the credibility of these regimes with their own people.

1. Formal Sector Alternatives

By their nature, micro-lenders are located in rural areas that are isolated from capital and professional services.²⁷⁵ These are the very communities over which hawaladars now hold a monopoly. Remember that even with the US/MEX corridor, the formal sector was unable to reach beyond urban centers. Micro-lenders are able to thrive in these regions where traditional institutions cannot, and do not want to, operate.

2. Cultural Familiarity

Micro-credit staffers embody the trust element that is so essential to the success of hawala, for they too are from the communities which they serve. Language proficiency and cultural understanding provide access to these outlier villages and inspires trust and, thereafter, community participation. In addition, in many micro-lending models borrowers are simultaneously shareholders. By owning the organization, or branch of that organization, it's no longer viewed as an intrusion, but as an addition to the community.

3. Affordability

Micro-lending institutions are able to keep their costs down by utilizing local resources and by conducting no-frills operations. With local staffers and Spartan offices, these organizations can operate at a fraction of the budgetary and infrastructural requirements of their more traditional peers. And, with government partners, MLMSBs should receive preferential lending and tax incentives.

Further, the availability of turnkey technologies now allows these businesses to operate more efficiently, without duplication of process or personnel. This would also help in keeping track of AML/CFT due diligence and security features. Yes, regulation –much of which micro-credit institutions now manage to avoid – costs money. But, an expansion in services would offset an expansion in the cost

275. *See id.* at 121, 141

of compliance via cross-selling. For example, many recipients of micro-credit are simultaneously recipients of remittances. Further, many recipients of remittances need to exchange those monies into local currency. Lastly, the adoption of risk-based-modeling with regards to transfer amounts²⁷⁶ would exclude many of the transactions that now occur, thus limiting the amount of actual AML/CFT reporting required.

Without doubt, the initial period of service expansion would be difficult both in terms of money and personnel. But, USAID and World Council of Credit Unions (WOCCO) provide capacity-building support.²⁷⁷ WOCCO further provides, via its International Remittance Network (IRnet), “a vehicle by which to send and distribute remittances at low cost,”²⁷⁸ thus blunting an inevitable increase in marketing costs that MLMSBs would incur on the sending side. In addition, SWIFT can provide direct funds transfer, and commercial bank and transmitter partnerships can supply “access to international payment networks, foreign exchange access, and risk management expertise.”²⁷⁹

The bottom-line, however, is that none of the above can occur without one of a few things occurring, the first being a radical change in policy and regulation that would allow the creation of MLMSBs. The second would be a change of legal status, thus morphing micro-lenders into versions of full-fledged financial institutions. The third would be a series of micro-lender-private-sector partnerships with those that already have the appropriate legal status and licensure to conduct expanded financial services. With a dearth of research in this area, I am not in a position to recommend one action above another. I would only add that, as Pankaj Ghemawat writes in his latest book,²⁸⁰ contrary to Thomas Friedman's assertions, the world is not flat.²⁸¹ As such, what might work well in India might not work at all in Pakistan or Bangladesh or Malaysia.

4. Anonymity

With government partners, MLMSBs would escape much of the desire for anonymity that illegal hawaladars (and by extension, their customers) now seek.

276. Transactions that are below 'X' amount do not match criminal/money laundering transmission profiles and thus should be excluded from many of the AML/CFT reporting requirements. CHINYERE EGWUAGU ET AL., *AML/CFT Regulation: Implications for Financial Service Providers that Serve Low-income People 5* (Consultative Group to Assist the Poor & World Bank 2005), http://siteresources.worldbank.org/EXTAML/Resources/396511-1146581427871/AML_implications_complete.pdf.

277. Anne Hastings, *Address at the Global Microcredit Summit in Halifax, Nova Scotia: Entry of MFIs into the Remittance Market: Opportunities and Challenges* (Nov. 13, 2006), http://www.microcreditsummit.org/papers/Workshops/23_Hastings.pdf.

278. *Id.* at 29.

279. *Id.* at 31; see Jennifer Isern, Rani Deshpande & Judith van Doorn, *Crafting a Money Transfers Strategy: Guidance For Pro-Poor Financial Service Providers*, 10 OCCASIONAL PAPER 20 (Consultative Group to Assist the Poor 2005), available at http://www.cgap.org/gm/document-1.9.2704/OccasionalPaper_10.pdf.

280. See PANKAJ GHEMAWAT, *REDEFINING GLOBAL STRATEGY: CROSSING BORDERS IN A WORLD WHERE DIFFERENCES STILL MATTER* (Harvard Business School Press 2007).

281. *Id.* at 10.

Illegal immigrants will continue to associate formal financial institutions with governmental organs, but MLMSB alliances with receiving countries are unlikely to invoke this same trepidation. Pakistan, for example, is unlikely to report the legal status of a U.K. remitter to authorities in England; Pakistan, after all, benefits from the money being sent home. Further, the receiving government would be in no position to adjudge the legality of a remitter living abroad. Lastly, “anonymity by default” becomes a lesser obstacle because micro-lenders, by training and by practice, are accustomed to dealing with, and putting at ease, individuals with lower levels of formal education.

D. Conclusion

Nothing, including the creation of MLMSBs, will prove to be a panacea if enforcement does not follow. While our country develops cutting-edge national security programs, far too often the production stage is both where policy begins and ends. Granted, enforcement dollars are finite, but I fear that inaction is regarded as safer (politically) and has, therefore become the bureaucratic default.

Further, I have decided that lack of execution in this particular area either stems from a loss of interest, or from deliberate misdirection regarding the recent implementation of a secret program that is many, many times more effective than was SWIFT. I am a cynic by nature, and unfortunately that means that I believe the former to be true. Sexier topics naturally prevail in an election season, however, given that terrorists tend to stage attacks around election cycles (e.g. Spain and Pakistan), let’s hope that I’m wrong.

SACRIFICIAL LAMBS OF GLOBALIZATION: CHILD LABOR IN THE TWENTY-FIRST CENTURY

DR. RANEE KHOOSHIE LAL PANJABI*

I. INTRODUCTION

The idea of progress has dominated global thinking for the past few centuries. Politically, progress has enshrined concepts of human rights and brought freedom and democracy to many parts of the world that had previously only known absolutism and autocracy. Economically, the notion of progress has knit the world via the pathways of globalization into an inter-dependent unit where people engage in an international division of labor involving all levels of manufacturing and service provision. The resulting growth of human-developed technology has shrunk the world in terms of communications and dissemination of knowledge on a scale never conceived before.

With this development of a vast and powerful international market place there should have been a greater sharing of profits and the benefits. Unfortunately, this has not been the case. Socially, globalization has brought greater comprehension of diversity and the necessity for tolerance of the infinite variety of cultures that flourish on this amazing planet. However, economic “progress” has been largely at the expense of the most vulnerable elements of almost every society. Those elements, the poor, the illiterate, and particularly the children of the poor have paid a terrible price so that we in the richer countries might enjoy an orgy of consumerism at reasonable prices. Our need to buy and consume, but always at very low prices, has required that food and manufactured goods be produced to sell inexpensively but still provide sufficient profit. One methodology to achieve this aim is to utilize either very cheap labor – hence the export of manufacturing from the West to the developing world – or worse, much worse, to use slavery and child labor, and pay almost nothing to those who make our goods and harvest our food.

This research demonstrates that child labor prevails across the planet, in both rich and poor countries. Although it may be decreasing in some parts of the world, that is no comfort to those children caught in its brutal grip. This research has also verified the extent of international concern about this terrible practice, which robs the childhood of thousands.. *The Economist* stated that of “all the alleged sins of

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globalization, child labour has been among the most scorned.”¹ Far from the promise of progress for those victims of globalization, this new internationalized marketplace has resuscitated the horrors of the past, such as slavery, human trafficking, and child labor—widely perceived as one of the most insidious of all crimes—against the most vulnerable and defenseless members of every society.

To be fair, we have progressed to the point of internationally outlawing child labor in a number of high-sounding and well-meaning legal instruments. Unfortunately, most countries only pay lip service to these instruments, while turning a blind eye to the prevalence of a practice that dooms thousands of children around the world to a life of back-breaking labor, brutal mutilation, physical and sexual torture, and emotional and psychological trauma. The International Labour Organization (ILO) has deemed the “economic exploitation of children . . . an insult to humanity.”² Any search for the reason why, in a world so dedicated to the concept of progress, such egregious human rights violations persist, only leads to the realization that children “are employed because they are easier to exploit and they can be paid less,” if they are paid at all.³

This article seeks to emphasize the nature of the problem, the immense scope of child labor internationally, and to remind us that we already have verbal commitments and laws. What we need is a greater will to promote their implementation, and rid our world of this terrible crime that brutalizes so many children. Space constraints restrict this article to dealing specifically with two manifestations of child labor: first, agriculture, which involves most of the children who are forced to work; and second, the labor roles of children in warfare as child soldiers and as sex slaves, porters and spies. Extensive research has clarified the idea that child labor cannot be eradicated in a vacuum which disregards societal breakdown caused by poverty, environmental degradation, civil strife, and economic turmoil. An analysis and assessment of the situation has yielded some ideas whereby the developed world can act multilaterally and meaningfully to make a difference in the developing world’s poorest countries, many found in Africa. With a new American administration, and a president committed and dedicated to the politics of change, a new look at multilateral solutions might provide answers that can make a viable and long-term difference. With no oblique pun intended, it is obvious that internationally child labor is a ‘motherhood’ issue.

The child labor practices that prevail across the planet, even in the progressive democracies of the Western world, have few defenders, and a vast number of detractors. If the ultimate goal is still international progress, then child labor is a self-defeating practice in terms of the future of our planet. We cannot go on exploiting children and basing our economies, even partially, on the ill-gotten

1. *Sickness or Symptom?*, THE ECONOMIST, Feb. 5, 2004, at 73.

2. INTERNATIONAL LABOR ORGANIZATION [ILO], *Facts and Figures on Child Labour 2* (1999), <http://www.ilo.org/public/english/comp/child/download/pdf/statistics.pdf> [hereinafter *Facts and Figures on Child Labour 1999*].

3. Ximena de la Barra, *Defeating the Trends: In Search of a Better Future*, in 4 ADVANCES IN EDUCATION IN DIVERSE COMMUNITIES: RESEARCH, POLICY AND PRAXIS 477, 484 (Carol Camp Yeakey et al. eds., 2006).

fruits of child labor. If all of us can determine individually, nationally, and internationally not to allow this practice to prevail; we will secure a decent future for this entire planet. This is a major and significant issue of human rights. Any assumptions we have of being 'progressive' in this twenty-first century are eradicated by our acceptance of a form of ruthless exploitation that brutalizes the most helpless in our world to enhance our own creature comforts. The International Labour Organization has stated that the "effective abolition of child labour is one of the most urgent challenges of our time."⁴ If we fail in this endeavor to rid the world of this heinous crime, we doom the future of the entire planet. Rarely has true progress—idealistic progress, progress that is meaningful and valuable—been grounded in exploitation, acquiescence, and indifference to the fate of children.

II. DEFINITIONS

It has been correctly emphasized that "[t]here is no universally accepted definition of 'child labor.' Varying definitions of the term are used by international organizations, non-governmental organizations, trade unions and other interest groups. Writers and speakers don't always specify what definition they are using, and that often leads to confusion."⁵

National, cultural, and societal norms dictate the parameters that define "childhood" as a distinct time in the life of a human being. Childhood is thereby distinguished from adulthood, which can occur at different times, depending on gender, culture, social value systems, and laws of different societies. In a bid to provide a degree of uniformity, while still giving the nod to national divergence on this grounding issue, the United Nations has set the parameter for childhood at age eighteen, "unless under the law applicable to the child, majority is attained earlier."⁶ States ratifying the ILO's Minimum Age Convention are required to specify a minimum working age.⁷ The results have determined that countries in the developing world set the parameter at fourteen years, while developed countries tend toward age fifteen.⁸

Definitional discussions about child labor point to the necessity to distinguish between labor that provides a child with a useful set of skills for earning a living in adulthood, a type of education, and labor that includes assisting the family in household chores or farm work, geared to familial survival and economic progress. According to author and Director for the Elimination of Child Labour at the International Labour Organization, Guy Thijs:

4. ILO, *Facts on Child Labour* (June 2005), <http://www.ilo.org/public/english/bureau/inf/download/child/childday05.pdf> [hereinafter *Facts on Child Labour 2005*].

5. Images of Child Labor: Photography for Social Change, Child Labor: Frequently Asked Questions, <http://www.childlaborphotoproject.org/childlabor.html>.

6. Convention on the Rights of the Child, G.A. Res. 44/25, art. 1, U.N. Doc. A/44/49 (Nov. 20, 1989).

7. *Id.* at art. 32.

8. *Global Child Labour Figures Fall*, B.B.C. NEWS, May 4, 2006, http://news.bbc.co.uk/2/low/in_depth/4973088.stm.

participation in certain types of light work, such as helping parents care for the home and family for short periods in the day, or teenagers working for a few hours before or after school or during holidays to earn pocket money, is considered to be part of growing up for boys and girls and a means of acquiring basic survival and practical skills.⁹

Although a very broad definition would encompass any work performed by children, it is universally recognized that some forms of work involving family chores have a positive role to play in child development.¹⁰ As John J. Tierney Jr. has explained, "the type of child labor that has become the focus of international concern is the abusive, unhealthy, commercial exploitation of children that interferes with their education."¹¹ The problems of child labor relate to exploitative labor, which is usually unpaid and unrecompensed and deprives children of any meaningful future and degrades them in every way imaginable.¹² The International Labour Organization has estimated that mentally, emotionally, and physically degrading child labor affects one in six children in the world today.¹³ The complexity of defining such work has been admitted by the United Nations International Children's Emergency Fund (UNICEF); which explained in its 1997 Report on the State of the World's Children that such work has to be gauged along a linear continuum, comprising destructive work at one extreme and beneficial work at the opposite side.¹⁴ Between these polar opposites exists a range of work typologies that "need not negatively affect a child's development."¹⁵

Unfortunately, whether the particular child labor is a constructive preparation for adulthood or the worst form of exploitation is usually a subjective assessment, often based on cultural and societal norms, which can defeat the best intentions of international laws and covenants. The framers of the United Nations Convention on the Rights of the Child were quite aware of this dilemma, and of the fact that severe exploitation could be passed off as an apprenticeship for adulthood.¹⁶ Similarly, a child's contribution to working off a family's debt of indentured labor could, depending on one's social values, be perceived as a useful and helpful form of assistance to the family unit, rather than a cruel and heinous extension by generation of bonded enslavement. Perceptions colored by national and cultural norms cloud the definitions in this debate. The ultimate eradication of exploitative child labor will depend largely on a realization that, although national standards differ, there has to be international acknowledgment and effective implementation

9. Guy Thijs, *National Policies and Programmes*, in ACTION AGAINST CHILD LABOUR 3, 4 (Nelien Haspels & Michele Jankanish eds., 2000); *Global Child Labour Figures Fall*, *supra* note 8.

10. John J. Tierney Jr., *Regulated Child Labor is Necessary in Developing Countries*, in CHILD LABOR AND SWEATSHOPS 24, 27 (Ann Manheimer ed., 2006).

11. *Id.*

12. *Id.*

13. *Facts on Child Labour 2005*, *supra* note 4.

14. UNITED NATIONS CHILDREN FUND [UNICEF], THE STATE OF THE WORLD'S CHILDREN: WHAT IS CHILD LABOR 24 (1997), available at <http://www.unicef.org/sowc97/report/> [hereinafter STATE OF THE WORLD'S CHILDREN 1997].

15. *Id.*

16. G.A. Res. 44/25, *supra* note 6, at art. 32.

of the principle that child labor, that is exploitative in a universally-recognized manner, is unacceptable in this twenty-first century. We cannot allow definitional disputation to dominate the debate over the eradication of this practice. One way to cut the Gordian Knot of such bickering is perhaps to work globally toward the implementation of compulsory education for all boys and girls through high school. Should this goal ever be achieved, children would automatically be removed from sweatshops, brothels, mines, and quarries, where they labor and despite employer and parental objections, be placed in school for most of the day. The World Development Report concluded in 2007 that there are approximately 130 million children, between the ages of fifteen and twenty-four years old, who are unable to read and write.¹⁷ A consistent universal effort to deal with this problem of mass illiteracy and child labor would simultaneously address two major problems that afflict the world's children and the future development of the planet.

One of the most comprehensive definitions of child labor that the vast literature provides is that selected by Guy Thijs, who has explained that child labor comprises work that is “mentally, physically, socially or morally dangerous and harmful to children,” and is “work carried out to the detriment and endangerment of the child, in violation of international law and national legislation.”¹⁸ It is important to emphasize that definitional disputes ought not to detract us from the main task at hand, namely the urgent alleviation of the the lot of the most vulnerable and helpless members of our society.

III. SCOPE OF CHILD LABOR

According to Cathryne L. Schmitz, the “work of children is a global issue.”¹⁹ Whether perceived through the lens of geography, economic activity, international division of labor, or through any investigative prism, the results are staggering in terms of the numbers of children who are exploited and the range of work they perform. Arguably, children constitute a very significant component of the global economy, and comprise its most exploited element. It has been estimated that, as this new century began, approximately two billion persons—one-third of the people—on this planet were under the age of eighteen, with one-tenth being under the age of five.²⁰ Approximately 90 percent of these youngsters live in the developing world.²¹ In its 2005 *Facts on Child Labour*, the International Labour Organization estimated that about 73 million of working children were younger than ten years of age.²²

Statistics vary depending on the researcher's established parameters in individual inquiries. Kebebew Ashagrie attributed this to an absence of

17. WORLD BANK, WORLD DEVELOPMENT REPORT: DEVELOPMENT AND THE NEXT GENERATION, REP. 35999, 37 (2006), available at http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2006/09/13/000112742_20060913111024/Rendered/PDF/359990WDR0complete.pdf.

18. Thijs, *supra* note 9, at 4.

19. CATHRYNE L. SCHMITZ ET AL., CHILD LABOR: A GLOBAL VIEW 1 (Cathryne L. Schmitz et al. eds., 2004).

20. de la Barra, *supra* note 3, at 478-79.

21. *Id.* (citation omitted).

22. *Facts on Child Labour 2005*, *supra* note 4.

appropriate survey methodology concerning child labor, which is “a hidden or invisible phenomenon,” and concluded that there is “a wide variety of guesstimates as to the number of working children under fifteen years of age, ranging from 200 to 400 million worldwide.”²³ Clearly, while determining the existence of exploitative child labor in particular situations can be a challenge, enumerating the practice statistically is even more difficult, given that the work frequently occurs under the radar and is hidden from law enforcement and non-governmental agencies. It is not easy for enumerators to persuade perpetrating employers to cooperate when the latter are aware that their use of children is against national and international laws. The plethora of international instruments has at least disseminated the realization that the practice is frowned upon, and that there are elements around the world that seek its eradication. However, this awareness, in those who perpetrate the exploitation of children, has led to a more clandestine and more invidious methodology for utilizing child labor. As with slavery and trafficking, child labor forms part of the illegal, underground economy in many countries, and is therefore much more difficult to deal with and to eradicate.²⁴ The inconsistent statistics are indicative of the unfortunate success of perpetrators of this practice at camouflaging their activities. The varying enumerations notwithstanding, the conclusions are similar and frightening. Too many children are trapped in this terrible form of exploitation. No world that strives for progressive improvement can countenance such egregious violations of the rights of children.

Complicating any attempt at statistical clarity is also the fact that some children work full time, others for a few hours, and others only seasonally. Moreover, the designation of exploitative child labor can vary depending on the economic sector, the familial financial circumstances, individual employers, and a host of other variables that can bedevil any cohesive attempt to establish firm statistical data. Additionally, the age groups of children being considered statistically can vary depending on individual enumeration systems, from very wide inclusive boundaries to very restricted criteria. For instance, Zoe Chafe, writing for the World Watch Institute, has commented that “[a]ll children who report having worked at least one hour on any day during a seven-day period are considered economically active.”²⁵

In a valiant effort to cope with this very challenging and complex situation of enumeration the International Programme on the Elimination of Child Labour and the Statistical Information and Monitoring Programme on Child Labour (IPEC/SIMPOC) coordinated “an internationally accepted definition of employment,” which focuses on paid and unpaid work performed by children in

23. Kebebew Ashagrie, *Improving the Knowledge Base on Child Labour*, in ACTION AGAINST CHILD LABOUR 117, 117 (Nelien Haspels & Michele Jankanish eds., 2000).

24. See generally Rane K.L. Panjabi, *Born Free Yet Everywhere in Chains: Global Slavery in the Twenty-First Century*, 37 DENV. J. INT'L L. & POL'Y 1 (2008).

25. Zoe Chafe, *Child Labor Harms Many Young Lives*, WORLD WATCH INSTITUTE, Nov. 8, 2007, <http://www.worldwatch.org/node/5479>.

the formal and nonformal economies in rural and urban areas.²⁶ The definition excludes work that children perform in their own homes.²⁷ Although the IPEC/SIMPOC contribution has been very significant, the challenges of quantifying and analyzing the fundamental problems remain, particularly with respect to those economic activities that are illegal.

There are numerous attempts at shedding light on both the scale and the proliferation of this type of abuse of children. The Christian Children's Fund has estimated that about 218 million children, aged five through seventeen, are engaged in child labor—excluding child domestic labor.²⁸ More tragic is the organization's estimate that about 126 million of these children are engaged in hazardous labor including working in mines or in situations involving pesticides, chemicals, and dangerous machinery.²⁹

These statistics can be compared with the data of the International Programme on the Elimination of Child Labour working in tandem with the Statistical Information and Monitoring Programme on Child Labour.³⁰ Excluding children who work in their own homes, this group estimated paid and unpaid economic activity by children in rural and urban areas.³¹ Their very important 2002 report concluded that 352 million children, between the ages of five and seventeen years, were working as of the year 2000.³² It was found that as many as 73 million of these children were under ten years old.³³ A few years later, the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) estimated that, as of November 2007, over eight million children were trapped in the most insidious manifestations of child labor, specifically “slavery, trafficking, debt bondage, forced military service, prostitution and pornography.”³⁴ With an obvious view to highlighting one of the most heinous precursors that leads to a childhood of forced labor, the International Labour Organization, in its June 2005 *Facts on Child Labour*, estimated that over a million children were victims of trafficking.³⁵

Although “the developed countries of the world are far from innocent of the plagues of exploitative child labor and human trafficking,”³⁶ the problem is far

26. SCHMITZ, *supra* note 19, at 5.

27. *Id.*

28. CHRISTIAN CHILDREN'S FUND, CHILD LABOR 4 (June 2008), [http://www.christianchildrensfund.org/uploadedFiles/Public_Site/news/Newsroom/Current/DevEd%20Education_Child%20Labor_Youth%20Version_Final\(1\).pdf](http://www.christianchildrensfund.org/uploadedFiles/Public_Site/news/Newsroom/Current/DevEd%20Education_Child%20Labor_Youth%20Version_Final(1).pdf).

29. *Id.*

30. ILO, *Every Child Counts: New Global Estimates on Child Labour* (2002), <http://www.ilo.org/ipecinfo/product/download.do?type=document&id=742> [hereinafter *Every Child Counts*].

31. *Id.* at 29.

32. *Id.* at 5.

33. SCHMITZ, *supra* note 19, at 5.

34. Posting of James Parks to AFL-CIO Now Blog, *Time to End Child Labor Now* (Nov. 13, 2007), <http://blog.aflcio.org/2007/11/13/time-to-end-child-labor-now>.

35. *Facts on Child Labour 2005*, *supra* note 4.

36. 4 ADVANCES IN EDUCATION IN DIVERSE COMMUNITIES: RESEARCH, POLICY AND PRAXIS xv (Carol Camp Yeakey et al. eds., 2006).

more extensive in the developing world, where—by one estimate—there are approximately 1.3 billion young people, the “most ever in history.”³⁷ It is fairly obvious to any researcher in this field that statistical enumeration of the problem is far from precise. However, there can be no doubt that the evil of child labor prevails on a gigantic scale, and that the world needs to act decisively, not simply to frame and formulate pronouncements and conventions, but to act to end this brutal practice.

It is clear that the practice prevails globally, with no country exempt from this violation of the human rights of children. UNICEF, in its 2007 Progress for Children report, emphasized the economic activities of children between the ages of five and fourteen.³⁸ Based on regional data relating to 2006, the Report found that the worst exploitation of children occurred in Sub-Saharan Africa with 35 percent of children engaged in labor.³⁹ Such economic exploitation of children affected 13 percent of children in Asia, 11 percent in Latin America and the Caribbean, 7 percent in East Asia and the Pacific Region, 9 percent in the Middle East and North Africa.⁴⁰ UNICEF concluded that approximately 158 million children work globally, an overwhelming majority of them in the developing world.⁴¹ The high estimated percentage for Africa notwithstanding, the largest number of working children are located in Asia, where in 2005 an astounding 127 million children fourteen and younger were at work.⁴² As of June 2005, the International Labour Organization estimated that 2.5 million children worked in developed economies and another 2.5 million worked in the transition economies that appeared after the fall of the Soviet Union.⁴³ The practice is so globally prevalent that it will require a multilateral approach and international will to eradicate and eliminate this human rights violation.

On a more positive note, several enumerators have found some signs of decline in child labor. Globally, the estimated 246 million laborers between the ages of five and seventeen in 2000 had dropped to an estimated 218 million by 2004.⁴⁴ This drop is significantly lower than the 246 million reported by the ILO in its 2002 Report.⁴⁵ The ILO concluded in 2006 that there was a noticeable drop in Latin America and the Caribbean over the previous four years.⁴⁶ In that region it was estimated that the number of working children had dropped by two-thirds between the ILO's Reports of 2002 and 2006, with Brazil showing a remarkable 60

37. WORLD BANK, *supra* note 17 at 4.

38. UNICEF, 6 PROGRESS FOR CHILDREN: A WORLD FIT FOR CHILDREN STATISTICAL REVIEW 43 (2007), http://www.unicef.org/progressforchildren/2007n6/files/Progress_for_Children__No._6.pdf [hereinafter PROGRESS FOR CHILDREN].

39. *Id.*

40. *Id.*

41. *Id.*

42. *Facts on Child Labour 2005, supra* note 4.

43. *Id.*

44. ILO, *Facts on Child Labour 1* (2006), http://www.ilo.org/wcmsp5/groups/public/---dgreports/-dcomm/documents/publication/wcms_067558.pdf [hereinafter *Facts on Child Labour 2006*].

45. *Global Child Labour Figures Fall, supra* note 8.

46. *Facts on Child Labour 2006, supra* note 44.

percent drop in the number of working children aged five to nine years old.⁴⁷ Most recent estimates by the ILO suggest that about 5 percent of Latin American children aged five to fourteen are working.⁴⁸

While numbers fell in Latin America, there was little change in Africa.⁴⁹ In its 2005 *Facts on Child Labour*, the ILO recorded that sub-Saharan Africa had the largest proportion of working children; numbering 48 million and comprising about one-third of children fourteen and younger.⁵⁰ In Asia there were still 122 million children working, a decline of only five million⁵¹ over a four year period with specific reference to children aged five to fourteen years.⁵² Asia is the most densely populated part of the world, and it has the highest number of child laborers.⁵³

Much more research and attention has to be directed toward the prevalence of child labor in populations at risk, such as indigenous peoples of various societies, both in the developing and developed world. These marginalized groups⁵⁴ have standards of living so low and their grip on survival is so fragile that parents are often persuaded and coerced into selling their children, so that the remainder of the family may eat for a few weeks. Additionally, the prevalence of a massive refugee crisis, affecting virtually every country in the world, has further endangered children. Families disrupted and uprooted from their homes and lifestyles are more likely to be compelled to send children to labor as a means of survival.⁵⁵ Sometimes, children are separated from parents as families flee from armed conflict. In such situations children can easily be kidnapped and enslaved.⁵⁶ Countries torn asunder by war, terrorism, and civil conflict are particularly prey to internal and external refugee crises.⁵⁷ In these situations the plight of children becomes really dire. Child labor cannot really be eradicated permanently until the conditions that render children so vulnerable are also addressed multilaterally. Unfortunately all the high-sounding phrases of international covenants become meaningless and almost farcical in the context of armed conflict, rebellions, and wars which destroy the fabric of societies, the unity of families, and provide more child laborers for exploitation in the economic markets of this globalized world.

The range of economic activity undertaken by children is indicative of the extent to which the global marketplace has come to rely on this egregious form of human exploitation. In some countries there is scarcely an economic enterprise that does not participate in some form of child labor. The ILO estimated that, as of June 2005, 70 percent of working children were involved in agriculture,

47. *Global Child Labour Figures Fall*, *supra* note 8.

48. *Facts on Child Labour 2006*, *supra* note 44.

49. *Global Child Labour Figures Fall*, *supra* note 8.

50. *Facts on Child Labour 2005*, *supra* note 4.

51. *Global Child Labour Figures Fall*, *supra* note 8.

52. *Facts on Child Labour 2006*, *supra* note 44.

53. *Facts and Figures on Child Labour 1999*, *supra* note 2, at 2.

54. See SCHMITZ, *supra* note 19, at 3-4.

55. *Id.*

56. *Id.*

57. *Id.*

commercial hunting, fishing and forestry; 8 percent in manufacturing; and 7 percent in personal service, which includes domestic work.⁵⁸ In 2006 the same organization estimated that 70 percent were still involved in agriculture, 22 percent in the service sector, and 9 percent in industry, which includes mining, construction, and manufacturing work.⁵⁹ Quantifying and evaluating the economic involvement of children on a global basis is rendered complex by the variety of occupations in which there is apparently scope for the beneficial or exploitative use of young people. Alessandro Cigno and Furio C. Rosati point out that “[c]hildren throughout the world are engaged in a great number of activities classifiable as work. These range from fairly harmless, even laudable, activities like helping out in the home, to physically dangerous and morally objectionable ones like soldiering and prostitution.”⁶⁰

Hence, children can work without pay by helping out at home or by working on family farms. Additionally, they can supplement family income by engaging in handicraft making, and participating in village cottage industries.⁶¹ Children in the developing world are frequently apprenticed to artisans crafting hand made goods like brass ware, jewelry, carpets, embroidery, and leather goods, made largely for the consumption of tourists.⁶² The economic conditions of such children can range from very benign to very dangerous, depending on the type of work, the employer, and a number of other variables. At its best, such work can provide children with useful skills and the ability to earn a living as adults. At its worst, this type of situation can deteriorate into a form of slavery with little or no pay, barely enough food, and brutal living conditions. Moreover, children in these situations can develop permanent economic and even psychological dependence upon the master craftsman.

The developed world also participates in the exploitation of children. Where, as in the United States of America, there are large farms that require seasonal labor, children form part of migrant families that harvest crops and perform agricultural chores. Agricultural pursuits constitute a major part of child labor, and many of the serious violations of children’s rights occur in rural economies.⁶³

This utilization of child labor in agriculture is prevalent in many developing nations like India and China, as well as regionally in South-East Asia, Africa, and parts of Latin America.⁶⁴ The situation is particularly serious when children form part of families that are bonded to a moneylender for debts, sometimes of less than one dollar. Generations of peasants have, in the developing world, been swindled

58. *Facts on Child Labour 2005*, *supra* note 4.

59. *Facts on Child Labour 2006*, *supra* note 44.

60. ALESSANDRO CIGNO & FURIO C. ROSATI, *THE ECONOMICS OF CHILD LABOUR 1* (2005).

61. State Child Labour Rehabilitation Welfare Society, *Forms of Child Labour*, www.tnchildlabour.tn.gov.in/forms.htm (last visited Jan. 31, 2009) [hereinafter *Forms of Child Labour*].

62. *Id.*

63. Press Release, ILO, *Child Labour Persists Around the World: More Than 13 Percent of Children 10-14 are Employed*, ILO/96/18 (Jun. 10, 1996), available at http://www.ilo.org/global/About_the_ILO/Media_and_public_information/Press_releases/lang--en/WCMS_008058/index.htm.

64. *Id.*

out of any meaningful life and financial independence, working for years, eking out a bleak life on bare subsistence, unable to break the liability of indenture because they lack the literacy and the legal skills to demand their rights. On occasion, children and their labor form part of the payment for the debt that is owed, a situation that leads to the worst excesses of slavery and brutalization.⁶⁵

Research from many countries demonstrates how widespread is the use of child labor. Children are put to work in a variety of enterprises, from the notorious making of footballs in Pakistan,⁶⁶ to stone-breaking, and rag-picking. According to one study, there are over three hundred such occupations in just one country, Bangladesh.⁶⁷

It has appropriately been stated that “child labor is not confined to any particular economic sector.”⁶⁸ Children can be found in every type of economic enterprise, whether working as servants, field hands, miners (where they are exposed to lead, mercury and other dangerous metals),⁶⁹ or as divers for pearls or in deep sea fishing. Children are also often found making toys, garments, and a multitude of other consumer goods that the wealthy world enjoys.⁷⁰ Children who work at making shoes are consistently “exposed to solvents, glues, and curing and cleaning agents.”⁷¹ Additionally, children can be found in service industries such as tourism, cleaning and cooking at restaurants, and even professionally begging on the streets for the benefit of a gang leader.⁷² “They carry out a multitude of activities such as hauling wood and water, brick making, wrapping cigarettes, domestic chores, and child care . . . They are exploited in the commercial sex industry and engaged in the drug trade.”⁷³ Author Alan D. Woolf has discovered child labor in “wholesale and retail stores, personal services, transportation, storage, communications industries, construction, and mining and quarrying activities.”⁷⁴ According to Woolf, in “some countries, scavenging and recycling from community waste dumps is an economic necessity for poverty-ridden families,”⁷⁵ and children troll the garbage, hunting for materials that can be sold.

Most tragic of all is the plight of homeless children, many of them orphans who live on the streets and work in terrible environments, doing just about

65. *Forms of Child Labour*, *supra* note 61.

66. Sherin Khan, *Awareness-Raising*, in ACTION AGAINST CHILD LABOUR 273, 277 (Nelien Haspels & Michele Jankanish eds., 2000).

67. *Id.*

68. Carol Camp Yeakey & Judith Brooks Buck, *Small Hands: Global Dimensions of Child Labor and Exploitation*, in 4 ADVANCES IN EDUCATION IN DIVERSE COMMUNITIES: RESEARCH, POLICY AND PRACTICE 295, 296 (Carol Camp Yeakey et. al eds., 2006).

69. Alan D. Woolf, *Child Labor Hurts Children's Health and the Economy*, in CHILD LABOR AND SWEATSHOPS 32, 33-34 (Ann Manheimer ed., 2006).

70. See Camp Yeakey & Brooks Buck, *supra* note 68.

71. Woolf, *supra* note 69, at 33.

72. *Id.*

73. SCHMITZ, *supra* note 19, at 4.

74. Woolf, *supra* note 69, at 33.

75. *Id.*

anything in order to survive,⁷⁶ sometimes caring for and protecting younger siblings. These children are prey to all kinds of criminals, and even to police brutality in many developing world countries.⁷⁷ Their plight is the most tragic and studying and assessing their conditions a real challenge because they have no fixed homes.

The international scope of the problem has to be emphasized, along with its tragic particular economic manifestations. No country is immune from the taint of child labor. The agrarian economy utilizes children extensively in all parts of the world. Small enterprises found all over the world depend on children to maximize their profits. Child soldiers are mainly found in areas of turmoil such as Sudan, Uganda, and Afghanistan. Countries such as Thailand and the Philippines, which are both popular tourist destinations, tend to lure child predators from around the world. Wherever there are economies in peril, street children appear—working as hawkers, beggars, and child prostitutes. Where globalization has knit the world together into an inter-connected unit, the evils of globalization have proliferated across the world. Eradicating some of these problems will require international effort and universal commitment to action.

If we do not act expeditiously and with determination, there will be many million more children who will lose not just their childhood, but possibly their health and their lives. As Camp Yeakey and Brooks Buck explain: “[w]ith economic globalization tying national economies more closely together, awareness of the incidence of child labor in Third World nations is growing rapidly in industrialized countries.”⁷⁸ However, awareness is not sufficient. There has to be action as well. If the new American administration can provide the initiative to generate a multilateral dedication to eradicating child labor, and dedicate some part of its abundant expertise to promoting universal compulsory education through high school; it will demonstrate that the United States of America is not just a military superpower, but also a superpower in terms of human rights and human benefit.

A. Poverty and Child Labor

It is a truism that child labor prevails because poverty prevails. As Jeremy Seabrook has commented: “the great majority of children work because their families are poor.”⁷⁹ It is evident that “[p]overty is undoubtedly a dominant factor in the use of child labour.”⁸⁰ Like poverty, from which it is born, child labor has always been with us. The concept of making children work is as old as human history. Indeed, the notion of setting aside childhood for education and play is the newer concept, constructed as part and parcel of our commitment to progress.

76. SCHMITZ, *supra* note 19, at 4-5.

77. *See generally id.* (discussing 15 countries and the criminals to which children are prey in each).

78. Camp Yeakey & Brooks Buck, *supra* note 68, at 295.

79. JEREMY SEABROOK, CHILDREN OF OTHER WORLDS: EXPLOITATION IN THE GLOBAL MARKET 51 (2001).

80. ECLT Foundation, Causes of Child Labour, <http://www.eclt.org/about/overview.html> (last visited Feb. 10, 2009).

Educated children, it is widely felt, advance not just themselves, but the world. It is also a truism that society advances as its population acquires more knowledge, skills, and understanding of the world. In that context, child labor is regressive and antithetical to the notion of progress.

The prevalence of child labor tragically highlights the continuing existence of grinding poverty in our world. It is both a symptom of that poverty, and a consequence of the failure of many governments to act to alleviate this problem. As Ximena de la Barra has pointed out, “[p]overty begets child labor, begets lack of education, begets poverty and lack of fulfillment of personal aspirations as well as aspirations of a significant contribution to society.”⁸¹ UNICEF has explained that “[c]hildren living in the poorest households and in rural areas are most likely to be involved in child labour.”⁸²

Although there are significant pockets of abject poverty in every country in the world, the extreme forms of this affliction of intense poverty dominate parts of Latin America, Africa, and Asia, where, correspondingly, child labor also prevails.⁸³ To provide only one example of the dimensions of this problem, it has been estimated that over 40 percent of the population of the Philippines lives below the poverty line. Consequently, the prevalence of child labor in that country should not cause any surprise.⁸⁴

At the beginning of this new millennium, approximately 2.8 billion people, one-half the population of the planet, live on less than two dollars per day.⁸⁵ Of this vast number, 1.2 billion can be classified as being in a state of “extreme poverty,” subsisting on less than one dollar per day.⁸⁶ The enormity of the task ahead in eradicating child labor becomes obvious with the realization that more than half of the poor people in the world are children,⁸⁷ a grim statistic that should inspire the leaders of the world to act decisively and urgently to remedy this terrible situation. Although UNICEF has argued that it is a myth that “child labour will never be eliminated until poverty disappears,”⁸⁸ the nexus between the two has to be considered vital to any progressive multilateral plan for the future betterment of our planet. Although poverty is by no means the only cause of child labor, it is certainly an important factor, and one that has to be weighed in any serious analysis of the subject. As Cathryne L. Schmitz has commented, “[p]overty is the major precipitating factor, but education, rigid social and cultural roles, economic greed, family size, geography, and global economics all contribute.”⁸⁹ The contrast between have and have-not can be gauged by the statistics prepared by the

81. de la Barra, *supra* note 3, at 484.

82. PROGRESS FOR CHILDREN, *supra* note 38, at 43.

83. Child Labor Public Education Project, Causes of Child Labor, http://www.continuetolearn.uiowa.edu/laborctr/child_labor/about/causes.html (last visited Feb. 10, 2009).

84. See Teresita Silva, *Preventing Child Exploitation on the Streets in the Philippines*, 360 LANCET 1507, 1507 (2002), available at <http://www.crin.org/docs/ChildHope.pdf>.

85. de la Barra, *supra* note 3, at 482.

86. *Id.*

87. *Id.*

88. STATE OF THE WORLD'S CHILDREN 1997, *supra* note 14, at 20.

89. SCHMITZ, *supra* note 19, at 1.

United Nations Development Programme in 2003, and cited by Ximena de la Barra who explained that “the richest 5% of the world’s people receive 114 times the income of the poorest 5%. The richest 1% receives as much as the poorest 57% and the 25 million richest Americans have as much income as almost 2 billion of the world’s poorest people.”⁹⁰

The recent economic crisis that has beset the entire world has further endangered the children of the very poorest of families. With rising food prices, those who have subsisted on one or two dollars per day can no longer eke out enough food for the entire family. In such conditions of economic meltdown, the poorest are the most fragile and their children become the most vulnerable. World Vision has pointed out that in Mongolia the price of staple foods has doubled since 2007, with potatoes costing five times more.⁹¹ It is hardly surprising that nearly eight thousand children in Mongolia work in mines.⁹²

In such circumstances, where finding enough food to eat is the ultimate daily challenge, it is not unduly surprising that parents become dependent on the money their children can earn. Jeremy Seabrook explained this dilemma, stating that “[parents] are not transfixed by materialism, they are not greedy or selfish – they simply see no other pathway to survival; and the children absorb this lesson in the daily experience of empty bellies and frequent sickness.”⁹³

The nexus between child labor and poverty was aptly expressed by American social worker and activist Grace Abbott who explained, “[c]hild labor and poverty are inevitably bound together and if you continue to use the labor of children as the treatment for the social disease of poverty, you will have both poverty and child labor to the end of time.”⁹⁴

Although poverty and child labor are linked in a very clear and defined relationship, it is also important to emphasize that other factors have been articulated for the prevalence of this terrible violation of children’s rights. One of the best definitions of the varied causation involved can be found in the Declaration and Agenda for Action of the First World Congress Against Commercial Sexual Exploitation of Children held in Sweden in August 1996.⁹⁵ Although the causes mentioned are specific to sexual exploitation, the reasoning can very aptly be extrapolated to cover the entire subject of child labor. The Congress determined that a “range of other complex contributing factors include economic disparities, inequitable socio-economic structures, disfunctioning families, lack of education, growing consumerism, urban-rural migration, gender

90. de la Barra, *supra* note 3, at 482.

91. Justin Douglas et al., *Child Labor Increases as a Result of the Global Food Crisis*, WORLD VISION, Aug. 2008, http://www.worldvision.org/news.nsf/news/child-labor-200808?Open&wvsrc=ews&lpos=fea_txt_publicationindex_CHILD-LABOR.

92. *Id.*

93. SEABROOK, *supra* note 79, at 51.

94. CHRISTIAN CHILDREN’S FUND, *supra* note 28, at 4.

95. First World Congress Against Commercial Sexual Exploitation of Children, Aug. 27-31, 1996, *Declaration and Agenda for Action*, ¶ 6, U.N. Doc. A/51/385 (Sep. 20, 1996).

discrimination, irresponsible male sexual behavior, harmful traditional practices, armed conflicts and trafficking of children.”⁹⁶

The eradication of child labor is linked to an improvement in the lot of the poor. Even if the latter task seems beyond the grasp of any governments or international organizations, that should still not affect their will to alleviate the lives of the millions of children trapped in this terrible plight of working from a very young age. It is easy to suggest that all world leaders and bureaucrats have to do is implement their own commitments and words with respect to the rights of children. The global dependence on child labor must also be seen as ultimately detrimental to the progress of every nation that now seeks to profit from such young workers. If moral suasion fails, a pragmatic sense of responsibility to the global economy would dictate that we not doom our world’s future generations by seeking quick profits now, while imperiling the health and well being of the adult workers of tomorrow. The ILO has commented very aptly that “[w]orld political and social stability and security is difficult to envision if such large numbers of people continue to be trapped in cycles of poverty or see few opportunities in a global system that seems discriminatory and unfair.”⁹⁷ For those who deem the nexus between poverty and child labor a myth, it might be appropriate to point out that very rarely on this planet do rich children work, and certainly not in the gruesome conditions that afflict the children who form the subject of this article. According to the International Food Policy Research Institute, a study in 1996 established that “child labor declines as a country’s income rises.”⁹⁸ When families have enough adult-generated income so that they are not dependent on their children, child labor is eliminated. The experience of the developed world since the nineteenth century establishes this truism.⁹⁹ Cathryne Schmitz has explained that “[p]ersistent poverty fuels the perpetuation of abusive child labor. When the income level of a country increases, the incidence and proportion of child laborers decrease.”¹⁰⁰

Finally, while in no way diminishing the other causes of child labor—including a desire for consumer goods, cultural traditions, even religious traditions—this article emphasizes poverty because it is without a doubt the most pervasive and most insidious reason why millions of children forfeit their childhood to help their families survive and their employers thrive.

There is a national dimension as well to the issue of poverty and its linkage to many societal ills like trafficking, slavery, terrorism, drug use, crime, and child labor. Far from lessening the wealth disparities between rich and poor nations, it

96. *Id.*

97. ILO, Report of Director General to the 91st International Labour Conference, *Working Out of Poverty* (2003), available at <http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/kd001116.pdf>.

98. International Food Policy Research Institute [IFPRI], *Children at Work*, IFPRI FORUM, Sept. 2006, at 10, available at <http://www.ifpri.org/pubs/newsletters/ifpriforum/if16.pdf>.

99. The Economist, *Free Trade Will Result in Less Child Labor*, in CHILD LABOR AND SWEATSHOPS 40, 42 (Ann Manheimer ed., 2006).

100. SCHMITZ, *supra* note 19, at 2-3.

seems as though the globalized market place has blessed some countries, and sometimes particular groups in those nations, while neglecting other regions and nations altogether. India is often cited as the classic example. The country has a flourishing and growing middle class dedicated to assertive consumerism, but it also has a languishing pool of rural poor who are exploited and brutalized much as they were when the British ruled India until 1947.¹⁰¹ The global expansion of multi-national enterprises has favored parts of India because the democratic traditions of government, the existence of a well-educated and skilled labor force and the pervasiveness of English as a functioning language, enable these foreign corporations to outsource work from the West at much lower labor cost.¹⁰² In turn, Indian manufacturers sub-contract some of the toughest parts of their production chain. It is in these sectors that child labor and other similar abuses can creep into the process.¹⁰³ The international production system now in place is viewed as desirable by governments. These governments compete avidly with tax write-offs and other inducements to bring foreign corporations to their countries.¹⁰⁴ Low labor costs and minimal regulatory supervision are perceived as advantages. Both, however, are very detrimental to the objectives of eliminating and eradicating employment evils like slavery and child labor. Often, when the benefits offered to the foreign corporation have expired, the company moves elsewhere in response to an equally welcoming invitation, issued by the cash-poor representatives of another developing country.¹⁰⁵ The economic losses sustained by the first nation can be devastating as jobs literally vanish overseas overnight. Governments find their tax base dwindling, and resort to borrowing money from the world's markets, an action that necessitates belt-tightening, and the reduction of vital programs like health, education, and child services.¹⁰⁶ The downward spiral eventually reaches into almost every family, and when the savings evaporate the only method to sustain the family is for every person who can work to do so. This is how globalization and the proliferation of an international market can, on occasion, result in an increase in child labor and other such evils. It is only when globalization is implemented with a conscientious commitment not to exploit, but to mutually benefit, that poverty might diminish and its manifestations like child labor can be eliminated.

B. Child Labor in Hazardous and Dangerous Occupations

If the world collectively believes, as near-universal adherence to the Convention on the Rights of the Child would indicate, that child labor has to be eradicated, the first priority has to be to free children from the torment of what are deemed to be hazardous occupations—including those that are now categorized as the worst forms of labor because they pose such threats to the health and moral welfare of children. According to Michele Jankanish, the “worst forms of child

101. *Id.* at 106-07.

102. *Id.* at 103.

103. *See generally id.* at 103-04.

104. Child Labor Public Education Project, *supra* note 83.

105. *Id.*

106. *Id.*

labour” perceived by the ILO include, slavery, trafficking, debt bondage and serfdom, military recruitment of children, abuse of children for prostitution, pornography, drug trafficking, and any other type of work which threatens the “health, safety and morals of children.”¹⁰⁷ Author Carol Yeakey has appropriately emphasized the difficulties involved: “The challenge of preventing and eradicating extreme violations of children’s rights illustrate the layers of want, discrimination and exploitation that drive humanity’s poorest children into obscure and dangerous worlds.”¹⁰⁸

According to the ILO, any child under eighteen is deemed under-age for hazardous work when health, safety, and morals are concerned.¹⁰⁹ Additionally some occupations are deemed as the worst forms of child labor. While the process of categorization is significant in terms of enabling appropriate classification and enumeration, the important point to note is the extent of human misery and degradation involved in any form of exploitative labor for the most vulnerable element in any society, its children.

Concern expressed in many countries about the plight of children exposed to so many different types of hazards impelled the International Labour Organization to initiate a Convention on the Worst Forms of Child Labour, which was adopted in 1999.¹¹⁰ This initiative made the elimination of the worst forms of child labor an urgent priority.¹¹¹

It was estimated as of 2005 that of the 246 million children at work, approximately 171 million worked in hazardous situations or conditions that were deemed dangerous for their welfare.¹¹² Of this figure, the majority—or 111 million children—were under the age of fifteen,¹¹³ a fact that highlights the urgent requirement for the world to take effective action to eradicate child labor globally. The category universally deemed as the worst form of child labor had, as of the 2005 data, 8.4 million children in its grip.¹¹⁴ The authors Cigno and Rosati appropriately described this statistic as “stunning.”¹¹⁵ The scope of this very serious human rights violation includes forced and bonded labor, which enslaved 5.7 million children.¹¹⁶ An estimated 1.2 million children were victims of

107. ACTION AGAINST CHILD LABOUR 47 (Neliën Haspels & Michele Jankanish eds., 2000).

108. CAROL CAMP YEAKY & JUDITH BROOKS BUCK, 4 ADVANCES IN EDUCATION IN DIVERSE COMMUNITIES: RESEARCH, POLICY AND PRAXIS xv (Carol Camp Yeakey et al. eds., 2006).

109. *Global Child Labour Figures Fall*, *supra* note 8.

110. ILO, Worst Forms of Child Labour Convention, No. 182, June 17, 1999, *available at* <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C182>; ILO, Worst Forms of Child Labour Recommendation, No.190, June 17, 1999, *available at* <http://www.ilo.org/ilolex/cgi-lex/convde.pl?R190>.

111. Worst Forms of Child Labour Convention, *supra* note 111.

112. International Center on Child Labour and Education, How Many Children Work? http://www.knowchildlabor.org/child_labor/facts.php (last visited Mar. 1, 2009) [hereinafter *How Many Children Work?*].

113. *Id.*

114. *Id.*

115. CIGNO & ROSATI, *supra* note 60, at 1.

116. *Every Child Counts*, *supra* note 30, at 10.

trafficking; 0.3 million were forced into armed conflict; 1.8 million into prostitution and pornography; and 0.6 million into drug production and trafficking.¹¹⁷ In these and other occupations, children are inevitably exposed to diseases, stunting of normal growth, toxic chemicals, and a variety of dangerous perils. To give only one example of such dangers, in Liberia children assist their parents in the occupation of rubber-tapping, working for up to twelve hours a day, "carrying heavy buckets of pesticide-laden latex on their heads."¹¹⁸

There are some indications of possible improvement. The ILO estimated that between its reports of 2002 and 2006 the numbers of children working in hazardous conditions fell by 26 percent.¹¹⁹ From an estimated 171 million in 2000, the figure dropped to 126 million in 2004, and the decline for children from five to fourteen was higher, at 33 percent.¹²⁰ Lest such indicators of possible improvement lead to a sense of comfort about this problem, 126 million children almost form the equivalent of the population of Japan as estimated for 2008.¹²¹

C. Child Labor in Agriculture

Although time and space constraints preclude any detailed analysis of child labor on a sector-by-sector basis, some assessment of the problem in agriculture has to be addressed because the overwhelming majority of children labor in this field—no pun intended. The United States Department of Labor has concluded that "[m]ore of the world's working children are employed in agriculture than in any other sector."¹²² In 1999 the ILO estimated that agriculture was the dominant occupation for child laborers, averaging 70 to 74 percent, and rising as high as 90 to 95 percent in some countries.¹²³ In 2007, the United Nations Food and Agriculture Organization (FAO) estimated that 70 percent of child labor, about 132 million children between five and fourteen years old, was concentrated in the economic sector of agriculture.¹²⁴ Children comprise one-third of the worldwide agricultural work force.¹²⁵ It is a truism that "child labor rates are higher in rural areas, where the work is predominantly agrarian."¹²⁶

117. *How Many Children Work?*, *supra* note 113.

118. Zoe Chafe, *supra* note 25.

119. *Global Child Labour Figures Fall*, *supra* note 8.

120. ILO, Report of Director General to the 95th International Labour Conference, *The End of Child Labour: Within Reach* 6-7 (2006), available at <http://www.ilo.org/public/english/standards/relm/ilc/ilc95/pdf/rep-i-b.pdf>.

121. Central Intelligence Agency, *The World Factbook: Japan*, <https://www.cia.gov/library/publications/the-world-factbook/geos/ja.html#People> (last updated Feb. 24, 2009).

122. JOAQUIN F. OTERO, U.S. DEP'T OF LABOR, 2 BY THE SWEAT AND TOIL OF CHILDREN: THE USE OF CHILD LABOR IN U.S. AGRICULTURAL IMPORTS & FORCED AND BONDED CHILD LABOR 29 (1995), <http://www.dol.gov/ilab/media/reports/iclp/sweat2/sweat2.pdf>.

123. *Facts and Figures on Child Labour 1999*, *supra* note 2, at 4.

124. Food and Agriculture Organization of the United Nations, *Giving Children Back Their Youth*, (June 12, 2007), <http://www.fao.org/newsroom/en/news/2007/1000591/index.html>.

125. *U.N. Official: End Child Labor On Farms*, UPI, June 13, 2007, http://www.upi.com/Top_News/2007/06/13/UN_official_End_child_labor_on_farms/UPI-64101181729858/

126. SCHMITZ, *supra* note 19, at 5.

Historically, children helped their parents by working on family owned and operated farms. In the twentieth century the growth of large agribusiness corporations placed significant economic strains on small farms and plantations. Globalization has continued and accelerated the colonial trend whereby diverse farming of a variety of crops was abandoned in favor of cash crop production. The involvement of peasants and farmers, who had been self-sufficient for centuries, into the cash economy, sweeping across the world, resulted in serious repercussions which unfold to this day. The change from independent production and usage of food crops to sale of one cash crop and purchase of goods made by others, exposed farmers to a wider spectrum of consumables, but also placed them at the mercy of those who set the prices for cash crops, primarily speculators and middle-men in Western countries. From the perspective of the individual farmer, the economic law of supply and demand poses even more problems. A farmer who labors hard, and produces a larger than normal crop, often finds that the overall price diminishes when he attempts to sell the produce. Additionally, when a number of farmers are simultaneously selling their harvest, prices drop and middlemen reap the benefit.¹²⁷ Dependence on the fickle ups and downs of world market pricing makes farmers extremely vulnerable. The historical emphasis on agricultural sustainability has now been replaced by a concentration on profitability. Sandy Hobbs has commented that:

[The] consequence is to increase and intensify the level of exploitation needed in order for [farmers, peasants] to compete with large agribusinesses. Essentially this means that families have to work longer and harder for smaller returns and have to employ the labor of all their family members for longer and more intensive periods. Children in rural and peasant sectors of the world economy remain a vulnerable and exploited source of labor as a consequence.¹²⁸

When families lose their land for economic reasons, or because of their inability to compete with agribusiness, the ensuing disruption can sometimes result in the children being the only employable members of that unit. Because they are more nimble for a variety of tasks, more passive, easily exploited, and incapable of defending their rights, children are a more desirable work force, particularly for agricultural labor.

The ILO in Convention No. 138 on the Minimum Age for Admission to Employment and in Recommendation No. 146 established a minimum age of fifteen years, but allowed underdeveloped economies to lower that minimum age to fourteen.¹²⁹ The Convention sought to address the issue with respect to "plantations and other agricultural undertakings mainly producing for commercial purposes," but excluded family holdings geared to local consumption.¹³⁰

127. See generally SEABROOK, *supra* note 79.

128. SANDY HOBBS, CHILD LABOR: A WORLD HISTORY COMPANION 6-7 (1999).

129. ILO, Minimum Age Convention, art. 2.3-2.4, No. 138, June 19, 1976, *available at*: <http://www2.ohchr.org/english/law/ageconvention.htm>; ILO, Minimum Age Recommendation, No. 146, June 25, 1973, *available at*: <http://www.ilo.org/ilolex/cgi-lex/convde.pl?R146>.

130. ILO, Minimum Age Convention, *supra* note 130, at 5.3; ILO, Minimum Age

The labor of children also assists large agribusiness enterprises in the harvesting of crops and in other work, much of it very dangerous for their health and development. UNICEF has estimated that children involved in commercial agricultural work constitute about a third of the work force in some countries.¹³¹ In Brazil, children are put to work harvesting cane for sugar plantation companies, where they are required to use machetes that put them at risk of being mutilated.¹³² According to one estimate, approximately one-third of the workers in El Salvador's sugarcane plantations are children younger than eighteen.¹³³

There has been significant concern in the United States of America, particularly in agricultural areas of California, about the utilization of child labor from migrant families who work seasonally harvesting crops. Based primarily in Mexico and Central America, these migrants bring their children to the United States, where "[d]ire poverty forces many farmworker parents to risk their children's educational future by asking them to help augment family income helping to harvest crops."¹³⁴ The exposure of children to exhausting work, inclement weather, pesticides, fertilizer, and other perils can result in life-long health and developmental problems. Accusing the United States Government of failing to protect these children, Human Rights Watch pointed out that "[h]undreds of thousands of children work under dangerous and grueling conditions as hired laborers in US agriculture. These children risk serious illness, including cancer and brain damage, from exposure to pesticides and suffer high rates of injury."¹³⁵ The same organization pointed out that children in agriculture suffer 40 percent of work-related fatalities involving minors,¹³⁶ and it concluded that "[a]griculture is the most dangerous occupation open to minors in the United States."¹³⁷

The ILO found that "in rural areas, more children die of exposure to pesticides than from the most common childhood diseases put together."¹³⁸ Children in the developing world who are employed in agriculture "tend to have lower weight and life expectancy at birth, higher mortality and morbidity rates, greater incidence of malnutrition, and lower school enrollment and completion rates than do urban children. This combination of risks makes rural working children especially vulnerable."¹³⁹

Recommendation, *supra* note 128.

131. Camp Yeakey & Brooks Buck, *supra* note 68, at 299.

132. *Id.*

133. *El Salvador: Child Labor on Sugar Plantations*, HUMAN RIGHTS WATCH, June 9, 2004, <http://www.hrw.org/en/news/2004/06/09/el-salvador-child-labor-sugar-plantations>.

134. Child Labor Coalition, *Children in the Fields: Inequitable Treatment of Child Farmworkers* (2007), <http://www.stopchildlabor.org/Consumercampaigns/fields.htm>.

135. *Monthly Email Update: Urge the United States to Protect Child Farmworkers*, HUMAN RIGHTS WATCH, Apr. 2001, <http://199.173.149.140/update/2001/04.html#4>.

136. *Abusive Child Labor Found in U.S. Agriculture*, HUMAN RIGHTS WATCH, June 19, 2000, <http://www.hrw.org/en/news/2000/06/19/abusive-child-labor-found-us-agriculture>.

137. Victoria Riskin & Mike Farrell, *Profiting on the Backs of Child Laborers*, L.A. TIMES, Oct. 12, 2000, at B11.

138. Camp Yeakey & Brooks Buck, *supra* note 68, at 299.

139. OTERO, *supra* note 123, at 38.

The National Consumers League (founded 1899), through the Child Labor Coalition, complained in 1999 about the “dismal” record of the United States Congress with respect to supporting international anti-child labor initiatives.¹⁴⁰ In fairness, it has to be pointed out that the United States has allocated approximately \$30 million per year to international programs working to end exploitative child labor.¹⁴¹ Given the scale of the problem, it will take more than money to improve this situation.

The utilization of children in agricultural enterprises of all types is global. In Tanzania, children are expected to perform a variety of tasks on tobacco plantations, including clearing the fields, sowing the seedlings, fertilizing the plants, and plucking tobacco leaves.¹⁴² Children are exposed not just to extremely tiring work, but to possible snake bites, sickness, and injuries.¹⁴³ Children are paid twelve cents per day in Madagascar for picking vanilla orchids between 4:00 a.m. and 7:00 a.m. and for harvesting vanilla beans.¹⁴⁴ A 1999 survey of child work activities in South Africa concluded that labor in commercial agriculture qualified as high-risk for children.¹⁴⁵ In Egypt, small children are selected to pick delicate jasmine flowers at night because the essence is the purest at this time.¹⁴⁶ These children work barefoot in the mud without lights, and are subject to caning if they stop to avoid the swarms of mosquitoes prevalent in those fields.¹⁴⁷ Jasmine is a favored ingredient in the expensive perfumes and cosmetics that adorn women in the developed world. In Mexico, approximately fifty thousand children between the ages of five and fourteen work each year to harvest tobacco, and expose themselves to pesticides and nicotine as they work.¹⁴⁸ Children in India, employed to roll a form of local cigarette, suffer high rates of tuberculosis and other lung diseases.¹⁴⁹ In Egypt, where the cash crop is cotton, over one million children work to remove insects from the cotton plants.¹⁵⁰ Children in Ecuador have worked in banana plantations, while airplanes sprayed fungicides from above.¹⁵¹ In some Latin American and Asian farms children are tasked to hold up flags to

140. Press Release, Child Labor Coalition, Child Labor Abuses Remain a Problem in the U.S., The Child Labor Coalition's Response to the State of the Union Address (Jan. 1999), <http://www.stopchildlabor.org/pressroom/childpr122.html>.

141. Riskin & Farrell, *supra* note 138, at 11.

142. *About Child Labour: Children at the Tobacco Estates*, ECLT FOUNDATION, ¶ 6, <http://www.eclt.org/about/tobacco.html> (last visited Feb. 11, 2009).

143. *Id.* ¶ 7.

144. OTERO, *supra* note 121, at 44.

145. Judith Streak, *Harvesting Childhood: Causes, Nature and Impact of Child Agricultural Labour*, 5 HSRC REV., No. 3, 6 (Sept. 2007) (Human Scis. Research Council, Pretoria, South Africa), available at <http://www.hsrb.ac.za/index.php?module=pagesetter&type=file&func=get&tid=25&fid=pdf&pid=20>.

146. OTERO, *supra* note 123, at 41.

147. *Id.*

148. Reality Check, End Child Labor Involved in the Manufacturing of Tobacco Products, ¶ 4 (Jan. 11, 2008), <http://www.gopetition.com/online/16295.html>.

149. *Id.* ¶¶ 5-6.

150. HUMAN RIGHTS WATCH, BACKGROUND: CHILD LABOR IN AGRICULTURE, ¶ 4 (2002), <http://www.hrw.org/legacy/backgrounder/crp/back0610.htm>.

151. *Id.* at ¶ 11.

guide planes spraying pesticides.¹⁵² These child workers rarely wear any protective clothing and suffer direct exposure.¹⁵³

An idealized version of agrarian life envisions children working in a healthy outdoor environment, getting lots of fresh air and exercise, and developing physically because of these benefits. The reality is that one in eight children in agriculture suffer some consequent form of injury or illness.¹⁵⁴ Economists Alessandro Cigno and Furio C. Rosati have concluded that a “child working on a farm is exposed to dangerous tools and machinery, to chemicals, to water, soil and animal-borne infection, to heavy lifting and poor posture, as well as to heatstroke and sheer exhaustion.”¹⁵⁵ Where, as in most parts of Africa, agriculture is the mainstay of the economy, the possibility of alleviating the problem of exploitative child labor becomes a real challenge, a problem compounded by tribal and ethnic warfare, refugee crises, terrorism, food shortages, drought and famine, as well as diseases such as HIV/AIDS.¹⁵⁶

Any research of the terrible conditions, to which children working in agriculture are regularly exposed, can only lead to the conclusion that the work definitely falls under the category of “hazardous.” Accordingly, the provisions of the Convention on the Worst Forms of Child Labour should apply. These provisions state that the exposure of children to hazardous labor is a matter of urgency, and one requiring expeditious action toward elimination and eradication. There can be little doubt that agricultural work, involving long hours, night labor, exposure to dangerous machinery, and exposure to hazardous substances and chemicals, would qualify under the ILO’s Recommendation No. 190.

One of the great tragedies of globalization is that the widespread dissemination of consumer products and foods—a desirable outcome—has been achieved by the exploitation of children and slaves in many parts of the primary producing countries. In recent years, there has been considerable publicity about the connection between the Western world’s favorite delectable treat, chocolate, and brutal and oppressive labor practices in the countries where cocoa beans are grown.¹⁵⁷ The shock and outrage in the West have been genuine. Who could have associated the pleasurable consumption of chocolate in our Western world with causing so much misery in African nations like the Ivory Coast and Ghana, which provide the raw material for this most wondrous of sweets? The Ivory Coast produces approximately 43 percent of the cocoa of the world, but has utilized over

152. ILO, *Child Labour in Agriculture* 1 (1999), <http://www.ilo.org/public/english/comp/child/download/pdf/agriculture.pdf>.

153. *Id.*

154. ALESSANDRO CIGNO & FURIO C. ROSATI, *THE ECONOMICS OF CHILD LABOUR* 153-54 (2005).

155. *Id.* at 154.

156. Food & Agric. Org. of the U.N., *Agriculture Accounts for 70 Percent of Child Labour Worldwide*, Sept. 14, 2006, <http://www.fao.org/newsroom/en/news/2006/1000394/index.html> [hereinafter *Child Labour Worldwide*].

157. See, e.g., Carmel Egan, *Bitter Life of Chocolate's Child Slaves*, *THE AGE* (Melbourne, Australia), Nov. 4, 2007, <http://www.theage.com.au/news/national/bitter-life-of-chocolates-child-slaves/2007/11/03/1193619205911.html?page=fullpage#contentSwap1>.

100,000 children, some of them slaves, in this task.¹⁵⁸ That our love for chocolate should encourage slavery and child labor proved to be an inducement for some international action. In 2001, a meeting of major stakeholders resolved to eliminate the worst forms of child labor in cocoa production.¹⁵⁹ A year later in 2002, the International Cocoa Initiative Working Towards Responsible Labour Standards for Cocoa Growing was founded under Swiss law in order to deal with the agenda of eliminating child labor and slavery in cocoa production.¹⁶⁰ African heads of state also acted by holding summits on cocoa in 2006 and 2007. The African leaders eventually resolved to act to eliminate the worst abuses of child labor from cocoa farms.¹⁶¹ However, in June 2007 proponents of the Global March Against Child Labour reported that approximately 284,000 children still worked in cocoa production in West Africa.¹⁶² Meanwhile, the Dutch manufacturer Royal Verkade decided to use 100 percent Fair Trade cocoa and sugar in its sweets,¹⁶³ a telling and important example of corporate reaction to the expression of outraged world public opinion. Should more corporations pledge to remove child labor and slavery from their product lines, the profit motive—which fuels these two evils in the primary producing nations—would immediately disappear.

Such victories as the Royal Verkade decision are few, but they are significant. These victories highlight the fact that when governments are slow to respond, public opinion, the media, and the Internet can make a very meaningful and constructive difference. Were child labor to become a major topic in international media outlets, the naming and shaming of perpetrators might well result in some alleviation. The last thing any multinational corporation needs is adverse publicity, associating the company with malevolent practices such as slavery and child labor. The challenge, however, is to bring these issues to the forefront of media attention, and to ensure persistent publicity about the problem.

The exposure of dangerous and hazardous work in agriculture is rendered more complicated by the isolation of agrarian life; by the relatively smaller population base; and by the prevalence of the “company town” phenomenon. In such situations, one corporation acts as the sole source of employment, and the workers are in constant fear of jeopardizing that situation, which at least brings them some work and income, albeit with hazardous conditions.

158. *Id.* ¶¶ 3-4.

159. ILO, Int'l Programme on the Elimination of Child Labour, *Combating Child Labour in Cocoa Growing*, ¶ 2 (2005), http://www-ilo-mirror.cornell.edu/public/english/standards/ipecc/themes/cocoa/download/2005_02_cl_cocoa.pdf.

160. *Id.* at ¶ 5.

161. *African Heads of State Move to Eliminate Child Labour from Cocoa Farms*, THE TIDE (Nigeria), Sept. 24, 2007, (on file with Den. J, Int'l Law & Pol.).

162. Press Release, Stop Child Labour in Agriculture: World Day Against Child Labour, Global March Against Child Labour (June 12, 2007), <http://www.globalmarch.org/events/wdacl-2007.php>.

163. 20% Increase in Fair-Trade Chocolate Worldwide, Stop the Traffik Blog, July 16, 2008, <http://stopthetraffik.wordpress.com/2008/07/16/20-increase-in-fair-trade-chocolate-worldwide/>.

It is also true that governments, particularly in developing countries, lack the resources to monitor the agricultural sector.¹⁶⁴ This enables all types of irregularities to persist, and laws are routinely overlooked because there is effectively no enforcement mechanism on site. Rural laborers, particularly in the developing world, are rarely unionized and hence their exploitation is even easier.¹⁶⁵ As the United States Department of Labor concluded: “[t]he use of child labor in agriculture is thus, to a large degree, invisible – uncounted, often undocumented, and little understood.”¹⁶⁶

Globally, as the ILO has complained, “protective legislation is limited in agriculture.”¹⁶⁷ Even where laws exist, implementation is problematic. The problem is the same with respect to small family farms and larger plantations and agribusiness enterprises. Family farms are widely dispersed, scarcely regulated, and part of the informal economy. Quantifying and monitoring the work children and adults perform on family farms is next to impossible without vast bureaucratic teams of inspectors, well beyond the fiscal capacity of most nations in both the developing and developed world. Plantations, particularly those engaged in cash crop production, often hire an adult worker – usually a migrant – who comes, accompanied by children, to accomplish the daily quota of work. The registered worker is the adult. The children, even though they work all day, do not even figure on the documentation and they are not directly paid. When farm owners are inclined to hire undocumented immigrants, the problems of verifying the role of children become even more complex.

There is also a serious lack of knowledge in the rural sectors of most societies regarding the short and long-term health risks of certain practices, such as working with chemicals. Many small farmers and peasants, as well as farm workers, are barely literate, and lack the knowledge that would help to protect themselves and their children from exposure to toxic materials. Ironically, it is only when the middle and upper classes get sick from eating a particular contaminated food such as spinach or lettuce that the issues of hygiene in the fields and pertaining to the crops are rigorously investigated.

One consequence of the deterioration of rural patterns of life, and of traditional village societies has been the migration to cities and towns of the youngest and brightest children.¹⁶⁸ The diminution of any chance of an economically viable way to make a decent living in the villages pushes young people to urban centers, both for individual and for family survival. Urban centers have grown with resulting slums, over-crowding, inadequate water and sewage facilities, filthy living conditions, and crime, resulting in the drastic deterioration of the standard of living. The problem is most pronounced in the poorer countries

164. OTERO, *supra* note 123, at 29.

165. See, e.g., Jadir Atunes, *Brazil: The WTO and Lula's 'Struggle' for the G-20*, WORLD SOCIALIST WEB SITE, Jan. 24, 2007, <http://www.wsws.org/articles/2007/jan2007/braz-j24.shtml>.

166. OTERO, *supra* note 123, at 22.

167. *Child Labour in Agriculture*, *supra* note 153, at 2.

168. See, e.g., U.N. Office for Coordination of Humanitarian Affairs, *Kyrgyzstan: Increase in Rural Youth Migration to Cities*, Aug. 17, 2005, <http://www.irinnews.org/Report.aspx?ReportId=28893>.

of the world, where, by one estimate, in 1950 approximately 17 percent of the population was urban.¹⁶⁹ By 2000, this had jumped to 40 percent, and it is forecasted to rise to 57 percent by 2025.¹⁷⁰ This rapid movement from rural to urban areas has increased the incidence of child labor.¹⁷¹ Although most children labor in the agricultural sector, ironically, the destruction of agrarian life results in additional risks to such children who wind up begging on the streets, or living lives of abject poverty in the slums of large cities like Mumbai, India; Djakarta, Indonesia; and any number of other similar places.

The destruction of rural life globally has also resulted in a worldwide flow of migrants searching for work in richer parts of the world. This globalized labor movement has led to the phenomenon of remittance families—whether in India, Cuba, Mexico, the Philippines, or in many other parts of the world—where parents and younger siblings are left behind, subsisting largely on the regular influx of money sent home by the member who has gone abroad to work.¹⁷² Their dependence on the departed family member is critical to their survival. Any diminution of that inflow of capital subjects the family in the home country to a lower standard of living. This is why an economic crisis, causing high levels of unemployment in the United States of America, can have dire consequences in rural India, villages in Africa, small towns in Central America, and in various parts of the world, where the loss of employment of the outside family member can push the entire dependent group to poverty and its consequent ills, such as child labor and slavery. Whether in a hundred years globalization will be perceived as a blessing or a curse remains to be seen. There have been benefits, but the problems do require urgent international attention if the world economy is to thrive.

Although the problems of child labor are quite daunting given the scope and number of children involved, globalization itself provides us with the tools to address this. I am not here considering the international law instruments, and domestic laws that prohibit such practices. Extensive research in this area can generate a sense of resignation to the reality that such laws are routinely violated and transgressed across the planet, and that such conventions and legal directives are not necessarily going to be the panacea once envisioned for the world's children. These fine words are inspirational, and do provide an international standard and an ideal to be achieved. In the field, no pun intended, these words are quite meaningless without some very strong supports. These would, in a committed and dedicated program to implement the international conventions, include economic assistance to small farmers to sell their crops at a fair market value, providing for consistent family income and enabling parents to hire adult workers instead of utilizing their children; the building of rural schools with provisions for electricity and computing services in rural areas, enabling children to participate in online educational programs and spend their day learning, even

169. CHILD LABOR: A GLOBAL VIEW 3 (Cathryne L. Schmitz et al. eds., 2004).

170. *Id.*

171. *Id.*

172. See John Page & Sonia Plaza, *Migration Remittances and Development: A Review of Global Evidence*, 15 (Supp. 2) J. OF AFRICAN ECONOMIES 245, 246 (2006).

while they are at home; the foundation of small credit banks with fair interest rates to prevent farmers from resorting to money-lenders and loan sharks; the insistence that agribusiness enterprises globally document, account for, and pay every employee on the basis of established wage structures. Additionally, such enterprises must be compelled to provide on-site benefits such as drinking water, safety clothing, day care for infants, toilet facilities for field workers, and so on.

There is a role for local governments in certifying that the agricultural products sold on the world market are not tainted by either slavery or child labor. This type of certification, now used in some economic sectors, would provide one of the best assurances that child labor is not being used. When employers realize that the cheap labor of children hinders, rather than facilitates their sales, they are unlikely to employ them. Were sovereign governments to dictate severe penalties for such use, including confiscation of the enterprise and even jail terms for perpetrators, the resort to child labor and slavery could be considerably decreased. For those who would doubt that governments around the world would be honest enough in the certification process as to meaningfully inspect and verify the compliance of enterprises with the law, one might point to the fact that we are blessed today with a world-wide communications network that is so all-encompassing that, if an infraction occurs in one country, the knowledge is disseminated globally in seconds.

If our farming communities around the world are equipped someday soon with electricity and computers, even if government servants become bribed accomplices in the commission of such crimes, the entire community could act to generate worldwide exposure. It is evident that even the most troubled parts of the world, specifically in Africa, have adopted technological innovations like the cell phone with an enthusiasm that is quite amazing, and have now utilized that gadget for ever more innovative purposes such as transfers of money and so on.¹⁷³ Where globalization has caused a proliferation of the problems associated with child labor and the misery that ensues, it might be timely to utilize the tools and methods of globalization to remedy the problem, and alleviate the lives of millions of our most precious persons—the children of our world.

The first step would have to be taken with respect to child labor in agriculture. Aside from the sheer numbers of children engaged in agriculture, a significant proportion of such work is hazardous in a number of ways for child physical development and wellbeing. As Jennie Dey DePryck, Chief of the United Nations Food and Agriculture Organization's Rural Institutions and Participation Service, has stated: "[i]f we want to eliminate the worst forms of child labour, greater effort needs to be made to address child labour in agriculture."¹⁷⁴

D. Child Labor in Armed Conflict

Any assumption that the world was a more peaceful place during the latter half of the twentieth century because the Cold War had somehow averted a Third

173. See, e.g., Shashank Bengali, *Cell Phones Power Financial Revolution in Africa*, MCCLATCHY WASH. BUREAU, Feb. 10, 2009, <http://www.mcclatchydc.com/world/story/61909.html>.

174. *Child Labour Worldwide*, *supra* note 157, ¶ 17.

World War, is belied by the fact that in that period there were well over a hundred wars. These wars ranged from tribal and ethnic conflicts fought in small geographical areas, to significant and deadly national conflicts such as those between India and Pakistan and between Israel and various Arab states. Indeed, one consequence of the Cold War was the emphasis on the patron-client relationship between the two superpowers (U.S.A. and U.S.S.R.) and smaller, less powerful nations that depended on these mighty nations for arms, financial aid, and support at the United Nations.¹⁷⁵ Superpowers fought each other to the last drop of the client state's blood. Whether the arena was Central America, or the Middle East, or Africa, the deadly conflicts destabilized countries that were desperately trying to create viable governing systems after their long and economically draining experience with colonialism. Ironically, when the superpowers personally got involved in conflict, such as the American experience in Vietnam and the Soviet debacle in Afghanistan, the consequence was more than painful both militarily and on their national psyche.

War-ravaged states were prey to economic predators such as the raiders who looted diamonds in Africa and sold them for guns, resulting in global concern about the so-called "conflict diamonds." The instability of governments, particularly in Africa, put civilians at the mercy of bands of thugs who roamed the countryside looting, pillaging, and destroying homes and crops. While the period between 1945 and the present has not seen a global war, it has been witness to extreme terror, genocide, and human rights violations in a number of countries. These modern manifestations of war rarely adhere to any traditional rules of war, or any prohibitions against the abuse of civilians. Whether the particular conflict is classified as a rebellion, an act of terrorism, guerrilla warfare, civil war, a war to pursue national self-determination, or any other title, for civilians the consequences are invariably horrifying. Commenting on the changing nature of modern warfare, Radhika Coomaraswamy, Special Representative of the Secretary-General for Children and Armed Conflict, has explained that the distinction "between civilians and combatants is becoming increasingly blurred."¹⁷⁶ The intra-state nature of these conflicts, and the religious and ethnic polarization that promotes such violence have resulted in wars that are far more brutal and more directed at civilian targets.¹⁷⁷ UNICEF has estimated that civilian casualties of such conflicts in recent decades account for over 90 percent of the associated deaths, with approximately half of those being children.¹⁷⁸

175. Kingsley Banya & Juliet Elu, *The Dilemma of Child Soldering in Sub-Saharan Africa*, in 4 ADVANCES IN EDUCATION IN DIVERSE COMMUNITIES RESEARCH, POLICY AND PRAXIS 177, 181-82 (Carol Yeakey et al. eds., 2006).

176. Press Release, Office of the Special Representative of the Secretary General for Children and Armed Conflict, Human Rights Council: Changing Nature of Warfare Makes Children More Vulnerable (Sept. 9, 2008), <http://www.un.org/children/conflict/pr/2008-09-09189.html> [hereinafter *Changing Nature of Warfare*].

177. See generally Banya & Elu, *supra* note 176 at 177-206.

178. UNICEF, *Children in Conflict and Emergencies*, http://www.unicef.org/protection/index_arm edconflict.html (last visited Feb. 10, 2009).

Most horrifying of these human rights violations has been the proliferation of the use of children in armed conflict. This has resulted in utilization of children by rebels, military detention of children, and the emergence of child suicide bombers. This crisis has in recent times prevailed in parts of Africa, Asia, Latin America, Europe, and the Middle East.¹⁷⁹ In most of these regions, the use of children is ongoing. Special Representative Coomaraswamy highlighted the activities of Burma, Sudan, and Uganda, and the recruiting of children by the Tamil Tigers in Sri Lanka and by rebel groups in Colombia, Burma, and Sudan.¹⁸⁰

In a number of countries children have been kidnapped and forced to become child soldiers, a clear and egregious violation of international law, and a practice that involves state and non-state actors, conventional armies, and terrorist groups. It is quite difficult to enumerate with absolute precision the numbers of children involved, and hence the statistics diverge. The Coalition to Stop the Use of Child Soldiers concluded in its *Global Report 2008* that the “military recruitment of children (under-18s) and their use in hostilities is a much larger phenomenon that still takes place in one form or another in at least 86 countries and territories worldwide.”¹⁸¹ In October 2008, the United States Department of Labor estimated that there were over 300,000 children under the age of eighteen fighting as child soldiers in over thirty countries.¹⁸²

Children have also been used to perform menial chores for armies on the move. They have been brutally used as sex slaves by these marauding paramilitary bands. The range of activities inflicted on children is very extensive. They are “used in armed conflict as soldiers, spies, guards, human shields, human minesweepers, servants, decoys and sentries.”¹⁸³ Children have been tortured, raped, mutilated, humiliated, and degraded on a scale that is almost incomprehensible in terms of the horrors to which they have been subjected. Cathryne Schmitz has estimated that a combination of poverty, isolation, and upheaval make children vulnerable. She has also emphasized the large numbers involved, stating that as “many as three hundred thousand child soldiers as young as eight years of age have recently been used in at least thirty-three armed conflicts globally.”¹⁸⁴ The widespread nature of this brutal phenomenon can be gauged by the efforts of the United States Department of Labor to fund research and initiatives dealing with child soldiers in Afghanistan, Liberia, Sierra Leone, Uganda, Burundi, Democratic Republic of Congo, Republic of Congo, Rwanda,

179. *Changing Nature of Warfare*, *supra* note 177.

180. *Id.*

181. Coalition to Stop the Use of Child Soldiers, *Child Soldiers: Global Report 2008*, 12 (2008), http://www.childsoldiersglobalreport.org/files/country_pdfs/FINAL_2008_Global_Report.pdf [hereinafter *Child Soldiers: Global Report 2008*].

182. U.S. Dep't of Labor: Bureau of Int'l Labor Affairs, *Children Affected by Armed Conflict*, www.dol.gov/ilab/programs/ocft/armedconflict.htm (last visited Feb. 13, 2009) [hereinafter *Children Affected by Armed Conflict*].

183. U.S. Dep't of Labor, Bureau of Int'l Labor Affairs, *The Worst Forms of Child Labor*, in *CHILD LABOR AND SWEATSHOPS* 21 (Ann Manheimer ed., 2006).

184. SCHMITZ, *supra* note 19, at 7.

and the Philippines.¹⁸⁵ The Lord's Resistance Army in Uganda has particularly targeted children for recruitment in its war against the Ugandan Government.¹⁸⁶ Some children who attempted to escape were ruthlessly clubbed or bayoneted to death.¹⁸⁷

Once captured, these children have been subjected to bestiality of a kind that is beyond description. As part of their initiation into the environment of violence, they can sometimes be forced to kill members of their own families.¹⁸⁸ In addition to committing murder, children are made to witness gruesome torture to desensitize them to violence. In order to turn them into willing killers, they are required to indulge in mutilation, often of young children and babies, cannibalism, and the commission of genocide, as occurred in Rwanda in 1994. Approximately twenty thousand civilians, half of them children, suffered forcible amputation, some at the hands of child soldiers, during the bloody and brutal war between 1991 and 2002 in Sierra Leone.¹⁸⁹

Children involved in armed conflict are routinely given access to drugs to numb them sufficiently to tolerate the brutality they witness. In an interesting and compelling study authors Kingsley Banya and Juliet Elu have described the phenomenon of child soldiers, with particular reference to Africa. They point out that "child soldiers become model soldiers. They are preferred because blessed with great endurance, the ability to survive on relatively little food and water, child soldiers accept orders with few questions."¹⁹⁰

Most shocking of all is the fact that children are being forcibly recruited, not just into the paramilitary bands of roving renegades, which have terrorized millions of civilians, but also into national armies. According to an article in the International Herald Tribune, "Burma's military regime may have the largest number of child soldiers in the world. Thousands of children serve in Burma's national army, swept up in massive recruitment drives to offset high rates of desertion and a lack of willing volunteers."¹⁹¹ Jo Becker, Children's Rights Advocacy Director for Human Rights Watch, has deplored the fact that China's influence in favor of its ally, the military regime that rules Burma, has precluded the United Nations Security Council (in which China occupies a permanent seat) from acting decisively to rectify the Burmese Government's abuse of its children.¹⁹² Burma has simply denied that it utilizes child soldiers. Becker concludes: "[i]t's hard to decide whose actions are more shameful – Burma's

185. *Children Affected by Armed Conflict*, *supra* note 183.

186. *Armed Conflict: Child Casualties of War*, HUMAN RIGHTS WATCH, 2006, <https://199.173.149.140/reports/2001/children/9.htm>.

187. *Id.*

188. Aisling Ireland, *Sierra Leone - Human Rights*, BELLAONLINE, <http://www.bellaonline.com/articles/art24082.asp>.

189. Greg Campbell, *Blood Diamonds*, AMNESTY INTERNATIONAL USA, <http://www.amnestyusa.org/amnestynow/diamonds.html>.

190. Banya & Elu, *supra* note 176, at 184.

191. Jo Becker, *Child Soldiers and the China Factor*, INTERNATIONAL HERALD TRIBUNE, Sept. 12, 2008, available at <http://www.ihf.com/articles/2008/09/12/opinion/edbecker.php>.

192. *Id.*

exploitation of children as soldiers or the Security Council's failure to condemn the practice."¹⁹³

In August 2008 the Secretary General of the United Nations reported that in Chad children continued to be recruited into the Chadian National Army, despite commitments by the government of that country to stop this practice and demobilize children.¹⁹⁴ The ongoing conflict in Darfur has resulted in recruitment of children by both the government and the rebels.¹⁹⁵ Sima Samar, United Nations Rights Rapporteur in Sudan, condemned the widespread use of children in the conflict, labeling the practice a "clear violation of international human rights law."¹⁹⁶

Pointing out that recruitment of children is a war crime, UNICEF revealed the plight of thousands of Colombian children forced into armed groups. UNICEF has reported that, "[i]n 2003, according to the UN Secretary General, 7,000 children in Colombia were in the ranks of armed groups, and an additional 7,000 were involved in urban militias."¹⁹⁷

Children as young as five have been kidnapped and conscripted in countries like Nepal.¹⁹⁸ The possible use or abuse of children by terrorist organizations has also garnered much attention in recent years. Some religious schools in Pakistan were reportedly recruiting and training children as young as seven for work as militants and suicide bombers.¹⁹⁹ The youth of these child warriors makes it difficult for an opposing conventional army to fight back in a determined manner. For instance, in the Philippines government forces were urged whenever possible to arrest rebel child soldiers and hand them to social workers.²⁰⁰

For those children trapped in this cycle of violence, the road back is extremely difficult. They suffer from a variety of psychological and physical problems; their health is severely compromised. The emotional scars on such young minds continue for years. Kidnapped girls in particular are the victims of continuous rape and some become mothers while in captivity. Demobilization has been the goal of

193. *Id.*

194. Letter from Steve Crawshaw, United Nations Advocacy Director, to UN Security Council members on Child Soldiers in Chad, Sept. 3, 2008, available at <http://www.hrw.org/en/news/2008/09/03/letter-un-security-council-members-child-soldiers-chad>.

195. Opheera McDoom, *Khartoum, Darfur Rebels Use Child Soldiers-UN Rights*, REUTERS, July 10, 2008, <http://www.alertnet.org/thenews/newsdesk/MCD055318.htm>.

196. *Id.*

197. UNICEF, *Armed Groups in Colombia Stealing Childhood From Girls and Boys Alike*, Aug. 25, 2008, http://www.unicef.org/infobycountry/colombia_45354.html.

198. See generally *Ex Nepalese Child Soldiers More Likely to Have Mental Health Problems*, THAI INDIAN NEWS, Aug. 13, 2008, http://www.thaindian.com/newsportal/entertainment/ex-nepalese-child-soldiers-more-likely-to-have-mental-health-problems_10083413.html.

199. U.N. Office for the Coordination of Humanitarian Affairs, *Pakistan: Child Soldiers in Swat Valley*, May 26, 2008, <http://www.irinnews.org/report.aspx?ReportID=78400>.

200. Joel Guinto, *Palace: Child Warriors to be Avoided Unless They Fire First*, INQUIRER.NET, Sept. 18, 2008, <http://newsinfo.inquirer.net/breakingnews/nation/view/20080918-161456/Palace-Child-warriors-to-be-avoided-unless-they-fire-first>.

UNICEF, but accomplishing this aim has been a challenge.²⁰¹ Father Mark Hickey, a priest working in Sierra Leone to help demobilized child soldiers, commented that they “have a total disdain for civilian life.”²⁰² Often their home communities are frightened about inviting trained killers into their midst. Children brought up in a culture of bestiality and violence find it hard to accommodate themselves to the ways of peace and nonviolence. An untold number are drug addicts and even addicted to violence, and developing countries, where such child soldiers are a problem, lack extensive counseling services to guide reintegration back into normal life. When one compares the difficulties that confronted adult Vietnam War veterans in their adjustment back to American life, one can appreciate how much more complex the challenges are facing demobilized child soldiers.

The practice of using children to fight war continues on a global basis, despite the fact that it is a war crime prohibited by the Geneva Convention, which prevents recruitment under age fifteen,²⁰³ and by the Convention on the Rights of the Child.²⁰⁴ Compulsory recruitment of children is classified as one of the “worst forms of child labor” according to the International Labor Organization’s Convention No. 182 adopted in 1999.²⁰⁵ Additionally, the UN Optional Protocol on the Use of Children in Armed Conflict precludes recruitment of children under the age of eighteen.²⁰⁶ This international law instrument entered into force in 2002.²⁰⁷

In 2004 and 2005, the United Nations Security Council adopted Resolutions 1539 and 1612, respectively, “[c]alling for the establishment of a monitoring and reporting mechanism on children and armed conflict,” an agenda that has been implemented and has resulted in far more international awareness about the problem.²⁰⁸ There has been no dearth of global concern about this aspect of child labor, one of its worst manifestations. It is important to note that, although the problem of the abuse of children in military labor is very prevalent in Africa, such action is contrary to the African Charter on the Rights and Welfare of the Child, which enjoins signatories to “take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain, in particular, from recruiting any child.”²⁰⁹

Responding to universal anxiety about the plight of thousands of child soldiers and camp followers, the United States Department of Labor in 2003 hosted an international conference of stakeholders on the issue of *Children in the*

201. *Child Soldiers Riot in Burundi*, THE TIMES, May 14, 2008, <http://www.thetimes.co.za/News/Article.aspx?id=766259>.

202. Banya & Elu, *supra* note 176, at 199.

203. *Id.* at 191.

204. UNICEF, *Armed Groups in Colombia*, *supra* note 198.

205. See Worst Forms of Child Labour Convention, *supra* note 111.

206. U.S. Dep’t of Labor, *supra* note 184.

207. UNICEF, *Children in Conflict and Emergencies*, *supra* note 179.

208. *Child Soldiers: Global Report 2008*, *supra* note 182, at 14.

209. Org. of African Unity, African Charter on the Rights and Welfare of the Child art. 22, July 11, 1999, OAU Doc. CAB/LEG/24.9/49 (1990).

*Crossfire: Prevention and Rehabilitation of Child Soldiers.*²¹⁰ On October 3, 2008, United States President George Bush signed the Child Soldiers Accountability Act, which criminalized the recruitment or usage of soldiers under fifteen, and permitted American prosecution of any individual on United States soil, even if the affected children were in another country.²¹¹ The level of American interest in this matter can be gauged by the fact that this legislation passed unanimously through both the House of Representatives and the Senate.²¹² Its sponsor, Illinois Senator Richard Durbin stated that:

[The] United States must not be a safe haven for those who exploit children as soldiers. Period. The use of children as combatants is one of the most despicable human rights violations in the world today and affects the lives of hundreds of thousands of boys and girls who are used as combatants, porters, human mine detectors and sex slaves. The power to prosecute and punish those who violate the law will send a clear signal that the U.S. will in no way tolerate this abhorrent practice.²¹³

Although there have been a number of expressions of concern, and the production of significant international directives prohibiting the military usage of children, the practice continues and it is unlikely to end in the near future. Exposing thousands of children to such extreme forms of violence and degradation will undoubtedly make for a difficult transition to normal life once the wars that have enslaved them come to an end. Children find it far harder to reintegrate into society than adults.²¹⁴ Having become accustomed to basing their reactions on violence, any adjustment to a more flexible range of non-violent responses is difficult. Sometimes they are so damaged by the violent world in which they operated that their communities and villages cannot accept them back. By not acting decisively to prohibit this terrible abuse of young people, the international community dooms, not just the future of these victims, but the possible path back to peace for their entire societies. Carol Bellamy, Executive Director of UNICEF, has stated that “[c]hild soldiers are a symptom of the wider problem, the complete neglect of whole generations.”²¹⁵

IV. INTERNATIONAL LAW ON CHILD LABOR

Michele Jankanish aptly emphasized the ILO's assertion, stating that “[a]lthough the fight against child labour will not be won through legislation, it certainly cannot be won without it.”²¹⁶ However, it has to be realized that if law

210. *Children Affected by Armed Conflict*, *supra* note 183.

211. Child Soldiers Accountability Act of 2008, Pub. L. No. 110-340, § 2242, 122 Stat. 3735, 3735-36 (2008), available at <http://npl.ly.gov.tw/pdf/6579.pdf>.

212. *United States: Bush signs Law on Child Soldiers*, HUMAN RIGHTS WATCH, Oct. 3, 2008, <http://www.hrw.org/en/news/2008/10/03/united-states-bush-signs-law-child-soldiers>.

213. *Id.*

214. See ILO, *Reintegrating Child Soldiers*, 2003, <http://www.ilo.org/public/english/employment/crisis/download/factsheet3.pdf>.

215. Banya & Elu, *supra* note 176, at 191.

216. Michele Jankanish, *Towards Improved Legislation*, in ACTION AGAINST CHILD LABOUR 41,

alone were able to achieve the effective elimination of child labor, the world would have nothing to worry about with respect to this crisis. M.K. Pandhe, President of the Centre of Indian Trade Unions, explained that the “problem of child labour cannot be tackled by just enacting a law as it does not touch the fringe of the cause of its existence,” which is poverty.²¹⁷ Unfortunately though there are numerous laws, internationally and within states, and innumerable expressions of adherence and commitment, the implementation of these progressive words falls far short of the promises being made.²¹⁸ Perhaps the entire world has to come to the realization that this sort of resort to words, without effective action, is stealing the childhood of millions of children who, if they survive, will grow up to be disaffected, disenchanting, and emotionally scarred adults. Such a realization might generate sufficient will to carry out the progressive legislation that already exists. If we fail to take urgent action in this regard, and continue to exploit children in our zeal for cheap food and consumer goods, we ought not to be unduly surprised if the consequential problems of economic unrest, grinding poverty, terrorism, rebellion, and civil war continue to plague our planet.

By not addressing child labor now, we doom more than simply those children at risk. We also imperil our own future in the West, and—most importantly—that of our children and grandchildren who will undoubtedly pay the price in global societal breakdown for our failure to deal with this crisis. An awareness of our complicity in this tragedy—we are after all the consumers of the products made by these children—may assist us to realize, that individually and collectively, we have to demonstrate enough moral commitment to outlaw this terrible exploitation, not just in word but in deed as well. This section will discuss a few of the significant international conventions that concern child labor, and then, in a separate segment, deal with the most important of all international law instruments, the Convention on the Rights of the Child. No article of this length can cover the plethora of international instruments that deal with the subject of child labor. However, the highlighting of selected examples of such international law on the subject can establish the important point that the legal foundation for the elimination of this heinous practice has already been laid. The problem is not with the absence of law, but with its non-implementation.

International efforts to curb child labor have a long and intricate history. Space and time constraints prevent a full detailed analysis of all the measures approved by the world community. With respect to the twentieth century, it is noteworthy that as early as 1919 an international convention addressed the issue of child labor, and passed the first Minimum Age (Industry) Convention No. 5 which directed a minimum age of fourteen for children working in industry.²¹⁹ Seventy-

43 (Nelien Haspels and Michele Jankanish, ed., 2000) (citing *Child Labour Law and Practice*, in CONDITIONS OF WORK DIGEST (Int'l Labour Org. 1991)).

217. Staff Reporter, *Law Alone Cannot Tackle Child Labour*, THE HINDU, Sept. 12, 2008, available at <http://www.hindu.com/2008/09/12/stories/2008091253790400.htm>.

218. *Id.*

219. ILO, *International Law and Child Labour*, <http://www.ilo.org/public/english/comp/child/standards/index.htm> (last visited Feb. 12, 2009).

two countries ratified that document.²²⁰ The convention was followed by a number of international agreements, which elucidated minimum age requirements for specific economic sectors such as agriculture, 1921; fisheries, 1959; and work underground, 1965.²²¹

In 1924 the League of Nations, predecessor of the United Nations, adopted the Geneva Declaration of the Rights of the Child.²²² That document stated that “mankind owes to the child the best that it has to give,” and directed that children be provided with a normal development, and that the “child must be put in a position to earn a livelihood, and must be protected against every form of exploitation.”²²³ The issue of exploitative child labor was specifically addressed by the ILO in its 1930 Convention No. 29, which prohibited all forms of “forced or compulsory labour.”²²⁴ This has been called “one of the most widely ratified ILO Conventions,” and yet the evil practice persists.²²⁵ In 1956 the United Nations called for the abolition of the exploitation of children under eighteen.²²⁶ The United Nations continued its interest in this issue with the 1959 Declaration of the Rights of the Child, which, in Principle 9, specified that “the child shall be protected against all forms of neglect, cruelty and exploitation. He shall not be the subject of traffic in any form.”²²⁷ With reference to the instant issue of child labor, this Declaration was forthright: “The child shall not be admitted to employment before an appropriate minimum age; he shall in no case be caused or permitted to engage in any occupation or employment which would prejudice his health or education, or interfere with his physical, mental or moral development.”²²⁸

In its landmark 1966 International Covenant on Civil and Political Rights, the United Nations General Assembly, in Article 8, forbade compulsory labor.²²⁹ That same year the adoption by the United Nations of the International Covenant on Economic, Social and Cultural Rights drew global attention to the issue of child labor in Article 10, which directed nations to “protect young people from economic exploitation and from work that might hamper or prevent their normal development.”²³⁰ Both the 1966 Covenants entered into force in 1976.²³¹

220. HOBBS, *supra* note 129, at 142.

221. ILO, *International Law and Child Labour*, *supra* note 220.

222. *Geneva Declaration of the Rights of the Child*, Sept. 26, 1924, League of Nations O.J. Spec. Supp. 21, at 43 (1924), available at <http://www1.umn.edu/humanrts/instree/childrights.html>.

223. *Id.*

224. HOBBS *supra* note 129, at 142.

225. See Panjabi, *supra* note 24 at 27.

226. Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, art. 1(d), Sept. 7, 1956, 18 U.S.T. 3201, 226 U.N.T.S. 3, available at <http://www.unhchr.ch/html/menu3/b/30.htm>.

227. Declaration of the Rights of the Child, G.A. Res. 1386 (XIV), at Principle 9, U.N. GAOR, 14th Sess., Supp. No. 16, U.N. Doc. A/4354 (Nov. 20, 1959), available at <http://www.unhchr.ch/html/menu3/b/25.htm>.

228. *Id.*

229. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), at art. 8, 21 U.N. GAOR Supp. No. 16 at 52, U.N. Doc. A/6316 (Mar. 23, 1976), available at http://www.unhchr.ch/html/menu3/b/a_ccpr.htm.

230. HOBBS, *supra* note 129.

The ILO continued with its valiant efforts to address specific aspects of this crisis by adopting the Convention on the Minimum Age for Admission to Employment in 1973.²³² This Convention, C138, which entered into force in 1976, was an effort to eradicate child labor by requiring ratifying states to raise the minimum employment age.²³³ The general standard, with respect to age, was declared to be “not less than the age of completion of compulsory schooling,” and “in any case, shall not be less than 15 years.”²³⁴ For types of work likely to endanger children, the minimum age adopted was eighteen years.²³⁵

The ILO also established the International Programme on the Elimination of Child Labour (IPEC) in 1992, and by 2005 it was operating in eighty-six countries.²³⁶ With the involvement of a variety of stakeholders including governments, international agencies, community groups, and children and families, IPEC has sought to implement its mandate through action, including “assessment studies, capacity building, legal reform, awareness raising and social mobilization, prevention, withdrawal and rehabilitation of children from hazardous work, and the creation of alternatives for the families of child labourers.”²³⁷

Continuing its extensive activity with respect to children in the labor force, the ILO adopted the Declaration on Fundamental Principles and Rights at Work in 1998.²³⁸ Among other employment rights, this document called for the elimination of child labor.²³⁹ Fulfilling its commitment to awareness-raising, in 2002 the ILO declared June 12th as World Day Against Child Labour.²⁴⁰ Two years later a global economic estimate concluded that the benefits of abolishing child labor would be approximately \$5.1 trillion.²⁴¹ In its assessments of benefits, the ILO suggested that benefits would accrue from the higher incomes earned by children who were educated and healthier because they no longer worked in hazardous conditions.²⁴² By 2006, the ILO felt confident enough—possibly prematurely—to announce that the end of child labor was within reach thanks to the global movement against this practice.²⁴³

The worst forms of child labor, discussed in various sections of this article, also evoked an ILO Convention No. C182 in 1999.²⁴⁴ This Convention requires

231. ILO, *International Law and Child Labour*, *supra* note 220.

232. *Id.*

233. See generally ILO, Minimum Age Convention, *supra* note 130.

234. *Id.* at art. 2(3).

235. *Id.* at art. 3(1).

236. *Facts on Child Labour 2006*, *supra* note 44 at 2.

237. *Facts on Child Labour 2005*, *supra* note 4, at 2.

238. *Id.*

239. *Id.*

240. ILO, *World Day Against Child Labour*, <http://www.ilo.org/ipec/Campaignandadvocacy/WDAAC/lang--en/index.htm> (last visited Feb. 13, 2009).

241. *Facts on Child Labour 2005*, *supra* note 4, at 2.

242. CHILD LABOR AND SWEATSHOPS 6 (Ann Manheimer ed., 2006).

243. *Facts on Child Labor 2006*, *supra* note 44 at 1; ILO, *The End of Child Labour within Reach*, ix (2006), http://www.ilo.org/public/english/region/ampro/cinterfor/news/inf_06.htm.

244. See Worst Forms of Child Labour Convention, *supra* note 111.

ratifying states to eliminate the use of children in illicit activities, prostitution, and the production of pornography.²⁴⁵ It also requires them to prioritize action against the trafficking of children and all forms of forced labour, including the compulsory recruitment of children in armed conflict.²⁴⁶ The Convention was adopted on June 17, 1999, and entered into force on November 19, 2000.²⁴⁷ It applies to all economic sectors and covers all children under the age of eighteen.²⁴⁸

Because many children who become child laborers suffer the additional trauma of being enslaved or bonded, either through capture or because of parental debts, it is important to address the issue of child labor in tandem with the agenda to abolish the crime of slavery. The ILO Committee of Experts annually highlights the issue of bonded labor, including matters involving children. Additionally, IPEC has noted that the issue of childhood labor bondage is an important agenda to pursue.²⁴⁹

It has not been the intention in this section to enumerate every single international instrument that has addressed the issue of child labor. Rather the intent was to emphasize that there are plenty of detailed prohibitions in international law to bring about the legally sanctioned eradication of child labor, if only the world will find the will to abide by these commitments. There is little dispute that the work of the ILO has been pivotal in bringing the world to understand and appreciate both the scale of the problem, and guidance on how to rectify the wrong. According to the ILO, “[o]ne reason why modern societies and governments have not been more active in curbing the most harmful forms of child labour is that working children are often not readily visible. It is a matter of ‘out of sight, out of mind.’”²⁵⁰

V. THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD (1989)

Of all the international law instruments dedicated to the eradication of child labor and human rights violations involving children, the United Nations Convention of 1989 is generally perceived as among the most important. The fact that it has now been ratified by almost the entire world is a telling gauge of its value to the international community. At time of writing this article, only two countries have not ratified this instrument, Somalia and the United States of America.²⁵¹ The American position will be discussed later in this section. It took approximately ten years from the time of proposal of this Convention to its adoption.²⁵² However, once adopted in November 1989, it was signed and ratified

245. *Id.*

246. *Id.*

247. *Id.*

248. Jankanish, *supra* note 217, at 74.

249. Michael Bonnet et al., *Strategies to Address Child Slavery*, in ACTION AGAINST CHILD LABOUR 185, 197 (Nelien Haspels & Michele Jankanish eds., International Labour Office 2000).

250. ILO, *Child Labour: Targeting the Intolerable*, 16-17 (1998), <http://www.ilo.org/public/english/comp/child/publ/target/target.pdf>.

251. UNICEF, Convention on the Rights of the Child, Frequently Asked Questions, http://www.unicef.org/crc/index_30229.html (last visited Feb. 5, 2009).

252. HOBBS, *supra* note 129 at 37.

expeditiously, and entered into force in September 1990.²⁵³ UNICEF explained that this was the most “widely and rapidly ratified human rights treaty in history.”²⁵⁴

A child is defined by this Convention as a person under the age of eighteen, with due deference to variations in certain national law.²⁵⁵ This international law instrument advances the idea of non-discrimination, emphasizes the best interest of the child as a guiding principle, and enjoins governments to act to protect the children of their state. The rights provided to children include an adequate standard of living, an education, health and health services, and even the right to relaxation and playtime.²⁵⁶ Children are protected from being used for the illicit production of drugs, and in the trafficking of such substances.²⁵⁷ With respect to child labor, the Convention in Article 32 specifies that:

1. States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child’s education, or to be harmful to the child’s health or physical, mental, spiritual, moral or social development.

2. States Parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present article. To this end, and having regard to the relevant provisions of other international instruments, States Parties shall in particular:

(a) Provide for a minimum age or minimum ages for admission to employment;

(b) Provide for appropriate regulation of the hours and conditions of employment;

(c) Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article.²⁵⁸

Article 34 of the Convention calls for states to take all “appropriate national, bilateral and multilateral measures to prevent” the exploitation of children for unlawful sexual practices and pornography.²⁵⁹ Additionally, Article 35 prohibits the abduction, sale, and trafficking of children for any purpose.²⁶⁰ The issue of the use of children in warfare was addressed in Article 38, which calls on states to ensure that children under fifteen do not participate in hostilities, that there shall be

253. G.A. Res. 44/25, *supra* note 6.

254. UNICEF, Convention on the Rights of the Child, *supra* note 252.

255. UNICEF, Fact Sheet: A Summary of the Rights Under the Convention on the Rights of the Child, http://www.unicef.org/crc/files/Rights_overview.pdf (last visited Feb. 8, 2009).

256. *Id.*

257. G.A. Res. 44/25, *supra* note 6, at art. 33.

258. *Id.* at art. 32.

259. *Id.* at art. 34.

260. *Id.* at art. 35.

no recruitment under the age of fifteen, and that children affected by armed conflict will be protected.²⁶¹

As is the usual practice with the United Nations, an elected Committee of ten experts "of high moral standing" was established by this Convention to serve for four years, and to receive regular reports from States Parties on the measures they have taken to implement the provisions of the Convention.²⁶²

The Convention provides an inclusive system for the protection of children, and the acceptance and early ratification of this instrument by most governments testifies to the concern felt internationally about the need to protect this very vulnerable element of society. That the provisions of the Convention have not yet been fully or even adequately implemented ought not to detract from its significance or from the importance of its near universal acceptance. It sets a standard for all nations to follow if they wish to be members of the community of nations. The Convention also provides very specific duties for national governments. In this manner it ensures the continuation of viable family life across the planet by protecting children.

The utilization of the Committee of experts reveals the United Nation's determination to emphasize, and draw world attention to continuing abuses. In 2006 the Committee reminded signatories that the Convention exists to protect children "from economic exploitation," and from hazardous child labor by expressing serious concern about the persistence of corporal punishment, and other forms of degradation involving child employees.²⁶³

The position of the government of the United States of America on this Convention has certainly raised eyebrows across the planet. After all, this Convention has even been acknowledged and lauded by non-state actors such as the Sudan People's Liberation Army (SPLA).²⁶⁴ In failing to ratify this international instrument, the United States has teamed with only one other country, the violence-wracked, war-torn, and failing state of Somalia. Many feel the United States' position is mystifying in light of the obvious commitment demonstrated by previous American governments to the cause of eradicating child labor. United States President Bill Clinton signed the Convention on February 16, 1995, but he and his successor, President George W. Bush, did not initiate the process for ratification by Congress.²⁶⁵ At time of writing, December 2008, incoming President-elect Barack Obama may be able to initiate the cumbersome ratification process, which could bring the rights of the Convention into formal recognition in American law. The president-elect did declare it "embarrassing to find ourselves

261. *Id.* at art. 38.

262. *Id.* at arts. 43-44.

263. Committee on the Rights of the Child, General Comment No. 8: The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment, 42nd Sess., ¶ 36, U.N. Doc. CRC/C/GC/8 (Mar. 2, 2007).

264. UNICEF, Convention on the Rights of the Child, *supra* note 252.

265. Patrick Geary, *United States: Is Obama's Win Also a Victory for Children's Rights?*, CHILD RIGHTS INFORMATION NETWORK, Nov. 5, 2008, <http://www.crin.org/resources/infodetail.asp?ID=18874>.

in the company of Somalia, a lawless land,” and committed himself to reviewing this matter.²⁶⁶

Two Optional Protocols followed the nearly universally accepted Convention on the Rights of the Child. In May 2000, the United Nations adopted the Optional Protocol on the Involvement of Children in Armed Conflicts.²⁶⁷ This instrument entered into force on February 12, 2002.²⁶⁸ The agreement expressed concern about the “harmful and widespread impact of armed conflict on children,” and condemned the “recruitment, training and use within and across national borders of children in hostilities by armed groups.”²⁶⁹ The Protocol directed state parties to ensure that there would be no compulsory recruitment or involvement of persons under the age of eighteen in armed conflict. It is important to note that a concession was made to allow for voluntary recruitment under the age of eighteen.²⁷⁰ However, non-state actors such as armed groups are precluded from recruiting or using any persons under eighteen.²⁷¹ Further provisions call for the demobilization of affected children, social reintegration, and physical and psychological recovery programs.²⁷² The persistent use of child soldiers, and its serious expansion at the turn of the century prompted concerns in the international community that the provisions of the original Convention of 1989 were being violated. The instant Protocol garnered support, most notably in the United States, which ratified this instrument.²⁷³

American President George W. Bush also pledged his country to the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, which was adopted by the United Nations in May 2000.²⁷⁴ This Protocol was also ratified by the United States.²⁷⁵ The Protocol, which entered into force on January 18, 2002, articulated grave concern about the “significant and increasing international traffic in children for the purpose of the sale of children, child prostitution and child pornography.”²⁷⁶ The Protocol drew attention to the problems generated by sex tourism, and to the particular threat to girls. It called on state parties to

266. *Id.*

267. Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, G.A. Res. 54/263, U.N. Doc. A/RES/54/263 (May 25, 2000), available at <http://www2.ohchr.org/english/law/crc-conflict.htm>.

268. *Id.*

269. *Id.*

270. *Id.* arts. 2-3.

271. *Id.* art. 4.

272. *Id.* art. 6.

273. *Governments Breaking Promises to Children*, HUMAN RIGHTS WATCH, Nov. 10, 1999, <http://www.hrw.org/en/news/1999/11/10/governments-breaking-promises-children>.

274. Government of the United States of America, Consideration of Reports Submitted by States Parties Under Article 12, Paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, Annex 1, delivered to the Committee on the Rights of the Child, U.N. Doc. CRC/C/OPSC/USA/1 (May 10, 2007).

275. *Id.*

276. 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, ¶¶ Preamble-1, U.N. Doc. A/RES/54/263 (May 25, 2000), available at <http://www.unhchr.ch/html/menu2/6/crc/treaties/opsc.htm>.

prohibit the “sale of children, child prostitution and child pornography.”²⁷⁷ It urged signatories to criminalize the use of children in forced labor in their own legal systems.²⁷⁸ Additionally, it proposed the seizure of assets obtained from illicit activities.²⁷⁹ Additional provisions suggested support services for victims, and the strengthening of international cooperation to facilitate prosecutions.²⁸⁰

Whether or not these extensive and notable international provisions to protect children, particularly from exploitative labor in its many evil manifestations, will result in the eradication of these human rights violations remains to be seen. It is significant that as a milestone in international cooperation to protect our most vulnerable members of society, the entire world has shown concern and a conscience about the fate of children. The formulations of the United Nations can, however, only be standards and guides. Implementation remains the responsibility of sovereign member states of the United Nations. And they must act resoundingly and decisively, and carry through on the commitments they made when they signed and ratified these three all-important instruments of international law. There is no point in becoming complacent because the world now has international law to support this cause. Until the law is implemented globally, and the practices eliminated universally, these instruments remain just well sounding and well meaning words on paper.

VI. CONCLUSION AND ASSESSMENTS

This article began as an assessment of some aspects of the state of child labor in recent years. It concludes with guarded optimism, and uneasy apprehensions about the future. The 2008 economic meltdown, that has devastated the financial structure of so many countries, does not bode well for the future of child labor. When entire families are driven to starvation, and when poverty pervades entire communities, allowing children to become educated can seem like a luxury—one that no family in plight can afford. The premise of this research was to determine whether or not the state of this problem is to be deemed positive or negative. The conclusion, in terms that are deliberately cautiously optimistic, is that the situation in some countries has definitely improved, and over-all child labor rates are declining. However, for those young children in the grip of working as sex slaves, as soldiers, as farm workers, as matchstick makers, as rug weavers, and in a host of other economic activities, slight improvements provide no consolation. Their lives are brutal, imperiled, cruel, and agonizing. No amount of fine-sounding phrases from the United Nations will make the slightest difference to their lives until strong and assertive action is taken at the local level to free them and provide them and their families with an adequate standard of living.

This research also concludes with an advisory on the necessity for the developed world to address the problem of global poverty in a more meaningful and multilateral manner so that poor nations can become self-sufficient, and break

277. *Id.* at art 1.

278. *Id.* art. 3.

279. *Id.* art. 7.

280. *Id.* arts. 9-10.

the cycle of destitution and degradation, which involves adults and children. Although the incoming American president has a very large agenda, and has to tackle many serious challenges, he has convinced the majority of Americans, and inspired the rest of us to consider the limitless possibilities open to the human mind and spirit.

Focusing on the “Yes We Can” approach, that has made history in the last American election, this research leads to a possible direction for the international community—hopefully with the enthusiastic support of the United States of America. The proposal would be for a multilateral type of development plan, broadly along the lines of the original Marshall Plan, for the least developed nations of the world—those most at risk in terms of slavery and child labor. The plan, also drawing participation from Europe, the industrializing Asian countries, Canada, Australia, Japan, New Zealand, and indeed any other country that wants to be part of it, would provide effective assistance to any developing nation that would undertake to guarantee the implementation of human rights; hold fair and free, monitored elections; establish a democratic system of government; and commit to ending civil conflicts. Plan members would then provide economic aid, for a limited time, to those nations whose members dedicated themselves to achieving their own freedom from oppression.

Additionally and more important, the Plan would provide qualifying developing states with considerable expertise, according to their own needs and requirements—an immediate advantage for the West, in terms of solving the high unemployment rates in the developed world. Such expertise, mainly to teach skills, could deal with everything from establishing infrastructure including electricity, to teaching agricultural techniques, water conservation, environmental consciousness, and other skills aimed at poverty reduction. Instead of a scattered nation-by-nation donor approach to foreign aid, this would be a cohesive, global approach, undertaken multilaterally, and concentrated—not on handouts, which often disappear into the pockets of corrupt dictators—but on empowering entire communities to become more aware of their rights and responsibilities. The goal would be sustainable development and economic self-sufficiency. The training and skills would be imparted to people on the understanding that they would, in turn, train their fellow nationals and carry on the tradition. There is a saying quoted so often at the United Nations that it has almost become a cliché. But like all clichés it bears a measure of truth that cannot be denied: “If you give a man a fish, he will eat for a day. If you teach him to fish, he will eat all his life.”

The key to success would have to be local participation, and an acknowledgment that community concerns would have to be respected. Throwing money at passive recipients only turns them into mendicants and wastes the funds. The history of the twentieth century has proven that time and again. The new plan would be contingent on local initiatives that control tendencies to violence and take charge of law and order. Local populations will have to invest a great deal of themselves in this plan to prove their worth before the rest of the world commits to them. Countries under the sway of dictators like Zimbabwean President Robert Mugabe would have to act decisively to establish visible proof of a democratic government before they could be considered.

There is no assumption being made here that the removal of corrupt dictators and violent renegades will be easy. However, the peoples of each region will have to act decisively to create acceptable conditions for their own betterment. Foreign military intervention has not proven an effective long-term panacea for the ills of dictatorship. Foreigners inevitably generate distrust and spark internal polarization. The examples of Iraq and Afghanistan testify to the dangers inherent in military interventions that are not simultaneously geared towards economic development on a major scale. However harsh it may sound, the people of each region or nation have to sort out their own situation with respect to the acceptance or rejection of dictatorships and civil war. If they choose the path of human rights—a path already deemed as desirable by most nations—then they qualify by degrees of national achievement for the fundamental benefits of the Plan. It is true that displacement of existing corrupt regimes will be difficult. It will be very difficult, fraught with sacrifice and possible tragic loss of life. However, the prevalence of dictatorships in so many poor countries also takes a toll on human life and well being.

A study of twentieth century history could lead to the conclusion that people only value freedom after they have fought for it and achieved it by their own efforts. By giving people a reason to throw off their corrupt governments in favor of self-rule, and by holding out the possibility of a better economic future for their families and communities if they take this initial step, the outside world gives them the incentive to make such bold action feasible and possible. When they have sacrificed, and acted to establish their own locally acceptable form of democratic government they will have a system they will cherish and fight to preserve. The experience of the recent past demonstrates that democracy can very rarely be imposed from outside, unless there is a strong will within the recipient nation to live by and value that type of government.

President-elect Obama has articulated a desire for change in all realms of policy and for new approaches. If the United States of America takes the moral high ground—not in a superior or arrogant way, but to demonstrate its own best qualities by assisting and helping those peoples abroad who have demonstrated an ability to help themselves—then American expertise and aid, as part of a multi-state contribution, would not be feared, or suspected as coming with political strings attached. This democratic initiative would abandon the stale and unproductive foreign policy dependence on *realpolitik*, in favor of an approach that perceives America as part of a global community, where the realization prevails that all of us on this planet have to work together for mutual betterment.

A globalized effort, hinging on participation by many nations with the simple aim of raising the living conditions of the poor nations to an acceptable level, would ensure that in the future both the rich and the poor cooperate, rather than threaten each other. We in the West have already begun to realize that we cannot continue to live as islands of prosperity, while all around us the people of other regions live in grinding poverty and brutality. Our own ultimate security depends on the success of bold new initiatives that can bring the world together, not rip it asunder. If the “Yes We Can” President of the United States can undo, with one stroke, a racial notion that prevailed through all of American history, it might not

be all that daring to think that he and his team can generate dramatic global change as well. If the Obama presidency will not be about politics as usual, then the United States will no longer support dictators because of any *realpolitik* agendas. It will seek instead the honest proliferation of democratic practices both at home and abroad. American ingenuity, which turned a few colonies of rebels into a superpower in less than two hundred years, could work equally significant miracles for the dispossessed, the poor, the enslaved, and the children of the world. By saving the world's children, America will save itself. Although its government commands fear and suspicion in many countries, there is also an international wellspring of affection for the American people. American culture similarly draws enthusiastic approval, particularly among young people. If the new presidency can utilize this good will to position the United States on a moral plane, rather than on an expedient path in its foreign policy, it could literally change the entire world.

For example, this type of international plan applied to the ravaged continent of Africa could make a meaningful difference to the lives of millions, and provide them with the possibility of a better life and future. And lest these conclusions be deemed naïve, given the dangers the world is facing today—such as terrorism, dictatorship, revolutions, civil wars, economic melt-down and so on—is it not also true that America has always shown its best when facing very serious challenges and threats? The fact that the whole world became fascinated and enthralled by the 2008 American election shows how interested people around the world are in this amazing political phenomenon called the United States of America. While American foreign policy has many external detractors, the American people collectively command huge affection. Their decision to select a president who was lauded globally before he had been elected nationally testifies to the world's continuing absorption in all things American. The prevalence of American culture, and its icons across the planet demonstrate that there is a role for this country not as oppressor, but as friendly neighbor and benevolent helper. With American initiative in a multi-lateral plan of the type sketched out, the world might some day collectively prosper, instead of fragmenting and fracturing along political and economic fault lines. There are huge advantages for America in changing its entire approach to the foreign world. It could prove that there is a clear and direct linkage between the United States and the best values of democratic traditions; that America exists not to economically exploit poor countries for their resources, but to help them to achieve a higher standard of living; that America devotes itself initially to fulfilling human rights at home, and then to working toward such achievement overseas. If America commits itself in such a manner, threats to the United States, such as terrorism, could just possibly diminish. No one suggests that any of this will happen overnight or very quickly. However, the forces that have positioned themselves to destroy the United States—namely the fundamentalists and terrorists—gain popular support because American governments act in a manner that is either callous about the rest of the world, or indifferent to external imperatives. When America is perceived globally as a friend within the community of nations, not an international military power bent on its own agendas, inevitably the popular support that is vital for the sustenance of terrorism will diminish. This type of proposal, however idealistic it may sound, is actually in America's self-interest. We have witnessed the utter failure of

twentieth century style foreign policy. This new millennium has to come up with approaches that are not merely reflections of thinking outside the box, but which toss the box out in favor of innovative methods to approach the world.

And while naysayers might suggest that this is dreaming beyond the reach of humanity, looking over human history, all that is best in the world started as a dream, from where it progressed to an ideal, flowered into an idea, and after much human thought, ultimately became reality. There are many manifestations of evil prevalent in the world today. Exploitative child labor is just one such criminal practice. However, though this research has shown a bleak picture of suffering, it has also demonstrated universal concern and compassion hard at work, attempting to eradicate this evil.

Child labor, like slavery, is one more manifestation of what humanity can sink to when greed and avarice dominate. The eradication of child labor will prove once and for all that humanity has the will to achieve positive change, and that it has the grasp to reach for it. Given the risks that threaten not just the nations of the South, but those of the North, can we really afford not to rid our world of these evil practices?

A WOMAN'S WORTH: ACCOUNTING FOR WOMEN IN THE GLOBAL MARKET

MEGAN BERRY¹

*The manipulation of women's issues as an ideological and political resource in the Third World nationalist history commonly develops . . . into the manipulation of women themselves as a socio-economic resource in Third World nation states.*²

I. INTRODUCTION

Globalization is increasingly shaping the goals and methods of international actors in all realms of interaction: social, cultural, political, economic, etc.³ The term "globalization" has many definitions, but perhaps the most succinct is that globalization is "the growing integration of economies and societies around the world."⁴ As economies and societies become more interdependent, the problems of developing countries become more intertwined with the conduct of developed countries and, therefore, require mutual effort to minimize. Minimizing the problems of developing nations requires creating and implementing programs and policies that promote sustainable development.⁵

1. J.D., University of Denver; MA of International Development, Josef Korbel School of International Studies; B.S., College of Charleston. I would like to thank several professors and mentors who assisted and encouraged not only the writing of this paper, but my academic pursuits in researching the effects of development on women in Africa: Dr. Kelechi Kalu, Dr. Anita Halvorssen, Ms. Jennifer Williams, and the Women's Legal Center in Cape Town, South Africa. The author served the Denver Journal of International Law and Policy as Survey Editor in 2006-2007 and Executive Editor in 2007-2008.

2. Ann Stewart, *Juridifying Gender Justice: From Global Rights to Local Justice*, in LAW AND DEVELOPMENT: FACING COMPLEXITY IN THE 21ST CENTURY 36, 46 (John Hatchard & Amanda Perry-Kessaris eds., 2003), quoting Geraldine Heng, "A great way to fly": nationalism, the state and the varieties of third-world feminism, in FEMINIST GENEALOGIES, COLONIAL LEGACIES, AND DEMOCRATIC FUTURES 31-32 (M. Jacqui Alexander & Chandra Talpade Mohanty eds., 1997).

3. E.g., JOSEPH E. STIGLITZ, MAKING GLOBALIZATION WORK 4 (W.W. Norton & Company, Inc. 2006).

4. The World Bank Group, Globalization, <http://www1.worldbank.org/economicpolicy/globalization> (last visited Feb. 18, 2009). For a more critical definition, see Nsongurua J. Udombana, *How Should We Then Live? Globalization and the New Partnership for Africa's Development*, 20 B.U. INT'L L.J. 293, 306 (2002) ("the growth of international capitalism – driven by market forces – and capitalism is the ideology of the strong, based on selfishness and exploitation of resources, perpetuating forced servitude across the world.").

5. Sustainable development is most often defined as development that meets "the needs of the present without compromising the ability of future generations to meet their own needs." Report of the

It is widely acknowledged that sustainable development cannot be achieved without investing in women and reducing the inequalities faced by women in both developed and developing nations.⁶ The United Nations Conference on Trade and Development (UNCTAD) has observed that trade, being the most important form of globalization, can have significant implications for gender equality.⁷ Additionally, globalization tends to be more harmful to women than men because women are more likely to be targets of illegal labor practices such as low wages, sexual harassment, and resistance to unionization.⁸

This paper will focus primarily on the harmful effects economic globalization⁹ has had on women in Africa as a result of various international and regional trade agreements and economic unions.¹⁰ While there has been positive progress in recognizing the important role women play in the global economy and in economic development, there is a persistent gap between policy and practice. Without the ability to rely on the rights they have been promised, women will not be able to reach their full potential as individuals or help their countries to reach their full potential as nations. Investing in women and accounting for them and the work they do may improve the current generation's lives only marginally, but it will provide the catalyst for improving the lives of this generation's daughters and granddaughters and great-granddaughters, thereby enhancing those women's contributions to their countries' economic progress and sustainable development.

Section one provides a brief history of women's status in Africa as a basis for analyzing how this status has changed from the pre-colonial period, through colonization and into today's post-colonial societies. Section two will then present an overview of the empirical data available on the reality African women face as a result of economic globalization. The third section of this discussion analyzes a number of human rights agreements, international and regional institutions and agreements, and the role of governments in promoting and

World Commission on Environment & Development, G.A. RES 42/187, Preamble, U.N. DOC. A/RES/42/187 (Dec. 11, 1987).

6. See discussion *infra* section III.

7. United Nations Conference on Trade & Development (UNCTAD), Sao Paulo, Brazil, June 13-18, 2004, *Report of the United Nations Conference on Trade and Development on its Eleventh Session*, ¶ 73, U.N. Doc. TD/412 (Aug. 20, 2004), available at http://www.unctad.org/en/docs/td412_en.pdf (last visited Feb. 18, 2009) [hereinafter UNCTAD].

8. E.g., Liane M. Jarvis, Note, *Women's Rights and the Public Morals Exception of GATT Article 20*, 22 MICH. J. INT'L L. 219, 220 (2000). The author of this paper understands "resistance to unionization" to mean women's inability to form unions because of such factors as lack of education, lack of knowledge about unions, intimidation through physical or sexual coercion, and the high turnover rate of female employees. See, e.g., Gurushri Swamy, *The impact of international trade on gender equality*, 86 PREM NOTES (May 2004), available at <http://www1.worldbank.org/prem/PREMNotes/premnote86.pdf>.

9. Jarvis, *supra* note 8, at 220 (defining economic globalization as "the closer economic integration of [countries] through the increased capital flow of goods and services, capital, and even labor.").

10. The author recognizes that African women's experiences differ from country to country and region to region; therefore, much of this paper will necessarily be written in broad terms. Where more detailed data for a particular country is available, it will be used as much as possible to provide more specific examples in support of or contradiction to the argument.

protecting women's rights. The final section discusses the steps that have been taken, are being taken, and still need to be taken to improve women's capacity to participate in the global economy and contribute to sustainable development.

II. A BRIEF HISTORY OF AFRICAN WOMEN

Because women's status and duties varied from region to region in pre-colonial African societies, it is inaccurate to say that all African women shared the same experience. For example, in some societies, like the Tswana and Shona, women were essentially legal minors; while in other societies, like the Mende and Serbro, women could become chiefs.¹¹ Regardless of their pre-colonial status, it is generally accepted that the process of colonization resulted in women losing rights they previously held.¹² Colonialism produced a detrimental intersection of African patriarchy and Western ideology regarding the subservient role of women.¹³

For example, pre-colonial Igbo women and men were by no means equals, but there was a level of respect inherent in the recognition of their separate spheres of rights and duties.¹⁴ Women's status was independent of their husbands' status. In this pre-colonial society, as was common in many pre-colonial African societies, women's concerns and grievances were given voice through strong female institutions and marketing networks. These parallel authority structures enabled women to defend their rights and retain a level of autonomy in their societies.¹⁵

The European colonists failed to appreciate, or chose to ignore, the delicate balance of these parallel structures. Instead they viewed African society through a European lens and proceeded to impose gendered roles on men and women.¹⁶ These imposed roles were not always accepted and, by and large, served to dissolve the traditional social fabric of the Africans' lives.¹⁷ For example, in

11. *E.g.*, APRIL A. GORDON, *Women and Development*, in UNDERSTANDING CONTEMPORARY AFRICA 293, 295 (April A. Gordon & Donald L. Gordon eds., 2007).

12. Stewart, *supra* note 2, at 48; *see also* Susie Jacobs, *Land Reform: Still a Goal Worth Pursuing for Rural Women?*, 14 J. INT'L. DEV. 887, 888-91 (2002).

13. FREDERICK COOPER, *AFRICA SINCE 1940: THE PAST OF THE PRESENT, NEW APPROACHES TO AFRICAN HISTORY* 125 (Cambridge Univ. Press 2002).

14. *See* Uché U. Ewelukwa, *Centuries of Globalization; Centuries of Exclusion: African Women, Human Rights, & the "New" International Trade Regime*, 20 BERKELEY J. GENDER L. & JUST. 75, 92-3 (2005).

15. *Id.* at 93-4; Gordon, *supra* note 11, at 295.

16. Heads of State and Government Implementation Committee (HSGIC), *The New Partnership for Africa's Development (NEPAD) Framework*, Abuja, Nigeria, October 2001, ¶ 21 [hereinafter NEPAD] ("Colonialism subverted hitherto traditional structures, institutions and values or made them subservient to the economic and political needs of the imperial powers."), *available at* http://www.europarl.europa.eu/intcoop/acp/60_04/pdf/atelier_educ_en.pdf (last visited Feb. 19, 2009); *see also* Gordon, *supra* note 11, at 297.

17. One example of this dissolution of the social fabric, which is beyond the scope of this paper, relates to the effect codification of customary law and the imposition of Western values had on traditional marriage arrangements, i.e. multiple wives. For an interesting discussion on how formal legislation recognizing only one wife per man has further harmed some African women and their property rights *see, e.g.*, Laurel L. Rose, *Women's Land Access in Post-Conflict Rwanda: Bridging the Gap Between Customary Land Law & Pending Land Legislation*, 13 TEX. J. WOMEN & L. 197, 208-11 (2004).

Nigeria men were selected and trained to work in wage-earning positions with the railroads while women were taught modern methods of homemaking and childrearing.¹⁸ Despite this, women often continued to engage in the more traditional Yoruba practice of trading in order to continue to contribute to their families' well-being.¹⁹ Conversely, colonialism in Kenya forced Kikuyu and Kamba women to engage in trading and marketing practices as early as the mid-nineteenth century, which was a relatively unusual practice for this traditionally patrilineal and patrilocal society.²⁰ Although such shifts in social patterns evidence the impact of colonialism, the brunt of colonialism's imposed prejudicial system is most evident in two ways: provision of access to resources and the codification of traditional, or customary, law.

In an attempt to integrate African societies into the global capitalist economy, agriculture was commercialized. This commercialization had a tendency to disadvantage women, the primary food producers, more than men.²¹ First, agricultural commercialization meant the introduction of cash crops and new methods of farming, which were taught almost exclusively to men while women continued to produce subsistence crops. Second, educational opportunities were primarily available to men, meaning women were not provided with access to the same skills and resources as men and were consequently barred from jobs in the colonial administration.²² Finally, men were forced into the wage economy through work on plantations, in the mines, or in towns while women remained in the rural areas.²³

The codification of customary law served to promote and institutionalize these inequalities. Customary law is by nature an oral form of law, passed on by word of mouth in communities; therefore, any attempt to codify or record it will be limited by the static nature of this process. The customary practices were based on ensuring order and norms in the best interest of the entire community. As such, customary practices were not strict, unchangeable rules but rather a set of malleable guidelines inclusive of tradition but also reflective of the changing values and beliefs of the community at that time.²⁴ In today's society there are at least two forms of customary law: official and living.²⁵ The living law consists of those nebulous, flexible, changing practices actually observed by African

18. COOPER, *supra* note 13, at 124.

19. *See id.*

20. Claire Robertson, *Trade, Gender, and Poverty in the Nairobi Area: Women's Strategies for Survival and Independence in the 1980s*, ENGENDERING WEALTH & WELL-BEING 65, 66 (Rae Lesser Blumberg et al. eds., 1995) ("Trade in Nairobi...became a survival strategy for women seeking independence from men.").

21. Gordon, *supra* note 11, at 297.

22. *E.g., id.*; Ewelukwa, *supra* note 14, at 89-90.

23. Ewelukwa, *supra* note 14, at 89-90.

24. Megan Berry, *Gasa v. Road Accident Fund, No. 579/2006*, Amicus Curiae Brief, Annexure A (Supreme Court of Appeal of South Africa, *hearing date* Nov. 19, 2007) (unpublished brief) (on file with author).

25. SOUTH AFRICAN LAW REFORM COMMISSION (SALRC), REPORT ON CUSTOMARY MARRIAGES: THE HARMONIZATION OF THE COMMON LAW AND THE INDIGENOUS LAW (Project 90) 18 (August 1998) [hereinafter SALRC].

communities. The official law is the attempted codification of these practices relied on by courts and other state organs.²⁶ Because the official law is written down and recorded, it is less susceptible to change and less reflective of the true customary practices of a given community.²⁷ The official version of customary law has also been criticized as having been “invented”; that is, it describes less the practices people were actually observing at the time of codification and more what the colonial government thought they should be doing.²⁸

This tendency to impose Western or Northern values on African societies through law continues today. Despite the good intentions supporting many international treaties and agreements, modern attempts to introduce laws based on international norms largely ignore cultural practices, thereby continuing a pattern of neglect toward domestic values in post-colonial societies.²⁹ In many countries, independence did not always bring the expected positive revolution of economic and political structures. In fact, despite African women's integral contributions to many of the independence struggles,³⁰ many newly independent African nations retained the same colonial structures and institutions that created and contributed to women's subordination.³¹

III. OVERVIEW OF AVAILABLE DATA ON GENDER AND TRADE

*Women do two-thirds of the world's work, receive 10% of the world's income and own 1% of the means of production.*³²

26. *Id.*

27. See Kim L. Robinson, *The Minority and Subordinate Status of African Women under Customary Law*, 11 S. AFR. J. HUM. RTS. 457, 460 (1995) (“If the purpose of indigenous law is to reflect the living cultures of African peoples, by definition, codified customary law cannot fulfill this objective because it ‘freezes’ African life... When laws that allegedly reflect traditions cease to be appropriate to people's lives they are obsolete and should be rejected.”).

28. SALRC, *supra* note 25, at 19-20 (“[I]n principle, only the rules grounded on contemporary social practice should be deemed valid.”); see also Alice Armstrong et al., *Uncovering Reality: Excavating Women's Rights in African Family Law*, 7 INT'L J.L. & FAM 314, 324-26 (1993) (describing the terminology used in the codified version of customary law to support the argument that it was invented. Colonialists termed levirate marriage “widow inheritance,” transforming the view of the institution from women being owed a duty of support to women as property).

29. Stewart, *supra* note 2, at 48.

30. See, e.g., Ewelukwa, *supra* note 14, at 78, 92-108 (discussing the causes and results of the Aba Women's War of 1929 of the Igbo women in Nigeria); see also COOPER, *supra* note 13, at 125-26. See generally, SEMBENE OUSMANE, GOD'S BITS OF WOOD 186-204 (Francis Price trans., Heinemann 1995) (1960).

31. See, e.g., JEFFREY HERBST, STATES AND POWER IN AFRICA: COMPARATIVE LESSONS IN AUTHORITY AND CONTROL 98-103 (Princeton Univ. Press 2000); Gordon, *supra* note 11, at 299.

32. United Nations Development Fund for Women (UNIFEM), WORLD POVERTY DAY 2007: INVESTING IN WOMEN – SOLVING THE POVERTY PUZZLE, FACTS & FIGURES, available at www.womenfightpoverty.org/docs/WorldPovertyDay2007_FactsAndFigures.pdf [hereinafter UNIFEM] (referencing the informal slogan of the Decade of Women).

Women comprise roughly 70% of the world's poor.³³ In 2002, women constituted 40% of the world's total economically-active population and carried out about 70% of the informal work in developing countries.³⁴ Unfortunately, women's actual and potential economic capacity generally goes under- or unaccounted for in policy decisions.³⁵ In this manner, women are considered as a means to an end in products of trade, rather than as ends in and of themselves.³⁶

Global trade and investment tend to favor large companies rather than small and micro entrepreneurs, such as women working in the informal sector of the economy.³⁷ While trade tends to increase the availability of wage jobs for women, numerous other factors counteract that increased availability, which results in women remaining unable to benefit from the trade expansion.³⁸ UNCTAD notes that social norms linked to the traditional functions of men and women, both within the home and in the workplace, are the root causes of gender inequality.³⁹ These social norms directly and significantly impact women's ability to access the necessary resources – i.e. capital financing, education, and land – to be competitive in the economic market.⁴⁰

A. Invisible Work

In the developing world, much of the work in which women are engaged is in care services. Care services are those activities necessary for social reproduction,

33. Doris Mpoumou, *The Proof is in the Numbers, The Power is in the Women*, NEWS & VIEWS 15 (Women's Environment & Development Organization), March 1, 2002; Eugenia McGill, *Poverty and Social Analysis of Trade Agreements: A More Coherent Approach?*, 27 B.C. INT'L & COMP. L. REV. 371, 414-15 (2004).

34. UNCTAD, *supra* note 7, ¶ 5; African Caribbean Pacific – European Union (ACP-EU) Joint Parliamentary Assembly, Resolution on gender issues, ¶ C., ACP-EU/3392/02/fin (March 21, 2002) [hereinafter Cape Town Declaration].

35. See, e.g., Barbara Evers, *Gender, International Trade and the Trade Policy Review Mechanism: Conceptual Reference Points for UNCTAD 5-6*, GLOBALIZATION AND POVERTY (2002), <http://www.gapresearch.org/governance/BE%20evers%20unctad%20paper1.pdf>; COOPER, *supra* note 13, at 104 (“Unofficial cross-border trading networks...may well be doing more to create regional trading relations than official efforts...”).

36. Jarvis, *supra* note 8, at 224.

37. MARILYN CARR & MARTHA ALTER CHEN, WOMEN IN INFORMAL EMPLOYMENT GLOBALIZING & ORGANIZING, GLOBALIZATION AND THE INFORMAL ECONOMY: HOW GLOBAL TRADE AND INVESTMENT IMPACT ON THE WORKING POOR 2 (2001), available at <http://www.wiego.org/papers/carrchenglobalization.pdf>; McGill, *supra* note 33, at 422.

38. Swamy, *supra* note 8, at 1 (explaining that the factors that may impede women's ability to benefit from trade expansion include discrimination, lower skills, and gender inequalities in access to resources); cf. Elizabeth Gwaunza, Tsitsi Nzira & Virginia Chitanda, *The Socio-economic and Legal Implications of EPZs in Zimbabwe: Some Emerging Gender Concerns*, in DEMANDING DIGNITY: WOMEN CONFRONTING ECONOMIC REFORMS IN AFRICA 145, 159 (Dzodzi Tsikata et al. eds., 2000) [hereinafter DEMANDING DIGNITY] (noting that the jobs generated for women by trade tend to reflect a judgment on women's capabilities to perform certain tasks; hence, women are typically employed as support staff in administrative offices or as packers and quality inspectors in textile and agricultural factories, positions that pay less than the positions for which men were employed).

39. UNCTAD, *supra* note 7, ¶ 5.

40. E.g., *id.*; see also Swamy, *supra* note 8, at 3 (“An important institutional determinant of women's gains from trade, particularly in agriculture, is the extent of their control over land, labor, and the additional income generated by a switch to export crops.”).

or the "care and development of people and their capacity to work."⁴¹ This sector of the economy involves activities like subsistence farming, providing food, healthcare, and education for the family, as well as cleaning and laundry. Barbara Evers describes this "uncounted, unrecognized and undervalued" work as an "invisible policy variable" because it is:

- (i) An obligation which has costs in terms of time and energy ("work").
- (ii) Not remunerated by a wage ("unpaid").
- (iii) Indispensable for the continuation of the entire society ("social reproduction").
- (iv) An opportunity and a constraint for the achievement of food security, improved agricultural productivity and output.⁴²

The expectation that women, rather than men, will perform these jobs is promulgated by cultural, religious, and family norms in many societies.⁴³ For example, girls generally have to drop out of school at an earlier age than boys because they are expected to help out at home or because they need to take care of their own children.⁴⁴ Lack of education is one of the most crucial factors when evaluating gender inequalities, for it ties together women's inability to access resources in other sectors of society, such as training for skilled labor, and inclusion in policy-making discussions.⁴⁵

Engaging in care services requires a substantial amount of a woman's time; thus reducing the amount of time she has available to participate in more formally recognized economically-productive activities.⁴⁶ This contributes to women's inability to compete for higher paying jobs and thereby take advantage of international trade schemes. A study in Tanzania reveals that reducing women's time burdens results in a 10% increase in household cash incomes, a 15% increase in labor productivity, and a 44% increase in capital productivity.⁴⁷

41. U.N. Econ. & Soc. Comm'n For Asia and the Pacific [UNESCAP], *Emerging Soc. Issues Div., Gender and Dev. Discussion Paper Series, Discussion Paper: Women in International Trade and Migration: Examining the Globalized Provision of Care Services 2*, (February 2005) (drafted by Marina Fe B. Durano), available at <http://www.unescap.org/esid/GAD/Publication/DiscussionPapers/16/Discussion%20Paper%2016.pdf>.

42. Evers, *supra* note 35, at 6.

43. UNCTAD, *supra* note 7, ¶ 4.

44. See Robertson, *supra* note 20, at 67-68 (reporting that in Kenya the average number of years of education among traders was 5.1 for women and 7.9 men, and stating that "Women lack education as a result of a number of discriminatory factors, such as fewer and poorer schools, pregnancy terminating school attendance, parental reluctance to allow schooling because of the labor value of girls, and the poverty that forces that parental choice.").

45. See UNCTAD, *supra* note 7, ¶ 4 ("In many societies, cultural, religious or family norms continue to confine women to certain roles and are barriers to their participation in economic life on an equal basis with men . . . the prevailing gender order gives more authority to men in society . . . men tend to exclude women from their decision-making networks.").

46. Evers, *supra* note 35, at 5 (reporting that women's work burden averages 20% more than men, and even more in rural areas).

47. *Id.* at 405 (citing A. Tibaijuka, *The Cost of Differential Gender Roles in African Agriculture: A Cases Study of Smallholder Banana-Coffee Farms in the Kagera Region, Tanzania*, 45 J. AGRIC. ECON. 69 (1994)).

There is a substantial amount of evidence supporting the fact that when given access to resources, such as financial income, women invest more of those resources into their families to meet basic needs and cannot, therefore, invest in external resources as a means of production.⁴⁸ This keeps women tied to subsistence so that even when they are able to access the labor market they end up poorer than similarly-situated men.⁴⁹ For example, a study conducted among traders in Nairobi reveals that the majority of female traders relied solely on their own labor for their income and were not provided with supplemental income from their spouses, whereas most of the male traders were able to supplement their income with cash crops sold by their wives.⁵⁰ This knowledge should lead to the conclusion that because women engage in such socially-responsible investment practices, they should receive increased investment and that doing so is likely to benefit national growth and development more than a comparable investment in men.⁵¹

B. The Informal Sector

The expectation that women will provide for the family, regardless of the level of support received from a husband, propels many women into wage labor.⁵² Due to social norms and the gender-segregated nature of most developing countries' labor market, women's engagement in the market is generally through informal means such as market trading; therefore, the effects of trade liberalization, which often result in an increase in export-oriented industry, predominately affect women.⁵³

The effect trade liberalization has on women often results in negative economic consequences for the country in which those women live. An example of how this process occurs can be witnessed by analyzing Zimbabwean cross-border traders. These traders, who are predominantly women, cross the borders into South Africa or Botswana on a weekly or monthly basis using a visitor's visa.⁵⁴ They buy goods in the receiving country, which they then bring back into Zimbabwe to sell on the informal market. This hurts Zimbabwe's economy because these traders spend the majority of their profits in the formal sector of the receiving country, not in Zimbabwe.⁵⁵ These traders are also able to sell their foreign-bought goods more cheaply through Zimbabwe's informal market than

48. *E.g.*, Helene Lambatim & Aichta Sy, *Chad: Gender-Specific Impacts of Economic Reforms*, in DEMANDING DIGNITY, *supra* note 38, at 237, 244-45.

49. *See* Robertson, *supra* note 20, at 69-70.

50. *Id.*

51. *See* Rae Lesser Blumberg, *Introduction: EnGENDERing Wealth and Well-Being in an Era of Economic Transformation*, in ENGENDERING WEALTH & WELL-BEING, *supra* note 20, at 1, 10.

52. *See* McGill, *supra* note 33, at 414-15.

53. *See id.* at 414-16, 421-24; *see also* Robertson, *supra* note 20, at 81 (“[W]omen undertook trade in order to meet family needs . . . not because they viewed trade as a career they might enjoy.”).

54. SALLY PEBERDY & JONATHAN CRUSH, SOUTHERN AFRICAN MIGRATION PROJECT, MIGRATION POLICY SER. NO. 6, TRADING PLACES: CROSS-BORDER TRADERS AND THE SOUTH AFRICAN INFORMAL SECTOR 26-27 (1998), available at <http://www.queensu.ca/samp/sampresources/samppublications/policyseries/Acrobat6.pdf>.

55. *Id.* at 2.

people would be able to buy them in the formal markets in Zimbabwe; thereby, depriving the state of much-needed revenue.

Another reason export-oriented industries predominately affect women is because women tend to have fewer rights to land, which means their land can be taken from them by a large corporation for agricultural purposes or as development space for factories. Women need their land not only for subsistence farming for their families, but as a means for producing crops that can be sold on the informal market. Because women also tend to receive less education and job-specific training than men, they generally have fewer skills that are "marketable" in the industrial sector. The informal agricultural market, therefore, is often their only wage-earning option.⁵⁶

C. Property Rights & Agricultural Liberalization

Generally speaking, the inequality in ownership and control of land is due to a reliance on traditional norms regarding the appropriate roles of the sexes.⁵⁷ Most traditional systems throughout Africa are patrilineal, meaning that land and property inheritance favors male heirs. This pattern of male preference is realized through marriage laws, inheritance laws, land reforms, inequalities in the markets, and the concept of the male as being "head of the household."⁵⁸ Many of these traditional practices are embodied in customary law, which, while not necessarily promoting the status of women, was also not necessarily historically harmful to them. In Kenya, for example, land was traditionally held communally and women were able to bargain for access to land based on the notion of mutual obligations and responsibilities.⁵⁹ Because land in many African communities was viewed as being held in trust for future generations, many families were reluctant to alienate their land.⁶⁰ Therefore, although women may not have owned their own land, they were ensured access to and cultivation of it.

These traditional norms, and women's relative status, all changed with the imposition of Western views of property law brought by colonization. European colonizers emphasized private ownership of land.⁶¹ There was a focus on registration of ownership, typically only in the name of the head of the household, i.e. men.⁶² This focus on privatization, or individualization of property ownership increased as African communities adopted the more Westernized market. Individuals were more likely and willing to alienate land, thereby undermining the

56. See generally, e.g., McGill, *supra* note 33, at 414-24; UNCTAD, *supra* note 7; Swamy, *supra* note 8.

57. Karen O. Mason & Helene M. Carlsson, *The Development Impact of Gender Equality in Land Rights*, in HUMAN RIGHTS AND DEVELOPMENT: TOWARDS MUTUAL REINFORCEMENT 114, 120 (Philip Alston & Mary Robinson eds., 2005).

58. See *id.*

59. Renee Giovarelli, *Customary Law, Household Distribution of Wealth, and Women's Rights to Land and Property*, 4 SEATTLE J. SOC. JUST. 801, 802 (2006).

60. L. Amede Obiora, *Remapping the Domain of Property in Africa*, 12 U. FLA. J.L. & PUB. POL'Y 57, 64 (2000).

61. See Giovarelli, *supra* note 59, at 802.

62. See T.W. BENNETT, HUMAN RIGHTS AND AFRICAN CUSTOMARY LAW 123 (1995).

traditional protections women had in terms of usufruct and collective accountability.⁶³ Along with the loss of communal ownership was women's loss of bargaining ability and socio-economic security. Because land and livestock from the point of colonization onward were generally held in a man's name and because land and livestock were the focus of the Westernized market for property, women's contributions to the household property were typically disregarded.⁶⁴ Recent studies reveal that women head about one out of three households in Zimbabwe, but tend to have smaller farm sizes than their male counterparts.⁶⁵ While there are legal documents on the records granting equal land rights to women, these rights are unenforceable due to the constitutional provision that makes customary law superior to civil law in cases of conflict. Because customary Zimbabwean law is patriarchal, women can never truly be secure in their land holdings.⁶⁶

Agricultural trade liberalization is perhaps the area that most directly harms women.⁶⁷ The World Bank states that trade in agriculture benefits women by increasing their ability to exercise control over land, labor, and the "additional income generated by a switch to export crops."⁶⁸ This statement ignores the reality that women in developing countries often lack access to the resources necessary to make that switch, i.e. credit, education, and enforceable property rights. Furthermore, public farm aid programs are typically not adapted to small-scale production, such as the farming in which most women are engaged; hence, trade liberalization of agricultural markets has historically benefited medium- and large-scale farms, bypassing women.⁶⁹ The World Bank also ignores the reality that even if women could gain access to the necessary resources, they would still likely need to engage in subsistence farming to support themselves and their families and would be unable to make a complete switch to cash crops.⁷⁰

It is this historical base and continued practice of discrimination against women that the international community now seeks to improve. The next section of this paper will discuss the efforts made by the global international community as

63. See Obiora, *supra* note 60, at 67-68; see also FAREDA BANDA, WOMEN, LAW AND HUMAN RIGHTS: AN AFRICAN PERSPECTIVE 149 (2005).

64. See BANDA, *supra* note 63, at 132-33 (explaining that women's contributions to the household property are generally consumable so she has nothing to show for her efforts. Also, domestic contributions are not seen as being on par with financial contributions).

65. See INST. OF ENVTL. STUDIES (Zimbabwe), EVALUATING THE IMPACT OF FARMER PARTICIPATORY RESEARCH AND EXTENSION IN NATURAL RESOURCE MANAGEMENT IN ZIMBABWE 2 (2001), available at http://www.prgaprogram.org/modules/DownloadsPlus/uploads/PRGA_Publications/Natural_Resource_Mgmt/Reports/ies_small_grant.pdf; LLOYD M. SACHIKONYE, LAND REFORM FOR POVERTY REDUCTION? SOCIAL EXCLUSION AND FARM WORKERS IN ZIMBABWE 12 (2003), available at <http://www.chronicpoverty.org/pdfs/Sachikonye.pdf>.

66. See *generally* Magaya v. Magaya [1999] 3 L.R.C. 35 (Zimb. Sup. Ct.).

67. See UNCTAD, *supra* note 7, ¶¶ 18-19, 25.

68. See Swamy, *supra* note 8, at 3.

69. McGill, *supra* note 33, at 422; Lambatim & Sy, *supra* note 48, at 244.

70. Robertson, *supra* note 20, at 69-70.

well as the continental international community of Africa to ensure women's status is equal to that of men.

IV. INTERNATIONAL INFLUENCE

Long-term domination of all bodies wielding political power nationally and internationally means that issues traditionally of concern to men become seen as general human concerns, while "women's concerns" are relegated to a special, limited category.⁷¹

The International Monetary Fund (IMF) and the World Bank, which are heavily influenced in their economic policies by the United States' blend of neoclassical and neoliberal economic theory, have played a central role in "developing" the economies of African states.⁷² This base in economic theory means that the various institutions and instruments created to manage IMF and World Bank funds assume that states will act rationally to ensure their own best interests and that competition in the market will reward good performance and penalize poor performance; therefore, the IMF and World Bank promote deregulation, privatization, and the rule of the "free" market.⁷³ Basing policy decisions on this economic structure ignores the informal sector of the economy, which is a major component of many African nations' national economies and the dominant economic playing field for many women in these countries.⁷⁴ The following discussion of international documents provides support for the argument that by ignoring the informal sector, the international community has consistently and systematically marginalized and discriminated against women as rational actors in the economic market.

Following the end of World War II, amidst a general feeling of world unity, two major international instruments were created: The Universal Declaration of Human Rights⁷⁵ and the General Agreement on Tariffs and Trade (GATT).⁷⁶ The Universal Declaration of Human Rights has become the foundation for modern

71. Jarvis, *supra* note 8, at 222.

72. See generally Dr. Kevin Archer, Lecture for International Political Economy class at the Josef Korbel School of International Studies, University of Denver (Fall 2006); NEIL J. SMELSER & RICHARD SWEDBERG, *THE HANDBOOK OF ECONOMIC SOCIOLOGY* 4-6 (1994); ROBERT O. KEOHANE & JOSEPH S. NYE, *POWER AND INTERDEPENDENCE: WORLD POLITICS IN TRANSITION* (1977); DAVID K. LEONARD & SCOTT STRAUSS, *AFRICA'S STALLED DEVELOPMENT: INTERNATIONAL CAUSES & CURES* 26 (2003).

73. See, e.g., Archer, *supra* note 72; Emmanuel Opoku Awuku, *International Competition Law and Policy in Developing Countries*, in *LAW AND DEVELOPMENT: FACING COMPLEXITY IN THE 21ST CENTURY*, *supra* note 2, at 99, 102.

74. See, e.g., CARR & CHEN, *supra* note 37, at 1, 3; Gumisai Mutume, *How to boost trade within Africa: Lower Barriers and Diversify Production*, 16 AFR. RECOVERY 20, Sept. 2002, available at <http://www.un.org/ecosocdev/geninfo/afrec/vol16no2/162reg3.htm> ("For many years it has been recognized that many countries' real economies have been mostly informal and much larger, more dynamic and more regionally integrated than their official economies.") (internal quotation omitted).

75. See Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 10, 1948).

76. See General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

human rights, including the rights of women. In fact, it was the first formal recognition of women's equality as a fundamental human right.⁷⁷ The preamble affirms the member states' faith "in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women."

Meanwhile, GATT was intended to create a third institution, the International Trade Organization (ITO), which would operate alongside the World Bank and the International Monetary Fund to handle the trade side of international economic cooperation.⁷⁸ GATT was to achieve this through the reduction of tariff barriers, quantitative restrictions, and subsidies on trade. The concurrent creation of these two documents reflects the general focus of the international community, namely: human rights and economic issues are two separate spheres of international concern, requiring separate documents and political bodies to govern them.

A. *International Human Rights Norms*

Since the Universal Declaration on Human Rights was adopted in 1948, a number of subsequent international documents have acknowledged that women's rights are human rights and, as such, should be protected and promoted. For example, in 1979 the United Nations General Assembly adopted the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).⁷⁹ The Convention recognizes that

discrimination against women violates the principles of equality of rights and respect for human dignity, is an obstacle to the participation of women, on equal terms with men, in the political, social, economic and cultural life of their countries, hampers the growth of the prosperity of society and the family and makes more difficult the full development of the potentialities of women in the service of their countries and of humanity.⁸⁰

Within two years, the Organization of African Unity adopted the African Charter on Human and People's Rights (Banjul Charter).⁸¹ The Banjul Charter incorporates the traditional values of African culture into a modern conception of human rights and women's equality.⁸² In doing so, the Banjul Charter affirms

77. Universal Declaration of Human Rights, *supra* note 75, at preamble (demonstrating that the Universal Declaration of Human rights has numerous statements asserting the inherent equality of men and women).

78. Due to the impossibility of some national legislatures, namely the U.S., to ratify the ITO Charter, the institution never came into being. Thus, the GATT Agreement "became the only multilateral instrument governing international trade from 1948 until the WTO was established in 1995." World Trade Organization, Understanding the WTO: Basics, The GATT years: from Havana to Marrakesh, http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm (last visited November 15, 2008).

79. Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res 34/180, U.N. Doc A/RES/34/180 (Dec. 18, 1979), *entered into force* Sept. 3, 1981 [hereinafter CEDAW].

80. *Id.* at preamble.

81. See African [Banjul] Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 rev. 5 (June 27, 1981), 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986 [hereinafter Banjul Charter].

82. *Id.* at preamble ("Taking into consideration the virtues of their historical tradition and the

African leaders' beliefs that all people are equal before the law and that parties to the charter should make efforts to eliminate all forms of discrimination, including discrimination against women.⁸³

Continuing along these lines and building on numerous conventions and declarations signed in the interim, the international community adopted the Beijing Declaration at the Fourth World Conference on Women in 1995.⁸⁴ This declaration acknowledges that while there has been some advancement in women's rights, inequalities between men and women persist, resulting in "serious consequences for the well-being of all people."⁸⁵ This document further reiterates that women's rights are human rights and that

[e]radication of poverty based on sustained economic growth, social development, environmental protection and social justice requires the involvement of women in economic and social development, equal opportunities and the full and equal participation of women and men as agents and beneficiaries of people-cent[er]ed sustainable development.⁸⁶

African leaders recognized the validity of this statement and the reality that, despite ratification of numerous regional and international instruments, African women were continuing to be victims of discrimination and marginalized in development efforts. Therefore, the Heads of State or Government of the Southern African Development Community (SADC)⁸⁷ signed the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Protocol) in 1997.⁸⁸ While this instrument asserts many of the statements that have come to be expected in documents promoting women's rights, such as equality before the law and the right to personal integrity; it also includes provisions that recognize the specific problems faced by African women, such as unequal access to employment and education, inadequate food security, and the need to include women in the process of formulating cultural and developmental policies.⁸⁹

values of African civilization which should inspire and characterize their reflection on the concept of human and peoples' rights.").

83. *Id.* at arts. 2, 3, 18.

84. Fourth World Conference on Women, Beijing, China, Sept. 15, 1995, *Final Declaration*, ¶¶ 8, 10 available at <http://www.un.org/womenwatch/daw/beijing/beijingdeclaration.html> [hereinafter Beijing Declaration].

85. *Id.* ¶ 5.

86. *Id.* ¶ 16.

87. For information regarding the formation of the SADC, see *infra* text accompanying notes 88, 89.

88. African Commission on Human and Peoples' Rights, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Sept. 13, 2000, preamble, CAB/LEG/66.6 (entered into force Nov. 25, 2005) ("Noting...women's essential role in development... Recogniz[ing] the crucial role of women in the preservation of African values based on the principles of equality, peace, freedom, dignity, justice, solidarity and democracy ... Concerned that despite...solemn commitment to eliminate all forms of discrimination and harmful practices against women, women in Africa still continue to be victims of discrimination and harmful practices...").

89. See generally *id.*

However, the fact that this Protocol took over ten years to enter into force exhibits the very lack of commitment by African leaders the Protocol sought to rectify.

The creation of the United Nations' Millennium Development Goals (MDGs) has been one of the most recent developments in international recognition of women's rights.⁹⁰ The MDGs place issues of gender equality at the center of any discussion regarding development by declaring that the MDGs cannot be realized without advancing gender equality.⁹¹ In pursuit of achieving the MDGs, the United Nations Development Programme (UNDP) has created an agenda to make gender equality a reality through gender mainstreaming and women's empowerment.⁹² Incorporating gender into the core development discussions is no longer an option; it is an important necessity. As the UNDP points out, gender discrimination is at the center of endemic poverty, low economic growth, and poor governance; therefore, "[g]ender equality is not merely a desirable by-product of human development; it is a core goal in its own right."⁹³

B. International & Regional Institutions

The wave of African states' independence occurred primarily during the 1960s. Over the course of the next two decades a number of regional and international institutions affecting both trade and gender developed. The first Pan-African multidisciplinary institution,⁹⁴ the Organization of African Unity (OAU), was established in 1963 to promote greater coordination and cooperation of African states.⁹⁵ In July 2003, the African Union (AU) replaced the OAU as the

90. See United Nations Millennium Declaration, G.A. Res. 55/2, U.N. GAOR, 55th Sess., U.N. Doc A/Res/55/2 (Sept. 18, 2000).

91. U.N. Dev. Programme (UNDP), Gender and Poverty Reduction, Key Initiatives: Women's Empowerment – access to markets, lands and assets and the assessment of inheritance, marital laws and social norms, <http://www.undp.org/poverty/genpov.htm> (last visited Nov. 10, 2007); UNITED NATIONS DEVELOPMENT FUND FOR WOMEN (UNIFEM), *Resource Guide for Gender Theme Groups*, at 3, Jan. 2005, available at http://www.unifem.org/attachments/products/ResourceGuideGenderThemeGroups_200511_eng.pdf (“Gender equality and women’s empowerment are Millennium Development Goals (MDGs) in their own right and central to all other development efforts.”).

92. U.N. Dev. Programme [UNDP], *Gender Equality Practice Note*, 4 (Nov. 2002) (prepared by Jan Vandemoortele, Aster Zaoude, Dasa Silovic, & UNDP), available at <http://www.undplao.org/whatwedo/bgresource/poverty/GenderequalityPracticeNote.pdf> [hereinafter *Gender Equality Practice Note*].

93. *Id.*

94. The Southern African Customs Union originated in 1889 and is one of the oldest formal trading blocks on the continent; however, the OAU was the first post-independence organization of African Heads of State. DANIELLE LANGTON, CRS REPORT FOR CONGRESS ON UNITED STATES-SOUTHERN AFRICAN CUSTOMS UNION (SACU) FREE TRADE AGREEMENT NEGOTIATIONS: BACKGROUND AND POTENTIAL ISSUES, Order Code RS21387, at 3 (2007), available at <http://www.nationalaglawcenter.org/assets/crs/RS21387.pdf>; see also Department of Foreign Affairs, Southern African Customs Union (SACU), History and Present Status Department of Foreign Affairs, Southern African Customs Union (SACU), History and Present Status, <http://www.dfa.gov.za/foreign/Multilateral/africa/sacu.htm> (last visited Nov. 10, 2007).

95. Organization of African Unity (OAU) Charter states that the objectives of the union are: (1) to promote the unity and solidarity of the African States; (2) to co-ordinate and intensify their cooperation and efforts to achieve a better life for the peoples of Africa; (3) to defend their sovereignty, their territorial integrity and independence; (4) to eradicate all forms of colonialism from Africa; and (5) to

governing pan-African unit.⁹⁶ The founding documents of both the OAU and the AU recognize the equality and dignity of all people, including women.⁹⁷

The Southern African Development Co-ordination Conference (SADCC) was established in 1980 with four primary objectives: 1) to reduce Member States dependence, particularly, but not only, on apartheid South Africa; 2) to implement programmes and projects with national and regional impact; 3) to mobilize Member States' resources, in the quest for collective self-reliance; and 4) to secure international understanding and support.⁹⁸ In 1992 the Heads of State and Government of the SADCC signed a Declaration and Treaty creating the Southern African Development Community (SADC).⁹⁹ The SADC member states coordinate on a wide array of social and economic policies and projects to promote self-reliance and an improved quality of life for all.¹⁰⁰ The SADC was just one of the many regional African organizations formed during the 1990s to promote cooperation among member states for improved economic status. Some of the other important unions are: the Common Market for Eastern and Southern Africa (COMESA)¹⁰¹; the East African Community (EAC)¹⁰²; and the Economic Community of West African States (ECOWAS).¹⁰³

promote international cooperation, having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights. Organization of African Unity (OAU) Charter art. II, May 25, 1963, 479 U.N.T.S. 39 [hereinafter OAU Charter].

96. Constitutive Act of the African Union (AU), *opened for signature* July 11, 2001, OAU Doc. CAB/LEG/23.15.

97. *Id.* at preamble, arts. 3, 4; OAU Charter, *supra* note 95, at preamble ("Conscious of the fact that freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples.").

98. Southern African Development Community (SADC), SADC History, Evolution and Current Status: The Origins, Southern African Development Community, Sept. 26, 2008, <http://www.sadc.int/index/browse/page/54> [hereinafter SADC] (last visited Oct. 20, 2007).

99. Declaration by the Heads of State or Government of Southern African States Regarding the Establishment of the Southern African Development Community, Aug. 17, 1992, 32 I.L.M. 267 (1993).

100. *Id.* at preamble, art. 5.

101. The Treaty Establishing the Common Market for Eastern and Southern Africa, Nov. 5, 1993, 33 I.L.M. 1067 (1994) [hereinafter COMESA Treaty].

102. The Treaty Establishing the African Economic Community, June 3, 1991 30 I.L.M. 1241 (1991); Treaty for the Establishment of the East African Community, Nov. 30, 1999, *entered into force* July 7, 2000 [hereinafter EAC]. The original East African Community (EAC) dissolved in 1977; however, the member states continued negotiation and discussion, which led to the signing of the Agreement for the Establishment of the Permanent Tripartite Commission for East African Co-operation on November 30, 1993. Then, wanting to further consolidate regional co-operation, the member parties engaged in making the Agreement a Treaty, resulting in the (re)creation of the EAC in 1999. See East African Community, History, <http://www.eac.int/about-eac/eac-history.html> (last visited Feb. 10, 2009).

103. ECOWAS was originally established in Lagos on May 28, 1975; however, the parties revised the founding treaty in 1993 to better incorporate and reflect the principles of the Banjul Charter and the Declaration of Political Principles of the Economic Community of West African States (July 6, 1991). See Articles of Association for the Establishment of an Economic Community of West Africa, May 4, 1967, 6 I.L.M. 776 (1967); Economic Community of West African States (ECOWAS): Revised Treaty, July 24, 1993, 35 I.L.M. 660 (1996) [hereinafter ECOWAS Revised Treaty].

Each of these unions expressly state the important and central role women have in development efforts, and contain at least one article addressing the specific actions to be conducted regarding women's status. For example, Article 63 of the revised ECOWAS treaty orders "[m]ember States undertake to formulate, harmonize, coordinate and establish appropriate policies and mechanisms, for advancement of the economic, social and cultural conditions of women." This is to be done by, among other things, identifying and assessing constraints that inhibit women's ability to contribute to development efforts and to provide a framework within which to address these constraints.¹⁰⁴

The articles addressing women's empowerment in the COMESA and EAC documents are almost identical. They begin by asserting that "[t]he Partner States recognise that women make a significant contribution towards the process of socio-economic transformation and sustainable growth and that it is impossible to implement effective programmes for the economic and social development of the Partner States without the full participation of women."¹⁰⁵

These articles then continue by describing certain actions member state governments must make through enacting or abolishing certain legislative and other measures. The required measures include ensuring that women are more involved at all levels of socio-economic decision-making, promoting programs aimed at changing negative attitudes towards women, adopting or creating technologies to increase women's employment stability and progress, and any other measures to eliminate prejudices against women and promote equality.¹⁰⁶

One provision of particular importance requires member states to abolish discriminatory legislation as well as to discourage discriminatory customs.¹⁰⁷ The provision requires abolishing legislations and customs that are discriminatory *against* women, but does not address legislation and customs that are discriminatory in favor of women.¹⁰⁸ As mentioned previously, many of the "traditional" customs, as codified during colonialism, disproportionately affect women and their livelihood capabilities. For example, although women in many "traditional" societies were not able to own land, they were assured support and access to land by their husbands and husbands' families.¹⁰⁹ When colonialists codified this custom of male-dominated land ownership, they failed to factor in the accompanying societal expectation of support of the woman. In doing so, and with the disruption to societies caused by increasing industrialization and urbanization, colonialists removed women's sense of security in their livelihoods and in their

104. ECOWAS Revised Treaty, *supra* note 103, art. 63(2)-(3).

105. COMESA Treaty, *supra* note 101, art. 154; EAC, *supra* note 102, art. 121.

106. COMESA Treaty, *supra* note 101, art. 154; EAC, *supra* note 102, art. 121.

107. COMESA Treaty, *supra* note 101, art. 154(b); EAC, *supra* note 102, art. 121(b).

108. For an interesting discussion of international affirmative action approaches to the gender equality issue see Lia Hayes, *International Affirmative Action: Current Gender Affirmative Action Approaches in International Trade Serving as a Possible Model for Minority Groups*, 12 CURRENTS INT'L TRADE L. J. 78 (Winter 2003).

109. See, e.g., T.W. BENNETT, HUMAN RIGHTS AND CUSTOMARY LAW 124-28 (1999); Armstrong, *supra* note 28, at 317, 346.

ability to provide for their families. Therefore, by not only encouraging member states to recognize and eliminate these customs, but by *requiring* them to, the COMESA and EAC instruments provide a major move forward for women's equality. As should be expected, however, there remains a lag between the written aspiration and the daily reality.

One of the most recent regional organizations formed among African countries is the Economic, Social and Cultural Council of the African Union (ECOSOCC), which was established in March 2005.¹¹⁰ ECOSOCC is an advisory organ of the AU and is intended to facilitate the building of a strong partnership between African governments and civil society.¹¹¹ It is an organization composed of various social, cultural, and professional groups.¹¹² The importance of promoting gender equality is referenced throughout the Statutes of ECOSOCC.¹¹³

ECOSOCC Article 11 enumerates the Sectoral Cluster Committees, of which the Committee on Women and Gender is one.¹¹⁴ It is interesting that although gender is widely accepted as a "cross-cutting issue", ECOSOCC separates the two, providing one committee for Women and Gender and another committee for Cross-Cutting Programmes.¹¹⁵ One could argue that this indicates ECOSOCC's dedication to promoting gender equality by establishing an entire committee that will do nothing but focus on gender issues. Conversely, by separating gender from other cross-cutting issues such as HIV/AIDS and international cooperation it perpetuates the marginalizing practice of distinguishing "women's issues" from "core" issues of international economy and politics.

C. International & Regional Development Agreements

In an effort to fulfill the obligations set out in the various international declarations and founding documents of the institutions described above, as well as to facilitate trade and capital flow generally, most African states have signed on to various multi- and bilateral agreements. The most far-reaching of these agreements in terms of trade and economic development has been African states' membership in the World Trade Organization (WTO) and the subsequent Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).¹¹⁶

110. The Statute of the Economic, Social & Cultural Council (ECOSOCC), Assembly/AU/Dec.42 (III) was adopted by the Heads of State and Government at the Third Ordinary Session of the Assembly in July 2004; however, the organization was not formally launched until March 2005. The Economic, Social & Cultural Council (ECOSOCC) of the African Union, ECOSOCC as an Organ of the AU, http://www.ecosocc.org/ecosocc_au.php (last visited Nov. 10, 2007).

111. African Union, *Statutes of the Economic, Social and Cultural Council of the African Union (ECOSOCC)*, at preamble, Assembly/AU/Dec.42 (III), (July 2004), available at http://www.ecosocc.org/reports/24spt/ECOSOCC_STATUTES-English.pdf.

112. *Id.* art. 3.

113. *See id.* arts. 2, 3, 7.

114. *Id.* art. 11(j).

115. *Id.* art.11(j).

116. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, April 15, 1994, 33 I.L.M. 1125 (1994), available at http://www.wto.org/english/docs_e/legal_e/04-wto.pdf; Agreement on Trade-Related Aspects of Intellectual Property Rights, January 1995, Agreement Establishing the World Trade Organization, signed as Appendix 1C, 33 I.L.M. 81 (1994),

Just after independence many developing countries were “sponsored” into the GATT (and subsequently the WTO) by their former colonial powers and, therefore, did not go through the “full working party examination process” through which current WTO-applicant states must go.¹¹⁷ Many of these African states became WTO members without really understanding the substance of GATT or how to incorporate its trade mechanisms and provisions into their development policies.¹¹⁸ This initial lack of understanding regarding the international trade regime at independence and the African states’ relative lack of power to influence policy still today has often resulted in unfavorable regulations. The brunt of the burdens resulting from these unfavorable regulations has fallen disproportionately on women.¹¹⁹

The oil crisis of the 1970s, coupled with a prolonged and severe drought across much of the continent, and reduced global prices for agricultural goods shocked the fragile, developing African economies, resulting in national economic crises.¹²⁰ The response of the majority of these states was to accept foreign assistance in the form of structural adjustment program (SAP) loans from the World Bank.¹²¹ SAPs promoted price liberalization and deregulation, trade reform, and the privatization of state-owned enterprises.¹²² Rather than boost the national economies however, SAPs merely reinforced the colonial, export-oriented structures of the state and the gatekeeper¹²³ role of the government.¹²⁴

Although some scholars claim SAPs were successful in transforming Latin American economies, there is a growing consensus that they failed in Africa.¹²⁵ Not only did SAPs fail to transform African states’ economies into robust capitalist markets, there is also evidence they actually increased poverty, unemployment, and wage reductions.¹²⁶ Additionally, in the social sector, SAPs have been linked

available at http://www.wto.org/english/docs_e/legal_e/27-trips.pdf [hereinafter TRIPS].

117. Mary E. Footer, *Technical Assistance and Trade Law Reform Post-Doha: Brave New World*, in *LAW AND DEVELOPMENT: FACING COMPLEXITY IN THE 21ST CENTURY* 108, 113 (John Hatchard and Amanda Perry-Kessaris eds., 2003).

118. *See id.*

119. *E.g.*, Ewelukwa, *supra* note 14, at 80.

120. *See, e.g.*, NICOLAS VAN DE WALLE, *AFRICAN ECONOMIES AND THE POLITICS OF PERMANENT CRISIS, 1979-1999: POLITICAL ECONOMY OF INSTITUTIONS AND DECISIONS* 1-10 (2001); LEONARD & STRAUSS, *supra* note 72, at 23.

121. *See* JOHN MUKUM MBAKU, *INSTITUTIONS AND DEVELOPMENT IN AFRICA* 141-45 (2004). The first structural adjustment loan extended to Africa was received by Senegal in 1979. VAN DE WALLE, *supra* note 120, at 1.

122. VAN DE WALLE, *supra* note 120, at 8.

123. COOPER, *supra* note 13, at 5, (describing gatekeeper states as states without a strong national economic base and economies that are externally-oriented. The state’s economic power remains concentrated at the gate between inside and outside.).

124. VAN DE WALLE, *supra* note 120, at 80-81.

125. *See generally, e.g., id.*; LEONARD & STRAUSS, *supra* note 72, at 24-25; NEPAD, *supra* note 16, para. 24; Mutume, *supra* note 74, at 20 (“across Africa many incentives to promote industrial development have been dismantled through structural adjustment.”).

126. Nandini Gunewardena, *Reinscribing Subalternity: International Financial institutions, Development, and Women’s Marginality*, 7 *UCLA J. INT’L L. & FOR. AFF.* 201, 213 (2003); Oduor Ong’wen, *The Political Economy of Regional Trade Agreements in Africa*, 7 *SEATINI BULLETIN*

to reductions in access to health care and education as well as an increased prevalence of prostitution.¹²⁷ In this manner, the World Bank's structural adjustment programs contributed to the continued discrimination against women in Africa because, in their attempts to reduce the effects of these adjustments on their families, women disproportionately absorb the majority of the negative impacts.¹²⁸

The TRIPS Agreement is another example of a seemingly gender-neutral policy that has a detrimental effect on women and the ability of African states to engage in sustainable development strategies. TRIPS was created to "promote effective and adequate protection of intellectual property rights" and to reduce the possibility that intellectual property right protection would impede trade by balancing Member states' rights and obligations.¹²⁹

Article 27 describes the types of products and processes that are "patentable subject matter." According to Article 27, patents should be granted to "subject matter" that involves "an inventive step and are capable of industrial application."¹³⁰ This definition ignores the possibility that, to foreign scientists from industrialized nations, many of the "products and processes" used by people in African states that incorporate native plants, for example, may involve an inventive step for the foreign scientists.¹³¹ Once a patent is granted to the industrialized scientist, it becomes protected and must, therefore, be imported and bought through international trade.¹³² As noted in the Kurasini Declaration¹³³, the TRIPS Agreement "allows Northern companies and universities to claim exclusive ownership over local resources and knowledge, often developed by women."¹³⁴

Recognizing that the existing trade and development regimes were inadequate, African leaders adopted the New Partnership for Africa's Development

(March-April 2004), available at www.bilaterals.org/article.php?id_article=257.

127. Economic Justice Network of Fellowship of Christian Councils in Southern Africa, Kurasini, Dar Es Salaam, June 24-28, 2002, *Declaration on Gender and Trade*, para. 4 (July 1, 2002) [hereinafter Kurasini Declaration] ("social services have been depleted, unemployment is rife, international commodity prices have fallen drastically, and farmers and producers no longer receive subsidies and protection from unfair competition."); Cape Town Declaration, *supra* note 34, para. F; Gunewardena, *supra* note 126, at 213.

128. See Kurasini Declaration, *supra* note 127, para. 5 ("Structural adjustment policies have been imposed on the population at the expense of women's social and economic empowerment."); Gunewardena, *supra* note 126, at 218 ("Emerging evidence now reveals that export-led growth is a strategy that has hurt the poor, and poor women in particular.")

129. TRIPS, *supra* note 116, at preamble, art. 7.

130. *Id.* art. 27(1).

131. *Id.* art. 27(1), fn 5 ("For the purposes of this Article, the terms 'inventive step' and 'capable of industrial application' may be deemed by a Member to be synonymous with the terms 'non-obvious' and 'useful' respectively.")

132. See Kurasini Declaration, *supra* note 127, para. 7.

133. The Kurasini Declaration is the result of "the Economic Justice Network of FOCCISA [Fellowship of Christian Councils in Southern Africa] and partner organisations from eleven countries in southern Africa [who] gathered in Kurasini, Dar Es Salaam, from 24-28 June 2002 to reflect on and address the marginalisation and injustices women face in [their] economies and societies as a result of trade liberalisation." Rev. Malcolm Damon, Director of the Economic Justice Network of Focccisa (July 2002), available at http://www.igtn.org/pdfs/91_Kurasini.pdf.

134. *Id.*

(NEPAD) in July 2001. This agreement affirms these leaders' dedication to eradicating poverty, to placing their countries on a path of sustainable growth and development and to participating in the world economy.¹³⁵ Unlike many international agreements, NEPAD does not separate women and gender into its own focus-category to achieve these aims; rather issues of gender equality are addressed within the core sections of the agreement. For example, Article V (the Program of Action) of NEPAD identifies the promotion of women in all activities as a long-term objective and the elimination of gender disparities in education as one of its top goals.¹³⁶

Another example of NEPAD's acceptance of gender equality as a core issue in development is the focus given to improving land tenure security and the productivity of agriculture, "with particular attention to...women farmers."¹³⁷ NEPAD further supports this effort to incorporate gender as a truly cross-cutting issue by integrating it into the core issues of the agreement and establishing a "gender task team" to ensure that poverty reduction strategies include specific issues of concern to poor women.¹³⁸

The Cotonou Agreement similarly, and even more expressly, recognizes gender as a crosscutting issue for any development or poverty reducing policies.¹³⁹ The Cotonou Agreement replaced the Lomé Convention in managing and regulating relations between African, Caribbean, and Pacific (ACP) countries and the European Union.¹⁴⁰ Article 9, which lays out the fundamental principles of the agreement, reaffirms the equality of men and women.¹⁴¹ Article 31 builds on this principle and calls on the ACP governments to support and promote gender equality through increased access to resources, such as land and education; increased access to social services, such as healthcare; and increased involvement of women at all levels of development policy-making.¹⁴² Throughout the

135. NEPAD, *supra* note 16, at preamble.

136. *Id.* paras. 67, 68.

137. *Id.* paras. 154, 155.

138. *Id.* para. 116.

139. Partnership Agreement between the Members of the Group of African, Caribbean and Pacific States and the European Community and its Member States, ACP-EU, Cotonou, Benin, June 23, 2000 [hereinafter Cotonou Agreement].

140. *Id.*

141. *Id.* art. 9.

142. The full text of Article 31 reads:

Cooperation shall help strengthen policies and programmes that improve, ensure and broaden the equal participation of men and women in all spheres of political, economic, social and cultural life.

Cooperation shall help improve the access of women to all resources required for the full exercise of their fundamental rights. More specifically, cooperation shall create the appropriate framework

to:

(a) integrate a gender-sensitive approach and concerns at every level of development cooperation

including macroeconomic policies, strategies and operations; and

(b) encourage the adoption of specific positive measures in favour of women such as:

agreement, focus is given to strengthening technology, training, and investment in both the formal and informal sectors.¹⁴³ Assuming the member states are willing and able to incorporate gender equity within this structure of economic development, the Cotonou Agreement could be a major stepping-stone for the empowerment of African women.¹⁴⁴

The initial provisions of the Cotonou Agreement provide for review and revision of the agreement every five years.¹⁴⁵ Accordingly, the parties met in 2004 and produced the first compendium to the agreement in February 2005.¹⁴⁶ This compendium reasserts Member states' dedication to promoting gender equality and further defines the steps needed to ensure success in this area.¹⁴⁷ However, it may still be too early to tell if the governments of those states will transform the words in the document into transformative action.

D. The role of Governments in protecting and promoting women's equality

As the above discussion makes clear, African governments, like nearly all governments world-wide, are becoming increasingly aware of the need to include a broad spectrum of concerns in their process of reform. It is no longer enough to support just the core market functions because in so doing, important components of those structures will be neglected and the reforms will not be successful. Therefore, it is necessary for these governments to expand their efforts to include areas such as gender equality, land tenure, and equal opportunity.¹⁴⁸

The World Bank is also taking steps to incorporate a wider array of issues into its development strategies.¹⁴⁹ For instance, in 2001 the World Bank published a comprehensive policy research report with the intention of improving

- (i) participation in national and local politics;
- (ii) support for women's organisations;
- (iii) access to basic social services, especially to education and training, health care and family planning;
- (iv) access to productive resources, especially to land and credit and to labour market; and
- (v) taking specific account of women in emergency aid and rehabilitation operations.

Id.

143. See Cotonou Agreement, *supra* note 139, arts. 21-23.

144. *But see*, APRODEV & AID TRANSPARENCY, ANALYTICAL REPORT ON GENDER DIMENSIONS OF ECONOMIC PARTNERSHIP AGREEMENTS 10-11, Dakar, Senegal, October 27-29, 2003, (Sept. 2004) [hereinafter *Dakar Report*] (noting that although the Cotonou Agreement has clearly stated commitments to gender equality, "it is a basis for major concern that gender issues are missing in relation to the 'hard' areas of negotiations, especially trade and trade-related areas.").

145. Cotonou Agreement, *supra* note 139, art. 95.

146. European Commission, *Compendium on co-operation strategies: Partnership Agreement between the Members of the Group of African, Caribbean and Pacific States and the European Community and its Member States* (Feb. 23, 2005).

147. *Id.* at 45-46.

148. Stewart, *supra* note 2, at 42-43.

149. *Id.* at 43 (referencing the World Bank's 2000/2001 World Development Report in which the World Bank says that development strategies must consider social and political causes of poverty as well as economic).

understanding of the links among gender, development, and public policy.¹⁵⁰ The authors of the report observe that the effectiveness of development policies will continue to be undermined by ignorance regarding the nature and costs of gender inequalities to individuals' well-being and countries' potential for sustainable economic growth.¹⁵¹ The report notes that while disparities in basic rights hurt women and girls the most, such gender inequalities ultimately harm everyone.¹⁵² Therefore, one of the primary themes the report hopes to convey is that "to enhance development effectiveness, gender issues must be an integral part of policy analysis, design and implementation."¹⁵³

The combined awareness of international and national governing bodies regarding the crucial role of women in development is beginning to slowly produce tangible results. Numerous African states have enacted constitutions and legislation promoting and protecting gender equity; however, customary laws are more often followed in practice, denying women the equal rights promised in these instruments.¹⁵⁴ Women activists often find that state-based legal strategies make it difficult to assert these constitutional rights, thereby exposing the gendered nature of citizenship in many states.¹⁵⁵ Similarly, States' attempts to facilitate global economic liberalization policies can have an intense effect on social and political relationships at a local level.¹⁵⁶ States often employ inconsistent approaches to development as leaders attempt to legitimize their policies in the international community while also attempting to maintain cultural hegemony.¹⁵⁷ This inconsistent approach exposes women to additional dangers as they attempt to realize equality.¹⁵⁸

Ugandan women have experienced this inconsistency first hand. In 1992 the government implemented a broad-reaching policy of financial sector liberalization, which was intended to spur economic growth and investment through lower interest rates and deregulated credit.¹⁵⁹ These policies failed to benefit women, in large part because of the government's failure to account for women's unequal starting position relative to men. Failing to realize the unequal starting positions was primarily due to unquestioned acceptance of "traditional" culture. These policies were based on the faulty assumption that women and men have equal access to resources, such as upper-level education, ownership title to land, and the

150. WORLD BANK, *ENGENDERING DEVELOPMENT: THROUGH GENDER EQUALITY IN RIGHTS, RESOURCES, AND VOICES* (2001).

151. *Id.* at xi, xiii.

152. *Id.* at xi.

153. *Id.* at xii.

154. *See, e.g.*, Gordon, *supra* note 11, at 307; S. AFR. CONST. (1996); *compare* CONSTITUTION, art. 23 (1979) (Zimb.) *with* Magaya v. Magaya [1999] 3 L.R.C. 35 (Zimb. Sup. Ct.).

155. Stewart, *supra* note 2, at 46.

156. *Id.* at 50.

157. *Id.* at 50-51.

158. *See id.*

159. Enid Kiiiza, Winifred Rwe-Beyanga, & Agnes Kanya, *Accounting for Gender: Improving Ugandan Credit Policies, Processes, and Programs*, in DEMANDING DIGNITY: WOMEN CONFRONTING ECONOMIC REFORMS IN AFRICA, *supra* note 38, at 47, 49.

ability to establish long-term relationships with banks.¹⁶⁰ In response to a study conducted to measure these differences, bank officials' articulated the reason for this continued discrimination, namely "that women customers are not worth making changes for."¹⁶¹

Another factor contributing to inconsistent or ineffective approaches to addressing gender is lack of resources. Zimbabwe is one such example. In 2004 the government formulated a National Gender Policy coupled with a National Plan of Action to guide its implementation.¹⁶² This policy is focused on eliminating negative economic, social, legal, and political policies as well as cultural and religious practices that contribute to gender inequality.¹⁶³ While the National Plan of Action created ministries and commissions to focus solely on gender issues, the national government lacks the resources to support and operate these departments. Many of the departments, or "focal points," dealing with gender equity concerns are staffed by individuals who have "no link with development policy formation and implementation."¹⁶⁴ Additionally, junior officers and women, who have no real decision-making powers, staff many of the gender focal points.¹⁶⁵ Finally, Zimbabwe has no system for monitoring and evaluating the changes in gender equality resulting from the National Policy.¹⁶⁶ This means that, in reality, the government has likely done more harm than good by implementing a sham institutional structure to promote and oversee the progress and development of Zimbabwean women's equality.

Some African countries are making impressive progress toward institutionalizing equality. One such country is Rwanda, which has the highest representation of women in a house of parliament of any country in the world: 49%.¹⁶⁷ Similarly, Liberia made international headlines in 2005 by swearing in Ellen Johnson-Sirleaf, Africa's first elected female head of state.¹⁶⁸ It may still be too early to see how such female representation will affect trade and development policies in these countries and across the continent, but one can assume gender equality will play a more prominent role in policy discussions and formation.

160. *Id.* at 54.

161. *Id.* at 52.

162. Inter-Agency and Expert Group Meeting on the Development of Gender Statistics, United Nations Secretariat Department of Economic and Social Affairs Statistics Division, *The Development of gender statistics: Zimbabwe's experience*, 2, U.N. Doc ESA/STAT/AC.122/14.1 (Dec. 2006) (prepared by Joyce Malaba) [hereinafter Malaba Report].

163. *Id.* at 2-3.

164. *Id.* at 3.

165. *Id.*

166. *Id.* at 8.

167. Gordon, *supra* note 11, at 293-94; Gumisai Mutume, *Women break into African politics*, 18 AFRICA RECOVERY 4, Apr. 2004, available at <http://www.un.org/ecosocdev/geninfo/afrec/vol18no1/181women.htm>.

168. *African first for Liberian leader*, BBC NEWS, Jan. 16, 2006, available at <http://news.bbc.co.uk/2/hi/africa/4615764.stm>.

E. Case Studies: Zimbabwe & South Africa

There are countless examples of the reaffirmation of both women's status as equal to men and of women's inferiority to men. This section will briefly discuss two notable examples from Zimbabwe and South Africa.

Let us begin with the controversial and infamous 1999 case from Zimbabwe's Supreme Court, *Magaya v. Magaya*.¹⁶⁹ The issue faced by the *Magaya* court involved how to apply the customary law of inheritance in light of the government's general acceptance of human rights norms of gender equality. Although the court notes Zimbabwe's acceptance of various international human rights instruments, it primarily focuses on domestic law in declaring its holding. Specifically, the court states that the legislative intent in passing the Legal Age of Majority Act (the Act) was that it should co-exist with customary law, not replace it. Furthermore, while the Act was intended to remove certain legal disabilities, it was not intended to "create positive new rights."¹⁷⁰

The main argument in the *Magaya* case, however, is based on the Constitution of Zimbabwe. The court notes that Section 89 of the Constitution sanctioned the application of customary law.¹⁷¹ Customary law preferred male heirs above female heirs upon an intestate's death.¹⁷² The court further supports its application of customary law in this case, despite its discriminatory nature, by referencing Section 23 of the Constitution. The court first notes that sex is not one of the enumerated grounds for anti-discrimination protection in this section.¹⁷³ Second, the court says that even if sex is protected by international human rights instruments, the Constitution expressly exempts both matters involving property inheritance upon death and matters involving customary law issues of Africans.¹⁷⁴

Because the court ultimately held that customary law was exempt from international human rights norms, the decision reinforced the inferior status of women in Zimbabwe, especially in matters related to recognition of property rights.¹⁷⁵

Conversely, however, was the South African Constitutional Court's 2005 decision of *Bhe and Others v. The Magistrate, Khayelitsha and Others*.¹⁷⁶ In *Bhe*

169. *Magaya v. Magaya* [1999] 3 L.R.C. 35 (Zimb. Sup. Ct.).

170. *Id.* at 37.

171. *Id.* at 36; *see also* CONST. art. 89 (1979) (Zimb.), *amended by* §13 of Act 25 (1981) ("Subject to the provisions of any law for the time being in force in Zimbabwe relating to the application of African customary law, the law to be administered by the Supreme Court, the High Court and by any courts in Zimbabwe subordinate to the High Court shall be the law in force in the Colony of the Cape of Good Hope on 10th June, 1891, as modified by subsequent legislation having in Zimbabwe the force of law.").

172. *Magaya*, 3 L.R.C. at 36.

173. *Id.*

174. *Magaya*, 3 L.R.C. at 36.

175. *Id.* at 40-42.

176. *Bhe and Others v. The Magistrate, Khayelitsha and Others* 2005 (1) 580 1 (CC) (S. Afr.); *see also* Ephraim v. Pastory (2001) AHRLR 236 (TzHC 1990) (going even further than the South African court by holding that customary law had to accord with human rights norms despite the omission of sex as a protected ground in the Constitution's non-discrimination clause).

the court had to decide an issue involving the application of the customary law of intestate succession as dealt with in the Black Administration Act 38 of 1927 and the Intestate Succession Act 81 of 1987.¹⁷⁷

The court determined that the laws were discriminatory and, therefore, unconstitutional.¹⁷⁸ Both domestic and international law support this conclusion.¹⁷⁹ The court says the Acts violate Sections 9, 10 and 28 of the South African Constitution.¹⁸⁰ The court also explicitly stated that “customary law is subject to the Constitution.”¹⁸¹ Farena Banda argues that this is a “universalist” construction of the Constitution, which makes both customary law and the right to culture subject to the ideas of equality and non-discrimination before the law.¹⁸² This is an important example for all African judicial systems to follow in not only ensuring women’s equality through respect for customary laws, but also the recognition of the organic nature of law and its necessary evolution towards the accepted international norms.

V. RECOMMENDATIONS AND STRATEGIES

Actually effecting change in the gendered effects of trade and development policies will be difficult and will require great cooperation and effort, but it can be done. Part of the problem with current policies is the gap that remains between discussion and practice. Eliminating the gap between policy and practice will involve a multi-dimensional approach and a serious effort aimed at gender mainstreaming.¹⁸³ The United Nations Development Programme (UNDP) defines gender mainstreaming as “being deliberate in giving visibility and support to women’s contributions rather than making the assumption that women will benefit equally from gender-neutral development interventions.”¹⁸⁴ This means governments will need to take the extra step to ensure that the legal rights that have been created for women – such as access to education, health care, land, and training – are enforced.¹⁸⁵ Without the ability to rely on the rights they have been promised, women will not be able to reach their full potential or help their countries to reach theirs. The three main areas where major changes can and should be made are: Investment, Policy Discussions, and Enforcement.

Let us first talk about Investment. Addressing gender issues requires investing in ways that have been shown to improve women’s status and opportunities and that have a positive impact on a nation’s development. If we

177. *Bhe*, (1) 580 1 (CC) para. 1.

178. *Id.* para. 68.

179. *Id.* para. 55 (“In interpreting both section 28 and the other rights of the Constitution, the provisions of international law must be considered.”).

180. *Id.* para. 47; S. AFR. CONST. § 9 (equality), § 10 (human dignity), § 28 (rights of children).

181. *Bhe*, (1) 580 1 (CC) para. 44.

182. BANDA, *supra* note 63, at 34-38.

183. *E.g.*, Int’l Conference on Population and Dev., Cairo, Egypt, Sept. 5-13, 1994 *Plan of Action*, U.N. Doc. A/CONF.171/13, § 4.1 (Oct. 18, 1994) [hereinafter Cairo Agreement] (“Experience shows that population and development programmes are most effective when steps have simultaneously been taken to improve the status of women.”).

184. *Gender Equality Practice Note*, *supra* note 92, at v.

185. Gordon, *supra* note 11, at 311.

truly want to design and implement laws and policies that are effective and enforceable, they must be grounded in knowledge of the specific regions and countries in which they are to take effect. This will require investing resources to gain knowledge and understanding of local and national gender relations, practices, and procedures, and then incorporating that knowledge into law and policy development.¹⁸⁶

It also means that international agencies and organizations need to work with national ministries and agencies to provide training and guidance on gender mainstreaming – what it means, strategies for implementation, and education and sensitization sessions on gender issues.¹⁸⁷ Not only do we need to invest in training and education on gender mainstreaming, we also need to invest financial resources to support the governments that have implemented (or might attempt to implement) agencies, departments, or ministries specifically focused on gender issues. This financial investment should be narrowly targeted to the specific gender agencies so they will have the capacity to carry out the work they were created to do. Too many good ideas fail because they lack the financial resources to succeed.

Another area where targeted investment could play a crucial role in improving women's lives is education. The importance of investing in the education of women and girls cannot be stressed enough. In fact, many scholars claim that educating girls and women is the most important and effective investment a developing nation can make.¹⁸⁸ Educating women and girls improves the productivity of the labor force (once they are allowed to participate), improves family health and nutrition, improves the spacing of births and lowers infant and child mortality.¹⁸⁹ By improving the status of women and girls through improved access to continuing education, a developing nation could improve its overall social and economic development.

Next, we must talk about Policy Discussions. Mainstreaming gender means that human rights law, and therefore women's rights law, needs to be more expressly integrated into development agreements and policies. While there are numerous agreements, some of which have been described in this paper, that imply the need to invest in women in order to build successful sustainable development policies, few expressly state this need. The agreements that do expressly mention gender tend to separate these issues from the "more serious" development issues like trade and investment, which serves to further marginalize women's role in the economy and hinder efforts toward true equality. Formal economic modeling and empirical studies have demonstrated that trade policies do not necessarily have the same effect on men as they do on women; therefore, because gender relations can

186. See Stewart, *supra* note 2, at 38.

187. See Malaba Report, *supra* note 162, at 9.

188. E.g., Ilhan Ozturk, *The Role of Education in Economic Development: A Theoretical Perspective*, 33.1 J. OF RURAL DEV. AND ADMIN. 39, 40 (2001), available at <http://mpra.ub.uni-muenchen.de/9023/>.

189. See, e.g., *id.*

affect trade policy outcomes, it is essential that these considerations be accounted for from the beginning of any trade agreement or policy discussion.¹⁹⁰

The preamble of the WTO does not expressly reference women although it does mention its goal of achieving sustainable development.¹⁹¹ Despite the fact that it is now well-accepted that sustainable development is not possible without improving the status of women, by not expressly stating so, the WTO provides an opening for member states to ignore women and the detrimental effects trade policies can have, under a veil of ignorance. The WTO, as the primary body governing international trade, must expressly include provisions through which the important role of women in economic development can be accounted for and incorporated into policy decisions.

Additionally, women should be included in policy discussions, both at an international and a domestic level. Women are better equipped to understand the daily demands on their resources than men; however, if they are to provide meaningful contributions to these discussions, they must be given the proper tools. This means providing women and girls with educational opportunities. It also means providing women with equal standing when they are included in the discussion, which requires sensitization training for their male counterparts.

The final area where improvement and change must be made is in Enforcement. Rather than maintaining separate spheres of law for human rights and trade, human rights should form the basis for trade tribunal decisions.¹⁹² Just as environmental concerns are starting to be incorporated into trade and development policy discussions, gender must be too. If trade tribunals were required to consider human rights as well as potential profits in their decision-making process, it would quickly become apparent that the current structures need to be reformed.

A final option is to provide incentives for implementing gender-conscious trade reforms, rather than punishments. Incentives could be offered to companies and individuals from developed nations who are investing in, operating in, or trading with developing nations. Such incentives could include tax breaks or financial assistance from the developed nation's government when the company or individual makes positive gender-conscious business decisions. It could also include incentives from the developing nation to those same developed-nation investors in the form of import tax breaks or some other financial guarantee for their products or services. Finally, the incentives could run to the developing nation itself, either from developed nations' governments, private investors, or international organizations and agencies. These incentives could include financial aid, training, medical and/or nutritional resources -- really almost anything developing nations need, but all contingent on implementing gender-focused development goals.

190. McGill, *supra* note 33, at 411.

191. Jarvis, *supra* note 8, at 233.

192. *Id.* at 223.

VI. CONCLUSION

*Africans must not be wards of benevolent guardians; rather they must be the architects of their own sustained upliftment.*¹⁹³

Women comprise the majority of the world's poor yet the bulk of the work they perform continues to be unaccounted for in national and international economic development policies.¹⁹⁴ Women, particularly those in developing countries, continue to have unequal and inadequate access to the resources necessary to become viable players in the global market. In many African countries, women, compared to men, receive less formal schooling, job training, and opportunities for advancement within their jobs. Furthermore, women generally have less access to land and property despite the expectation that they will provide food, clothing, and healthcare for their families and regardless of the level of support received from husbands, fathers, brothers, or other male relatives.

Until this discrimination against women is eliminated, the international community will continue to see its trade agreements fail to achieve the desired results and will continue to undermine any real hope of achieving sustainable development policies for the developing countries of our world. That sustainable development is impossible without investing in women's lives and opportunities is a widely accepted fact. It is time to move beyond just stating the fact; it is time to take action to make it happen.

193. NEPAD, *supra* note 16, ¶ 27.

194. Although this statement has been promoted throughout this paper and in numerous sources, for a good summary of available statistics see UNIFEM, *supra* note 32.

COMBATING CHILD SEX TOURISM IN SOUTHEAST ASIA¹

KELLY M. COTTER²

“[I]f you choose to abuse children at home or abroad you will go to jail. The miles you travel from your home to commit these crimes will not insulate you from justice.” - Sharon Cohn Wu, attorney at International Justice Mission, Washington, D.C.³

I. INTRODUCTION

Sexploitation, flesh peddling of minors, children for sale, child sex tourism amongst the fancy phrases for the international market for child sexual abuse, it boils down to a blatant “rape for profit” industry. According to the U.S. State Department, each year more than two million children are exploited in the global commercial sex trade.⁴ Before 2006, the top criminal industries in the world were drugs, guns, and sex, ranked in descending order.⁵ Recently, illegal commercial sex has surpassed guns and become the second largest black-market in the world – drugs, SEX, guns - and the flourishing industry “shows little sign of abating.”⁶

1. Coincidentally, after the first draft of this paper, *Dateline NBC* ran a TV special on the *same three perpetrators* featured in this article, which allows the paper to have an outstanding multi-media component. See *Dateline: They Have a Future: New Developments in the Hidden Camera Investigation Exposing a Child Sexual Slavery Ring in Cambodia*, (NBC television broadcast Aug. 8, 2007), available at <http://www.msnbc.msn.com/id/20186675/>.

2. Kelly M. Cotter, J.D. University of Denver Sturm College of Law, 2008; B.S. Miami University of Ohio, 2000. The author spent five months as a legal intern at International Justice Mission during 2007. She wishes to thank IJM’s Gary Haugen, Sharon Cohn Wu, Bob Mosier, Sean Litton, Holly Burkhalter, and Bethany Hoang for their inspirational advocacy for children in sex tourism. Their work galvanized her to write this article. This article reflects the opinions of its author and not necessarily those of International Justice Mission.

3. Press Release, Int’l Justice Mission, Int’l Cooperation Results In Guilty Plea By Canadian Tourist Who Sexually Abused Children I (June 2, 2005) available at http://www.ijm.org/releases/2005/6.2.05_Bakker_Plea_Release.pdf.

4. U.S. STATE DEP’T., OFFICE TO MONITOR AND COMBAT TRAFFICKING IN PERSONS, TRAFFICKING IN PERSONS REPORT 24 (June 2008), available at <http://www.state.gov/g/tip/rls/tiprpt/2008/> (hereinafter *Trafficking in Persons*).

5. Nigel Morris, *Boom in Sex Trafficking Prompts Charities to Demand More Safe Houses for Victims*, THE INDEPENDENT (UK), Oct. 14, 2004, available at <http://www.independent.co.uk/news/uk/crime/boom-in-sex-trafficking-prompts-charities-to-demand-more-safe-houses-for-victims-535235.html>.

6. *Locals Fight Against Human Trafficking*, WWAY NEWS, May 30, 2007, http://www.wwaytv3.com/locals_fight_against_human_trafficking/05/2007/; R. Barri Flowers, *The Sex Trade Industry’s Worldwide Exploitation of Children*, 575 ANNALS AM. ACAD. POL. & SOC. SCI. 147, 148 (May 2001) (documenting the growth in sex-trafficking).

A. Background

Many men purposefully go abroad to purchase sex acts believing they will be able to remain anonymous.⁷ A Norwegian study of men's participation in buying sex acts found that "80 percent of those who bought sex acts did so abroad."⁸ Certain cities around the world have become notorious destinations for purchasing sex with children.⁹ Indeed, traveling for the purpose of purchasing sex acts is known as sex tourism.¹⁰ The U.N. defines child sex tourism as "tourism organized with the primary purpose of facilitating the effecting of a commercial-sexual relationship with a child."¹¹

Americans account for the largest group of foreign "tourists" in Southeast Asia.¹² , Around one-fourth of the 240 tourists who sexually abused and exploited children in Asia between 1991 and 1996 and as a result faced arrest, imprisonment, deportation, or fled the country, were American child sex tourists.¹³ The economic relationship between Western men seeking children and the Asian citizens who often run the supply remains a stronghold in this impervious illegal market.

As the commercial sex industry becomes more widespread and profitable, it enlarges the danger for women and children. One of the largest effects of this shift is the plight of children kidnapped into the industry.¹⁴ For instance, when the tsunami hit South East Asia in 2005, sex traders preyed on the orphaned children and kidnapped them.¹⁵ Although the Indonesian government issued a proclamation that no Indonesian child was allowed to leave the country at that time, experts believed it did not prohibit the traffickers, who often hold onto the "assets" for the long haul.¹⁶

Few campaigns aim at reducing the *demand* for victims, as many trafficking groups focus on prevention campaigns and warning potential victims. Donna Hughes, a prominent scholar on child-trafficking, purports that abolishing sexual

7. Sowmia Nair, *Child Sex Tourism* U.S. DEP'T. OF JUSTICE, CHILD EXPLOITATION AND OBSCENITY SECTION (CEOS), <http://www.usdoj.gov/criminal/ceos/sextour.html>; DONNA HUGHES, BEST PRACTICES TO ADDRESS THE DEMAND SIDE OF SEX TRAFFICKING 30 (Aug. 2004), http://www.uri.edu/artsci/wms/hughes/demand_sex_trafficking.pdf.

8. HUGHES, *supra* note 7, at 30.

9. For example Svay Pak, Cambodia; Bangkok, Thailand; Mumbai, India; Peking, China; San Jose, Costa Rica, Tijuana, Mexico. See *World Service: Trapping Cambodia's Sex Tourists* (BBC radio broadcast June 11, 2005), http://news.bbc.co.uk/2/hi/programmes/from_our_own_correspondent/4078304.stm; *Child Sex Tourism*, Copper Wiki, http://www.copperwiki.org/index.php/Child_Sex_Tourism; *Sex Tourism*, Wapedia, http://wapedia.mobi/en/Sex_tourism#1.

10. HUGHES, *supra* note 7.

11. Flowers, *supra* note 6, at 150.

12. *Id.* (quoting ECPAT Newsletter, 1996).

13. Flowers, *supra* note 6.

14. See Flowers, *supra* note 6, at 148 ("[T]here has been enough research ... to [reveal] that the proliferation of the sex trade industry globally has resulted in an increase in the prostitution and sexual exploitation of children").

15. *The O'Reilly Factor: Transcript: Gary Haugen on Tsunami Children at Risk* (FoxNews television broadcast Jan. 6, 2005), <http://www.foxnews.com/story/0,2933,143643,00.html>.

16. *Id.*

exploitation will require stronger efforts to combat the demand in receiving countries.¹⁷ She thinks that a focus on the demand side means making men personally accountable for their behavior that contributes to the sex trade.¹⁸ This article focuses on the demand side of sex tourism and what national and international steps of enforcement are taking place. Specifically, this paper reviews the recent publicized stories of three “johns” – men who traveled abroad for sexual tourism – in order to show the layout, progress, and “play-by-play” of U.S. and international laws toward perpetrators who seek criminal pedophilia in Southeast Asia.

B. Factors That Make Southeast Asia a Predominant Location For Sex Tourism: The Supply and Demand of Young Girls

According to the U.S. State Department, “Cambodia is a source, destination, and transit country for men, women, and children trafficked for the purposes of sexual exploitation.”¹⁹ Unfortunately, Cambodia is not an exception in Southeast Asia.²⁰ Sex trafficking also occurs rampantly in Thailand, Vietnam, Laos, and Burma.²¹ Each of these countries has young children stolen across its borders for the sex industry and each hosts brothels of young imprisoned girls.²²

In his book *Not For Sale*, David Batstone outlines that sex slavery thrives in Southeast Asia because of four powerful factors: (1) devastating poverty; (2) armed conflicts; (3) rapid industrialization; and (4) an exploding population growth.²³ Political scientists and economists surmise that Southeast Asia’s current period of radical transition may be a dominant factor in sex trading’s growth, because during seismic societal changes, the powerless suffer the most.²⁴

The ground-breaking work *Disposable People* expounds on the surge of “new slavery” around the world.²⁵ Whereas in “old slavery” the owners regarded the victims as valuable and expensive possessions of a family, in the “new slavery” the victims cost little and are easily replaceable.²⁶ Worldwide population growth has produced a glut of impoverished people, which provides a steady supply of people whom traffickers can manipulate and take advantage of.²⁷

Bales also writes about how rapid economic change produces an increase in “modern slavery.”²⁸ As modernization in developing countries contributes to the

17. HUGHES, *supra* note 7, at 2.

18. *Id.*

19. U. S. DEPT. OF STATE, OFFICE TO MONITOR AND COMBAT TRAFFICKING IN PERSONS TRAFFICKING IN PERSONS REPORT 83 (June 2006), available at <http://www.state.gov/g/tip/rls/tiprpt/2006/index.htm>; see also DAVID BATSTONE, NOT FOR SALE 21 (2007).

20. BATSTONE, *supra* note 19, at 21.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. KEVIN BALES, DISPOSABLE PEOPLE 12 (Univ. of Cal. Press rev. ed. 2004) (1999).

26. *Id.* at 14.

27. *Id.* at 12.

28. *Id.*

immense wealth of the elite, it also comes with rapid social and economic change that greatly effects the impoverishment of the poor majority. People may push aside traditional ways of life for the cash crop and a quick profit.²⁹ Modernization and globalization may shatter traditional families and their small-scale subsistence farming. The loss of common land, the shift from subsistence farming to cash-crop demands, and new government policies end up bankrupting millions of peasants and drive them from their land and sometimes into slavery.³⁰

Modernization also brings a new pressure for consumer goods.³¹ The rationale behind a family selling their daughter into the sex trade has shown to be changing.³² In Thailand, it had not been unheard of for parents to sell their daughters into prostitution in response to a serious family financial crisis. A family might sell a daughter in order to redeem debt on their rice fields and prevent destitution. For the most part, daughters were worth about as much at home as workers than if they were sold.³³ Bales reports how modernization has made selling a daughter into prostitution not just a response of desperation, but a means to a coveted product.³⁴ The sale of a daughter might buy a new television set.³⁵ A survey in the northern provinces of Thailand revealed that two-thirds of families who sold their daughters “preferred to buy color televisions and video equipment,” though they could afford to keep their daughters in the alternate.³⁶

Police complicity ranks as another prominent roadblock to combating child sex tourism in Southeast Asia.³⁷ The officers who should stand as sentries to protect young girls from these crimes often look the other way.³⁸ The chimera of poorly paid officials amidst opulent sex tourism operations remains an indefatigable impediment to the implementation of Southeast Asian anti-trafficking laws.³⁹ While many Southeast Asian countries have shown improvement through increased arrests and prosecutions, the U.S. State Department’s “Report on Human Rights Practices 2006” notes that in Cambodia corruption remains a significant

29. *Id.*

30. *Id.* at 13.

31. *Id.* at 13, 40.

32. *Id.* at 40.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*; *Caught in Modern Slavery: Tourism and Child Prostitution in Thailand*, Country Report Summary prepared by Sudarat Sereewat-Srisang for the Ecumenical Consultation held in Chiang Mai, May 1990.

37. Karoline Kemp, *Rebuilding Cambodia: One Woman at a Time*, THE TRAVEL RAG, 2007, <http://www.thetravelrag.com/docs/10112.asp>; Press Release, Int'l Justice Mission, *International Justice Mission Urges Cambodian Police to Expand and Investigate charges of Police Misconduct I* (June 18, 2008), http://www.ijm.org/releases/2008/06_18_08_Cambodia_release_FINAL.pdf; see Alien Smuggling/Human Trafficking: Sending a Meaningful Message of Deterrence: Hearing before the U.S. Senate Comm. on the Judiciary, 108th Cong. (2003) (testimony of M. Sharon Cohn, Senior Counsel, Int'l Justice Mission), available at http://judiciary.senate.gov/hearings/testimony.cfm?id=873&wit_id=2467.

38. See Testimony of M. Sharon Cohn, *supra* note 37.

39. *Id.*

problem.⁴⁰ Laws are only as effective as the police and judges who enforce them. The Report reviews that corruption and a weak judicial system hampered Cambodia's anti-trafficking efforts stating: "It was widely believed that some law enforcement and other governmental officials received bribes that facilitated the sex trade."⁴¹

C. Economics of Child Sex Tourism

According to INTERPOL, a woman can bring in from \$75,000 to \$250,000 per year for her sexual exploitation.⁴² Children often bring in more money because their virginity may be sold at a high rate.⁴³ For example, a mama-san in Cambodia can sell a virgin for \$600.⁴⁴ Video evidence of children in Cambodia reveals that one girl may sell for \$30, two girls for \$60.⁴⁵

Kevin Bales also exhibits an extensive chart about the costs of brothels in Thailand in *Disposable People*.⁴⁶ He reviews that it costs about \$2.00 to \$3.20 a day per prostitute for food and \$8-\$16 a day in bribes to the police.⁴⁷ However, the income monumentally exceeds the expenses. Each girl may have between ten and eighteen clients for \$50-\$90 each, making a single day's return \$1,000 to \$1,800, just on sex, as well as the other ways the brothel had incur fees, such as through drink sales, condom sales, and rent the girl must pay.⁴⁸ In total, the expenses for running a brothel in Thailand average about 257,000 baht (about \$10,280) a month, while the total income raked in at about 2,289,000 baht, which is a monthly profit of \$81,280 - a huge return.⁴⁹

The sex industries of Indonesia, Malaysia, Thailand, and the Philippines account for two to 14 percent of these countries' gross domestic product.⁵⁰ In Thailand, the yearly estimated income from prostitution between 1993 and 1995 was \$22.5 billion to \$27 billion.⁵¹ In Jakarta, the sex industry makes \$91 million per year and in Indonesia as a whole, the sex industry is estimated to bring in \$1.2

40. See U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, CAMBODIA: COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES (2006), <http://www.state.gov/g/drl/rls/hrrpt/2006/78769.htm>

41. *Id.*

42. DONNA HUGHES, DEMAND FOR VICTIMS OF SEX TRAFFICKING 12 (June 2005), available at http://www.uri.edu/artsci/wms/hughes/demand_for_victims.pdf.

43. *Id.* at 25; BALES, *supra* note 25, at 56.

44. Dateline NBC, *Children For Sale: Dateline Assists International Justice Mission In Investigating And Rescuing Children From Sexual Slavery In Cambodia* (NBC television broadcast Jan. 23, 2004); see also NBC News, *Children for Sale: Dateline Goes Undercover with a Human Rights Group to Expose Sex Trafficking in Cambodia*, DATELINE NBC, Jan. 9, 2005, <http://www.msnbc.msn.com/id/4038249/>.

45. Dateline NBC, *supra* note 44.

46. BALES, *supra* note 25, at 55.

47. *Id.* at 54.

48. *Id.* at 55.

49. *Id.*

50. HUGHES, *supra* note 42, at 12 (citing LIN LEAN LIM, THE SEX SECTOR: THE ECONOMIC AND SOCIAL BASES OF PROSTITUTION IN SOUTHEAST ASIA (International Labour Organization) (1998)).

51. *Id.*

billion to \$3.3 billion per year.⁵² Prostitution in the Philippines is now the fourth largest source of gross national product for the country.⁵³ The production of child pornography in the Philippines is a \$1 billion industry. Understanding the financial aspects of sex trafficking is a vital part in the strategies to disrupt the market. In order for exploiters to lose interest in trafficking, the economic incentive must decrease.⁵⁴

II. CASE STUDIES: THREE WESTERN "TOURISTS" IN SOUTHEAST ASIA AND THE EFFECT OF THE LAW ABROAD

This section outlines the activities of a few of these sex tourists. By following specific cases of tourists, this paper intends to show how U.S. laws, international laws, and trans-national legal solutions can coordinate to suppress the rapidly growing sex tourism industry. Mr. Albom, Mr. Bakker, and Mr. Smith all sought child exploitation in Southeast Asia, and for the most part, all were counting on getting away with it. This section will illuminate how the laws against foreign pedophiles abroad are getting stronger.

A. Jerry Albom

American doctor Jerry Albom commented that he came to Southeast Asia for its "remarkable architectural finds," such as the temples of Angkor Wat.⁵⁵ NBC *Dateline* reporters recorded Albom's remarks during their initial footage of general Phenom Phen tourism.⁵⁶ The legendary temples were not the only things that drew Dr. Albom to Cambodia, however.⁵⁷ When *Dateline* moved its story to Svay Pak, a smaller town seventeen miles from Phenom Phen and known for its specialty of child-aged prostitutes, again they observed Dr. Albom at a local bar. It turned out that Dr. Albom visited Cambodia for another kind of tourism.

In Svay Pak, Dr. Albom bragged about his exploits: "Usually I buy out three girls for 50 bucks, take them for the whole night," he unknowingly informed an undercover camera.⁵⁸ Dr. Albom described his covert plan for pedophilia abroad – he tells his American friends that he's traveling to Bangkok, so they won't be suspicious of a Cambodia trip.⁵⁹ Then, he crosses the border to Svay Pak, Cambodia, where he buys 14, 15, and 16-year-old girls for the night.⁶⁰

In 2003, not much could be done to legally reprimand Dr. Albom's actions with Cambodian child sex slaves. Unfortunately, Dr. Albom knew this as well, and this is what drew him to a country like Cambodia, which has little enforcement on its own anti-trafficking and anti-slavery laws. Besides poor enforcement and

52. *Id.*

53. *Id.* at 13 (citing Arnie C. Trinidad, *Rapid Appraisal of Child Pornography in the Philippines*, PHIL. RESOURCE NETWORK, 2005).

54. See BALES, *supra* note 25, at 51-52.

55. *Dateline* NBC, *supra* note 44.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

police complicity in sex-trafficking rings in Cambodia, in general, the case against Albom wasn't strong enough to begin with. Although undercover tape revealed Albom *talking* about buying girls, this evidence was not strong enough: no evidence had been obtained as to which girls, when, or other substantiation.

Prosecuting Albom was difficult for another reason, though. His actions occurred before a U.S. law went into place that made sex tourism abroad illegal.⁶¹ Before the law, a U.S. citizen could only be prosecuted for sex tourism if he or she traveled abroad with the *intent* for sex tourism. As revealed in the *Dateline* story on Albom, he knew of this *intent* loophole.⁶² During the undercover Cambodia footage, Albom told the investigator he took as another tourist, “[Y]ou don’t get in trouble unless they can prove that you traveled with the *intent* of having underage sex If you did it by accident, it’s OK It’d be hard to prosecute you. You’d get the papers, but they’ll hardly get a conviction.”⁶³

Although no Cambodian or trans-national legal reprimands were taken against this man who bought underage girls, a few months later the *Dateline* producers decided to follow-up with Albom to see what he had to say about his actions in Cambodia. Journalist Chris Hansen found Albom in Guam and confronted him about his trips to Cambodia.⁶⁴ Albom responded that, yes, he had been to Cambodia many times, but that he had not interacted with underage girls.⁶⁵ Hansen showed Albom the video statements about “buy[ing] out three girls” and Albom denied any participation.⁶⁶ Albom again repeated his *intent* defense: “I don’t go down there with the *intent* of trafficking or participating in sex with underage girls.”⁶⁷

Later in 2003, Albom’s *intent* defense became irrelevant when President Bush signed the Prosecutorial Remedies and Other Tools Against Exploitation of Children Today Act (PROTECT Act) into law.⁶⁸ The PROTECT Act changed the standard of evidence against foreign child-sex-crimes.⁶⁹ Prosecutors have to prove that a traveler like Dr. Albom had sex with someone younger than 18, and *intent* for traveling abroad is irrelevant.⁷⁰ Some worried that the extra-territorial

61. Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003, Pub. L. No. 108–21, 117 Stat. 650 (2003) [hereinafter *PROTECT Act*]; see also Press Release, Dep’t of Justice, Fact Sheet PROTECT Act (Apr. 30, 2003), available at http://www.usdoj.gov/opa/pr/2003/April/03_ag_266.htm.

62. *Dateline* NBC, *supra* note 44.

63. *Id.* (emphasis added).

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* (emphasis added).

68. PROTECT Act, *supra* note 61, § 105; Dr. Mohamed Mattar, Executive Dir., The Protection Project: John Hopkins School of International Studies, Child Sex Tourism in Anti-Trafficking Laws: Recent Developments at the Customs and Border Protection *Stop Human Trafficking* Symposium 4, (Sept. 9, 2008), available at <http://www.protectionproject.org/docs/Child%20Sex%20Tourism%20Speech%20U.S.%20Border%20Officials%20Sept%202008.pdf>; see also Dept. of Justice, *supra* note 61.

69. Mattar, *supra* note 68, at 4.

70. *Id.* at 4, 8.

jurisdiction allowed in the PROTECT Act may have constitutional concerns, but in 2006, the PROTECT Act was upheld as constitutional.⁷¹

B. Donald Bakker

During December 2003, Vancouver police received a call about a naked woman crying, screaming, and running through a park.⁷² When the officers arrived, the woman said that Donald Bakker had been following her, describing him as a “bad date” who had videotaped an assault on her.⁷³ The police arrested Bakker, a 40 year-old hotel worker with a wife and young child, and found videotapes in his bag and car.⁷⁴ The footage showed hours of violent sexual assaults in Vancouver and Cambodia.⁷⁵ Bakker had attacked women with whips and he repeatedly kicked one woman between her legs.⁷⁶ One video showed a woman pleading with Bakker to remove alligator clips he placed on her genitals.⁷⁷ The police said the evidence contained more than 60 images, including videos from Cambodia.⁷⁸

After watching the confiscated videotapes that Bakker recorded of his abuses with children in Cambodia, an officer saw the *Dateline* show and found similarities between the Bakker case and the footage on the program.⁷⁹ The officials then contacted International Justice Mission (IJM), whose investigation had been featured on *Dateline*.⁸⁰ The girls who appeared on Bakker’s tapes matched up as the same girls whom IJM had rescued at a later date.⁸¹ With this evidence, Canadian police were able to charge Bakker on multiple counts of sexual assault on children, through the newly enacted Canadian Protect Act.⁸²

Bakker became the first person to face trial under Canada’s newly amended Criminal Code, which strengthened its “sex tourism” laws to enabled police to prosecute sex offenses committed by a Canadian on foreign soil regardless of that country’s own laws.⁸³ Bakker pleaded guilty in a Vancouver court on June 1, 2005, to 10 counts of sexual assault, seven counts relating to sex crimes against

71. *Id.* at 5.

72. Daniel Girard, *First Conviction in Sex Tourism Case*, TORONTO STAR, June 2, 2005, at A01.

73. *Id.*

74. *Id.*

75. *Id.*

76. Daniel Girard, *B.C. Man Gets 10 Years for Sex Crimes*, TORONTO STAR, June 3, 2005, at A03.

77. *Id.*; Girard, *supra* note 72.

78. Canadian Press, *Sex-assault Suspect’s B.C. Home Searched*, TORONTO STAR, Jan. 20, 2004, at A07.

79. Press Release, Int’l Justice Mission, *International Cooperation Results in Guilty Plea by Canadian Tourist Who Sexually Abused Children* (June 2, 2005), available at: http://www.ijm.org/releases/2005/6.2.05_Bakker_Plea_Release.pdf.

80. *Id.*; *Dateline* NBC, *supra* note 44.

81. Int’l Justice Mission, *supra* note 79.

82. *Id.*

83. Jennifer Wells, *Canada’s Offshore Child Sex Law Faces its First Test*, TORONTO STAR, Aug. 29, 2004, at A02 (Bakker was the first prosecution under Section 7 (4.1) of Canada’s Criminal Code, which deals with offshore sexual offences against children or, as it’s colloquially known, child sex tourism).

children in Cambodia.⁸⁴ Chief constable of the Vancouver Police Department, Jamie Graham, commented that “[t]his conviction was obtained through the combined efforts of our dedicated investigators and IJM’s team [of law enforcement officials].”⁸⁵ Sharon Cohn Wu, Senior Vice President of Justice Operations for IJM remarked: “This case states it plainly – if you choose to abuse children at home or abroad you will go to jail. The miles you travel from your home to commit these crimes will not insulate you from justice.”⁸⁶ Bakker began serving a 10-year sentence on June 2, 2005.⁸⁷

C. Terry Smith

The Terry Smith investigation revealed another complex case of an American sex offender fugitive. In 1984, fifty-four-year-old Oregon resident, Terry Darnell Smith, was released from prison after serving 15 months for convictions of multiple charges that he used children in displays of sexual acts.⁸⁸ To avoid arrest and continue his patterns of abuse, Smith fled to the Philippines, and then to Cambodia.⁸⁹ In Sihanoukville, Cambodia, a destination known for international sex tourism, Smith setup “Tramp’s Palace,” a place where he brutalized girls himself, videotaped his sexual assault on young Vietnamese girls, and prepared them to be sold for sexual assault to other foreigners.⁹⁰ The girls at Smith’s bar, estimated between the ages of 11 and 14 years olds, danced topless for the customers and then were offered for sexual activity.⁹¹

The detainment of Smith began with an undercover investigation by IJM.⁹² In totality, Smith’s capture required the international coordination of U.S. state laws, U.S. federal laws, Oregon state police, Virginia state police, Cambodia laws, Cambodia courts, Cambodia police, the U.S. Embassy in Cambodia, the U.S. Marshals Service in Portland, and IJM. The investigation began when IJM recorded undercover video of Smith compelling the girls to dance topless and offer themselves for sexual activity.⁹³ Confiscated videos also revealed Smith videotaped every sexual act he had with the young girls.⁹⁴ Based on the investigation evidence, and led by the police chief of Sihanoukville’s Anti-Human

84. Press Release, Int’l Justice Mission, Vancouver Police Department Recognizes International Cooperation Resulting in Sex Tourist Conviction (Jul. 10, 2006), available at <http://www.ijm.ca/articles/VPD%20Press%20Release.pdf>.

85. *Id.*

86. *Id.*

87. *Id.*

88. Bryan Denson, *Asian Bust Nets Oregon Fugitive*, THE OREGONIAN, Sept. 21, 2006, at C01.

89. *Id.*

90. James Welsh & Prak Chan Thul, *Suspected Pedophile Disappears*, THE CAMBODIA DAILY, Sept. 12, 2006, available at <http://ki-media.blogspot.com/2006/09/suspected-pedophile-disappears.html>; Kevin Doyle, *Cambodia’s Child Sex Crackdown*, TIME (World), Oct. 5, 2006, <http://www.time.com/time/world/article/0,8599,1543174-3,00.html>.

91. Press Release, Int’l Justice Mission, International Collaboration Brings Down American Pedophile (Sept. 20, 2006), available at http://www.ijm.org/releases/2006/9.20.06_Smith_Arrest_Release.pdf.

92. *Id.*

93. *Id.*

94. Welsh & Thul, *supra* note 90.

Trafficking Bureau, Cambodian police arrested Smith on July 31, 2006.⁹⁵ On August 3, Cambodian police charged Smith with debauchery for having sex with two girls, aged 13 and 14 years, at his bar in Sihanoukville.⁹⁶ Smith's Police also charged Smith's Cambodian girlfriend with debauchery for allegedly procuring and facilitating Smith's abuse of children at his establishment.⁹⁷

Following the arrests in Cambodia, IJM's chief investigator called the Oregon police to search Smith's records.⁹⁸ Smith's sex-crimes charges had a familiar ring to Oregon authorities.⁹⁹ On August 5, 2006, Oregon officials reported that Smith had active warrants: a total of thirteen charges of child sexual abuse in Oregon, including sodomy, sexual abuse, and using child in a display of sexually explicit conduct.¹⁰⁰ Five years earlier, Smith had served fifteen months in prison, and when released he failed to register as a sex offender.¹⁰¹ He fled to the Philippines.¹⁰² Armed with this new evidence, the fugitive task force in Oregon secured jurisdiction and obtained a federal warrant to detain Smith and to prevent him from unauthorized flight.¹⁰³

They were too late. Unexpectedly, on August 31, Sihanoukville's court director quietly *released* Smith from his pre-trial detention.¹⁰⁴ The director issued a "warrant of temporary release" based on a letter from a neurologist at a Phnom Penh hospital.¹⁰⁵ The doctor claimed Smith suffered from a head injury sustained when he was a marine in the late 1970s, which was now causing him headaches.¹⁰⁶ Cambodian papers released stories with the headlines: "Suspected Pedophile Disappears,"¹⁰⁷ "Pedophilia Suspect Hurt Head: Doctor,"¹⁰⁸ and "Pedophile Missing; Ministry, Police Shed Blame."¹⁰⁹ Many anti-trafficking NGOs on the case assumed the release was a result of bribery, as Smith had posted a \$20,000 bond, nearly every penny he had.¹¹⁰

95. *Id.*

96. International Justice Mission, *supra* note 91.

97. Welsh & Thul, *supra* note 90.

98. The chief investigator had status as deputy sheriff in Virginia, which allowed him access to Oregon records.

99. Denson, *supra* note 88.

100. *Id.*; International Justice Mission, *supra* note 91.

101. Denson, *supra* note 88.

102. *Id.*

103. *Id.*; International Justice Mission, *supra* note 91.

104. Denson, *supra* note 88.

105. Welsh & Thul, *supra* note 90.

106. *Id.*

107. *Id.*

108. Prak Chan Thul & James Welsh, *Pedophilia Suspect Hurt Head: Doctor*, THE CAMBODIA DAILY, Sept. 13, 2006, available at <http://ki-media.blogspot.com/2006/09/pedophilia-suspect-hurt-head-doctor.html>.

109. James Welsh, *Pedophile Missing; Ministry, Police Shed Blame*, THE CAMBODIA DAILY, Sept. 14, 2006, available at <http://ki-media.blogspot.com/2006/09/pedophile-missing-ministry-police-shed.html>.

110. Denson, *supra* note 88.

In a maelstrom of finger-pointing, Cambodia's Minister of Justice, the court director, and the hospital all rejected responsibility for the disappearance of Smith.¹¹¹ We didn't ask for the release," the neurologist stated, "but he should receive treatment when he gets sick." The neurologist added that he had no idea why the court's director released the suspect from prison.¹¹² The court director said she had "no choice but to release [Smith] and his girlfriend If we kept him, it would have been dangerous to him and would even have been dangerous to me," she said without elaborating.¹¹³ The court director denied receiving any money to grant the release.¹¹⁴ She said that if Smith were to flee Cambodia it would be the failing of the country's border police for letting him escape.¹¹⁵ The chief of Sihanoukville's Anti-Human Trafficking and Juvenile Protection Bureau stated that police were not looking for Smith, adding that it was up to the court to decide whether to arrest him again: "The onus is on the court, it is out of our hands already."¹¹⁶ Cambodia's Minister of Justice emphasized that the case no longer "concern[ed] the Ministry of Justice, it concerns the police,"¹¹⁷ and he thought the police should track him down if Smith did not return on his own.¹¹⁸ Cambodia's former minister of women's affairs stepped up to say that everyone involved was responsible for Smith's disappearance.¹¹⁹

On September 20, 2006, Smith appeared at the U.S. Embassy in Phnom Penh, hoping to replace the passport Cambodian police had confiscated in July.¹²⁰ Aware that Smith might show up, the U.S. State Department summoned Cambodian police, who arrested Smith outside.¹²¹ Smith was flown back to Oregon in handcuffs to face his charges.¹²²

In spite of the Cambodian governmental finger-pointing around Smith's case, *The Cambodia Daily* released a story the next day, September 13, 2006, celebrating Smith's arrest and reviewing that Smith's was at least the ninth arrest that year of foreign men on charges of child sex abuse ("Arrests of Suspected Pedophiles Reflect New Will").¹²³ The U.S. also celebrated the global efforts involved in this arrest. Bob Mosier, chief investigator IJM who worked with the initial investigation, the Cambodian authorities, the U.S. Embassy, and the U.S. Marshall Service to obtain the necessary federal warrant, stated that "Cooperative, global law enforcement community efforts drove this arrest. Smith believed he

111. Welsh, *supra* note 109.

112. Thul & Welsh, *supra* note 108.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*; Welsh, *supra* note 109.

117. Welsh, *supra* note 109.

118. *Id.*

119. *Id.*

120. Denson, *supra* note 88.

121. *Id.*

122. *Id.*

123. Prak Chan Thul & Adam Pire, *Arrests of Suspected Pedophiles Reflect New Will*, THE CAMBODIA DAILY, Sept. 13, 2006.

could flee the U.S. to escape conviction and continue abusing children in Cambodia. He believed the Cambodian authorities would allow this. But he was very wrong."¹²⁴ In Oregon, Smith faced two counts of first degree sodomy, first-degree sexual abuse, using a child to display sexual conduct related to photographs he took, and two counts of failure to register as a sex offender.¹²⁵ On July 7, 2007, Smith was sentenced to more than twenty-two years in prison.¹²⁶

Smith's case highlights a success of global legal cooperation, but it also brings forth the reality that Cambodia remains a place where pedophiles hoping to find anonymity might find a new start.¹²⁷ Many instances of corruption almost barricaded Smith's capture. It is most likely that Smith's \$20,000 bought off the Cambodian court director who released him because of his "headache." In another Cambodian case in August 2006, evidence emerged strongly suggesting that Cambodia had granted citizenship to Thomas Frank White, a U.S. multi-millionaire currently in a Mexican prison on charges of child abuse.¹²⁸ White received citizenship without meeting any of the official criteria required of foreigners wishing to hold a Cambodian passport.¹²⁹ "The policies are improving, but the court is still very weak," said a worker from the anti-trafficking organization Action Pour Les Enfants (APLE).¹³⁰ Cambodia's authorities worry that pedophiles will become "smarter and [also] harder to track, as they branch out of Phnom Penh and Sihanoukville and into the provinces, such as the tourist towns of Siem Reap and [free-wheeling] Koh Kong and Poipet on the Thai border."¹³¹ The executive director of the Cambodian Women's Crisis Center fears that foreign pedophiles will still find ways to enter Cambodia for purposes of sexual tourism.¹³²

III. TRANS-NATIONAL EFFORTS AGAINST CHILD SEX TOURISM

When asked why he thought laws against child sexual tourism were important, then Secretary of State, Colin Powell, responded: "Because it's the worst kind of human exploitation imaginable. Can you imagine young children, . . . being used as sexual slaves for predators? It is a sin against humanity, and it is a horrendous crime."¹³³

As shown in the situations with perpetrators Jerry Albom, Donald Bakker, and Terry Smith, the legal remedies against "sex tourists" can be complex, incomplete, and difficult to orchestrate. The efforts to combat sex tourism take place at three broad levels: globally, nationally, and locally.¹³⁴ Further efforts to

124. International Justice Mission, *supra* note 91.

125. Paris Achen, *Sex Offender Brought to Justice*, MAIL TRIBUNE, July 7, 2007, available at <http://www.mailtribune.com/apps/pbcs.dll/article?AID=/20070707/NEWS/707070313/-1/rss01>.

126. *Id.*

127. Thul & Pire, *supra* note 123.

128. *Id.*

129. *Id.*

130. *Id.*

131. Kevin Doyle & Phnom Penh, *Cambodia's Child Sex Crackdown*, TIME, Oct. 5, 2006, available at <http://www.time.com/time/world/article/0,8599,1543174,00.html>.

132. *Id.*

133. Dateline NBC, *supra* note 44.

134. See ECPAT INT'L, QUESTIONS & ANSWERS ABOUT THE COMMERCIAL SEXUAL

tackle child sex tourism will include enforcing current laws and strengthening these laws legislatively.¹³⁵ Additionally, NGOs should fortify their international cooperative action and organize their grassroots efforts.¹³⁶ This section outlines some of the legal provisions that attempt to battle the continual growth of child exploitation.

A. *Laws In The United States*

1. TVPA and TIP Report

In 2000, the 106th Congress passed the Trafficking Victims Protection Act (TVPA) to specifically address the problem of human trafficking.¹³⁷ TVPA's approach focuses on prevention, prosecution, and protection.¹³⁸ The Act allows the U.S. to impose sanctions and withhold non-essential foreign aid for those countries that fail to show "significant efforts" to eliminate trafficking in their countries.¹³⁹ The Act created the State Department's annual *Trafficking in Persons Report* (TIP Report), which evaluates government responses in each country with severe forms of trafficking in persons.¹⁴⁰ Countries are rated in tiers, based on government efforts to combat trafficking.¹⁴¹

- Tier 1 countries fully comply with the Act's minimum standards for the elimination of trafficking.
- Tier 2 countries do not fully comply with the minimum standards but are making significant efforts to bring themselves into compliance.
- Tier 3 countries neither satisfy the minimum standards nor demonstrate a significant effort to come into compliance.¹⁴²

EXPLOITATION OF CHILDREN 32 (4th ed. 2008), available at http://www.ecpat.net/EI/Publications/About_CSEC/FAQ_ENG_2008.pdf; See also ECPAT INT'L, COMBATING CHILD SEX TOURISM: QUESTIONS & ANSWERS 27 (2008), available at <http://www.ecpat.net/EI/Publications.asp?groupID=5>.

135. See, e.g., Polaris Project, *Strategies*, <http://www.polarisproject.org/content/view/37/55/> ("We work to protect all victims of human trafficking by advocating for stronger federal and state laws and supporting legislators with research, training, and technical assistance.").

136. *Id.*

137. Trafficking Victims Protection Act of 2000, P.L. 106-386, §§ 101-113, 114 Stat 1464, 1467-91 (codified as amended at 22 U.S.C. §§ 7101-110 (2000)) [hereinafter *TVPA*]; see also Polaris Project, *Trafficking Victims Protection Act Fact Sheet*, <http://www.polarisproject.org/images/docs/newest%20tvpa%20fact%20sheet%20july%202008.pdf> (describing key provisions of the Victims of Trafficking and Violence Protection Act of 2000 and subsequent additions and amendments) [hereinafter Polaris, *TVPA Fact Sheet*].

138. Stephanie Richard, *Note: State Legislation and Human Trafficking: Helpful or Harmful?* 38 U. MICH. J.L. REFORM 447, 451-53; Polaris Project, *Trafficking Victims Protection Act Fact Sheet*, <http://www.polarisproject.org/images/docs/newest%20tvpa%20fact%20sheet%20july%202008.pdf>.

139. TVPA, *supra* note 137, § 110, 114 Stat. at 1482-83 (codified as amended at 22 U.S.C. § 7107).

140. TVPA, *supra* note 137, § 110(b)(1), 114 Stat. at 1482 (codified as amended at 22 U.S.C. § 7107 (b)(1)).

141. OFFICE TO MONITOR AND COMBAT TRAFFICKING IN PERSONS, THE FACTS ABOUT HUMAN TRAFFICKING, (Dec. 7, 2005), available at <http://www.state.gov/g/tip/rls/fs/2005/60840.htm>.

142. *Id.*

Congress defines sex tourism as part of the definition of “trafficking.”¹⁴³ TVPA’s “minimum standards” insists that countries should prescribe “measures to reduce the demand for commercial sex acts and for participation in international sex tourism by nationals of the country,” and mandates measures to ensure that nationals who are deployed abroad do not engage in or exploit victims of trafficking.¹⁴⁴ Additionally, an Interagency Task Force must “[e]xamine the role of the international ‘sex tourism’ industry in the trafficking of persons” in each country.¹⁴⁵

In 2003, 2005, and 2008 the Act was reauthorized, amended and strengthened.¹⁴⁶ For instance, in 2005, the three-tier system was elaborated to include a “Tier 2 Watch List” for countries requiring special scrutiny because of a high or significantly increasing number of victims, failure to provide evidence of increasing efforts to combat trafficking in persons.¹⁴⁷ In 2008, the TVPA reauthorization strengthened protections for children and their family members.¹⁴⁸ It also authorized new studies and reports to assist in understanding human trafficking globally.¹⁴⁹

The TVPA tier system had a direct effect on Cambodia’s willingness to prosecute sex-traffickers within its own country. During 2002, when Cambodia was placed on Tier 3 and faced sanctions, the new U.S. Ambassador to Cambodia¹⁵⁰ began to proactively work with the senior Cambodian authorities on U.S. policy toward trafficking.¹⁵¹ This direct work with Cambodian authorities, along with two years of investigative evidence already acquired by IJM, made it possible for a team of eighty Cambodian police to conduct a raid and rescue of thirty-seven minor victims of commercial sexual exploitation in Svay Pak, including about a dozen children between the ages of five and ten.¹⁵² Gary

143. TVPA, *supra* note 137, §103(9) (defining sex trafficking broadly as the “recruitment, harboring, transportation, provision or obtaining of a person for the purpose of a commercial sex act”).

144. TVPA, *supra* note 137, § 106(b)(3) (repealed and cited language removed at Pub. L. 110-457 § 106(2)(C), 122 Stat 5044, 5049 (2008)).

145. TVPA, *supra* note 137, §105(d)(5).

146. In 2008, TVPA was renamed the *William Wilberforce Trafficking Victims Protection Reauthorization Act*, P.L. 110-457, 122 Stat 5044 (2008). Polaris Project, *The Trafficking Victims Protection Reauthorization Act Passed Congress*, <http://actioncenter.polarisproject.org/take-action/advocate-for-policy/35-action/217-advocate-for-policy> [hereinafter *Polaris, TVPRA Passed Congress*]; see also *TVPA Fact Sheet*, *supra* note 138.

147. U.S. State Dept., Office to Monitor and Combat Trafficking in Persons, *Trafficking in Persons Report, Tier Placements* (June 5, 2006) <http://www.state.gov/g/tip/rls/tiprpt/2006/65985.htm>.

148. Polaris, *TVPRA Passed Congress*, *supra* note 147; International Justice Mission, *IJM President Joins Anti-Trafficking Leaders at White House as TVPRA is Signed into Law* (Jan. 6, 2009), <http://www.ijm.org/ijmnews/ijmpresidentjoinsanti-traffickingleadersatwhitehouseastvpraissignedintolaw>.

149. Polaris, *TVPRA Passed Congress*, *supra* note 147.

150. Ambassador Charles A. Ray

151. *Trafficking in Women and Children In East Asia and Beyond: A Review of US Policy: Hearing Before the S. Comm. On Foreign Relations*, 108th Cong., (2003) (statement of Gary Haugen, President & CEO, International Justice Mission), available at <http://foreign.senate.gov/hearings/2003/hrg030409p2.html> [hereinafter *Trafficking in Women*].

152. *Id.*; Press Release, International Justice Mission, *International Women’s Day is an Opportunity*

Haugen, president of IJM, testified in Congress that he thought the advocacy of the U.S. Embassy with the Cambodian authorities was an “indispensable and decisive factor in generating effective law enforcement cooperation.”¹⁵³ Additionally, about twelve suspects were arrested and charged, along with continued investigations on additional suspects.¹⁵⁴ One of Cambodia’s most notorious brothel owners received a sentence of twenty years in prison for trafficking-related crimes. This was the strongest sentence ever handed down by the Cambodian court in reference to trafficking.¹⁵⁵ Most notably, the senior police commander who had been involved in a lot of the corruption of protecting the trafficking crimes was fired.¹⁵⁶ Some of the best news in the case was that one Internet chat-room frequented by sexual tourists of Svay Pak now broadcast: “The party in Cambodia is over!”¹⁵⁷

As Haugen reviewed the raids during his Senate Foreign Relations testimony in 2003, he stated:

Cambodia has had a very poor record of tolerating sex trafficking (especially among very young children) and such a record cannot be turned around overnight We believe these encouraging events help to serve as a model for what can be achieved when there is transparent reporting through the TIP Report, a meaningful application of the tier rating system, direct advocacy by U.S. authorities at the highest levels of government, and tangible, practical assistance to foreign governments in bringing rescue to trafficking victims and justice to perpetrators.¹⁵⁸

2. PROTECT Act

In 2003, the United States strengthened its ability to fight child sex tourism by passing the *Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act* (PROTECT Act).¹⁵⁹ The PROTECT Act increased penalties to a maximum of thirty years in prison for engaging in child sex tourism.¹⁶⁰

3. Review of TVPA and Protect Act

As seen in the specific arrest of Terry Smith in 2006, TVPA, the PROTECT Act, and other U.S. state and Federal laws can be very important in prosecuting those who commit sexual tourism abroad. Without the U.S. federal warrant for

to Focus on Bringing Help to Victims of Sexual Exploitation and Trafficking (Mar. 7, 2005), available at www.ijm.org/releases/2005/3.7.05_International_Women's_Day_Release.pdf [hereinafter *IJM 2005*]. See generally GARY HAUGEN & GREGG HUNTER, *TERRIFY NO MORE* (2005).

153. Trafficking in Women, *supra* note 151.

154. *Id.*

155. Gary Haugen, *The Cambodia Story*, THE OTHER JOURNAL, Jan. 12, 2004, <http://www.theotherjournal.com/article.php?id=37>. See generally HAUGEN & HUNTER, *supra* note 153.

156. Haugen, *supra* note 156.

157. *Id.*

158. Trafficking in Women, *supra* note 151.

159. PROTECT Act, *supra* note 61 (relevant sections codified as amended at 18 U.S.C. § 2423).

160. PROTECT Act, *supra* note 61, §105(b).

Smith's arrest, and follow-up by the U.S. Embassy and officials, Smith may have permanently disappeared and started another "Tramp's Palace." Additionally, the U.S. State Department's TIP Report and its tier rankings continued to be instrumental in getting Southeast Asian countries to enforce their own laws against sex tourism. Again, in 2005 the U.S. State Department relegated Cambodia to its lowest tier three rating on the global trafficking report, alongside Burma, Cuba and North Korea.¹⁶¹ The U.S. threatened sanctions against Phnom Penh for its inability to comply with "minimum standards" to combat human trafficking and convict officials involved.¹⁶² Soon after, Cambodia's police started to make a number of high-profile arrests. By September 2006, Cambodia police arrested nine foreign men on charges of sexually abusing children.¹⁶³ Cambodia was taken off the tier 3 standing, as the U.S. saw these arrests as a sign of Cambodia's "political will" to eliminate sex tourism, when Cambodian police had for years faced accusations of looking the other way.¹⁶⁴ In terms of the PROTECT Act, according to a September 2006 article, Cambodia had arrested and departed at least six Americans to face charges under the PROTECT Act's provisions against sex tourism, and the Americans face penalties high as thirty years in prison.¹⁶⁵

The TIP Report 2007 ranked Cambodia on the "Tier 2 Watch List,"¹⁶⁶ a precarious status. In its country's narrative, Cambodia reported the updates on child sex tourism, stating that thirteen foreign child sex tourists were arrested, three were convicted (sentences ranging from one to eighteen years imprisonment); one American citizen charged with pedophilia was released on bail in Sihanoukville (Terry Smith, but as discussed above, he was later arrested and deported to Oregon); continued assistance with U.S. law enforcement to transfer U.S. custody of Americans who have sexually exploited children in Cambodia; deported one American national who was accused of child sex tourism in the U.S. under extraterritorial provisions of the U.S. PROTECT Act; and the deportation of two other American nationals with outstanding U.S. charges for child sexual exploitation and child pornography.¹⁶⁷

Cambodia did make some progress, however. TIP 2007 reports that the Ministry of Social Affairs and Youth Rehabilitations (MOSAVY) worked with International Organization for Migration (IOM) to repatriate trafficked children.¹⁶⁸ MOSAVY repatriated 1,273 children, victims, and those vulnerable from Thailand and Vietnam to Cambodia, and from Cambodia to Vietnam.¹⁶⁹ In terms of other

161. See Doyle, *supra* note 132.

162. *Id.*

163. Thul & Pire, *supra* note 123.

164. *Id.*; See also CAMBODIA COUNTRY REPORT 2006, *supra* note 40.

165. Thul & Pire, *supra* note 123.

166. U.S. DEP'T OF STATE, OFFICE TO MONITOR AND COMBAT TRAFFICKING IN PERSONS, TRAFFICKING IN PERSONS REPORT 20 (2007) available at <http://www.state.gov/g/tip/rls/tiprpt/2007/82805.htm> [hereinafter *TIP 2007*].

167. *Id.*

168. CAMBODIA COUNTRY REPORT 2006, *supra* note 40.

169. *Id.*

South East Asia countries, TIP 2007 ranked Burma on Tier 3, Laos on Tier 2, Vietnam on Tier 2, and Thailand on Tier 2.¹⁷⁰

4. State laws

Additionally, many U.S. States have anti-sex-trafficking criminal provisions (thirty-nine states).¹⁷¹ Of these states, some also have a statewide task force, a trafficking research commission, and/or law enforcement training (twenty states).¹⁷² For example, Colorado has anti-trafficking criminal provisions, a task force, and victim protection laws.¹⁷³ U.S. States with no existing law or pending legislation on human trafficking include: Alabama, Delaware, District of Columbia, North Dakota, South Dakota, Vermont, West Virginia, Wisconsin, and Wyoming.¹⁷⁴

B. International Protocol

At the First World Congress in Stockholm in 1996, and five years later at the Second World Congress held in Yokohama, Japan, participants representing governments, non-governmental organizations, UN agencies and other stakeholders, committed themselves to a global partnership against commercial exploitation of children. This commitment “was manifested in the Stockholm Agenda for Action.”¹⁷⁵ In addition, “there are several international conventions containing articles that offer protection to children from commercial sexual exploitation, and states that ratify these conventions are legally bound to comply with their provisions.”¹⁷⁶ The United Nations Convention on the Rights of the Child (CRC), entered in September of 1990, has been adopted and ratified by almost every country in the world.¹⁷⁷

C. National And International Non-Governmental Organizations (NGOs)

Many NGOs play a crucial role in providing resources for enforcement against sex tourism. Additionally, some NGOs rescue and care for those children kidnapped into the industry.

1. International Justice Mission (IJM)

International Justice Mission (IJM) is an international human rights agency that rescues victims of violence, sexual exploitation, slavery and oppression.¹⁷⁸ It

170. U.S. DEP'T OF STATE, OFFICE TO MONITOR AND COMBAT TRAFFICKING IN PERSONS, *Trafficking in Persons Report: Tier Placements*, <http://www.state.gov/g/tip/rls/tiprpt/2007/82802.htm>.

171. POLARIS PROJECT, U.S. POLICY ALERT GRAPHICAL ALERT SNAPSHOT – JUNE 2008 1 (2008), available at <http://www.polarisproject.org/content/view/149> [hereinafter *Polaris Snapshot*]; POLARIS PROJECT, U.S. POLICY ALERT ON HUMAN TRAFFICKING: SUMMARY OF U.S. POLICY ACTIVITY 2 (2008), available at: <http://www.polarisproject.org/content/view/149> [hereinafter *Polaris Summary*].

172. *Polaris Snapshot*, *supra* note 171; *Polaris Summary*, *supra* note 171.

173. *Polaris Summary*, *supra* note 171.

174. *Id.* at 2-3.

175. ECPAT INT'L, QUESTIONS & ANSWERS ABOUT THE COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN, 31 (2006) (2001).

176. *Id.*

177. *Id.*

178. IJM, *Who We Are*, <http://www.ijm.org/whoweare>. International Justice Mission, Mission Statement: “International Justice Mission is a human rights agency that secures justice for victims of

is a global organization of lawyers and investigators that works with local authorities to stop illegal abuses such as sex trafficking and forced labor slavery.¹⁷⁹ Based on referrals of abuse received from relief and development organizations, IJM conducts professional investigations of the abuses and mobilizes intervention on behalf of the victims. IJM has twelve world offices, including offices in Cambodia, Thailand, and Philippines, and has rescued children trapped in sex tourism in all of these Southeast Asian countries.¹⁸⁰ In 2003, IJM worked with local authorities in Cambodia to facilitate raids of several brothels that resulted in the rescue of thirty-seven girls, the youngest of whom was five years old.¹⁸¹

2. ECPAT International

ECPAT International (End Child Prostitution, Child Pornography and Trafficking of Children for Sexual Purposes) is “a global network of organizations and individuals working together to end child prostitution, child pornography, and the trafficking of children for sexual purposes.”¹⁸² “It seeks to encourage the world community to ensure that children everywhere enjoy their fundamental rights free and secure from all forms of exploitation.”¹⁸³ ECPAT provides helpful educational materials about eliminating child sex tourism, including its *Questions and Answers about the Commercial Sexual Exploitation of Children* handout.¹⁸⁴

3. Action Pour Les Enfants (APLE)

Action Pour Les Enfants (APLE) is an international NGO operating in Cambodia (Phnom Penh, Sihanoukville and Siem Reap).¹⁸⁵ APLE focuses on protecting Cambodian children from child sex offenders and preventing street-based child sexual exploitation. APLE’s objectives include:

- Intervention and aftercare: To emancipate victims from child sexual abuse and reduce the effects of trauma caused by such abuse.
- Legal protection: To increase the level of access to legal protection afforded to victims of child sexual abuse.
- Breaking the cycle: To lessen the likelihood of vulnerable children becoming victims, and victims becoming recurring victims through awareness and active social care.

slavery, sexual exploitation and other forms of violent oppression. IJM lawyers, investigators and aftercare professionals work with local governments to ensure victim rescue, to prosecute perpetrators and to strengthen the community and civic factors that promote functioning public justice systems.” *Id.*

179. *Id.*

180. *Id.* “IJM’s justice professionals work in their communities in 12 countries in Asia, Africa and Latin America to secure tangible and sustainable protection of national laws through local court systems.” *Id.*

181. George Gedda, *In One Girl’s Story, Picture Emerges on Human Trafficking*, BOSTON GLOBE, June 15, 2004, at 1.

182. ECPAT, *Vision and Mission*, http://www.ecpat.net/EI/Ecpat_vision.asp.

183. *Id.*

184. ECPAT, *supra* note 175.

185. Action Pour Les Enfants, *About Us*, http://www.aplecambodia.org/about_us.php.

- **Criminal accountability:** To improve current conditions of impunity and legal accountability of child sex offenders in Cambodia through cooperation with Cambodian and international law enforcement officials and bodies and through awareness raising on child sexual abuse issues.¹⁸⁶

D. Other Strategies and Solutions

1. Prosecutions

Prosecutions can be one of the most effective tools of deterrence. As IJM witnessed in their work in Southeast Asia, even a few judicial convictions and jail sentences for perpetrators can have powerful ancillary benefits. Convictions send a clear message to all criminals that breaking the law will not go unpunished. “Convictions change the fear equation: The criminals are now afraid, so victims and potential victims don’t have to be,” says Sharon Cohn Wu, Senior Vice President of IJM’s Justice Operations, who oversees all of IJM’s investigative and intervention strategies.¹⁸⁷ “Each arrest by Cambodian police of Western pedophiles reinforces an important message: “Pedophiles are not welcome in Cambodia and they will go to jail if they assault Cambodian children.”¹⁸⁸

Prosecutions can be a controversial strategy. Other organizations criticize that convictions will not deter perpetrators when the “real issues” lie in the poverty and social structure of a problematic country.¹⁸⁹ IJM’s strategy of prosecution is only part of a 4 fold purpose that involves: (1) victim relief; (2) perpetrator accountability (prosecutions); (3) structural prevention; and (4) victim aftercare.¹⁹⁰ Hopefully, prosecutions of both the traffickers and the corrupt officials who aid trafficking will help keep those in Southeast Asia more accountable to these sexual crimes against children. Prosecutions show that the country’s laws are more than lines on paper.

2. Police Training

The role of the police officer stands out as a crucial piece of managing sex tourism cases and preventing them. By increasing police awareness of commercial sexual exploitation, providing strategies on how to manage sex tourism cases, and training police to serve as trusted adults in the presence of victimized children, the steps of prosecutions and victim relief will be greatly enhanced.¹⁹¹ As ECPAT emphasizes, “The healing process for children begins the moment that they first come into contact with a trusted adult: typically this will be a police officer.”¹⁹² IJM holds specific sex tourism training classes for Cambodian police.¹⁹³

186. *Id.*

187. International Justice Mission, *supra* note 91.

188. *Id.*

189. See Samantha Power, *The Enforcer*, THE NEW YORKER, Jan. 19, 2009, at 59, available at http://www.newyorker.com/reporting/2009/01/19/090119fa_fact_power.

190. International Justice Mission, *What We Do*, <http://www.ijm.org/ourwork/whatwedo>.

191. ECPAT, *supra* note 175, at 32-33.

192. *Id.*

193. Power, *supra* note 190, at 53.

3. Advertising Efforts Geared At Anti-sex-tourism

The tourism and travel industry is gradually responding to the problem of child sexual exploitation in tourism by raising awareness among staff and tourists through leaflets and posters, setting up focal points for reporting instances of abuse, promoting the ECPAT – WTO Code of Conduct, formulating industry declarations, creating in-flight videos as part of education campaigns, and providing training in tourism schools and to tourism personnel on ways to identify and deal with child sex tourists.¹⁹⁴

In Cambodia, posters at the airport warn foreign visitors that abusing children will be paid for with any many as twenty years in prison.¹⁹⁵ Some slogans tout:

- “Turn a sex tourist into an ex-tourist;” and
- “Abuse a child in this country, go to jail in yours.”¹⁹⁶

4. Websites And Hotlines

The advertising strategies may be working, as child predator message boards on the Web have taken note. The Web sites now identify Cambodia as a risk for child predators, said an IJM investigator who had been tracking the sites.¹⁹⁷ Two great sites are:

- Child Sex Tourism Resources:
http://www.vachss.com/help_text/sex_tourism.html, and
- Child Wise Tourism:
<http://www.etravelblackboard.com/index.asp?id=66266&nav=48>

IV. CONCLUSION

The effective elimination of child sex tourists takes the cooperation of global laws and organizations. A new “political will” must be created in a country with a poor sex tourism record, and this political will is usually the result of diplomatic incentives and pressures.¹⁹⁸ For example, “the carrot[] of international donors and the stick of [the] U.S. State Department” sanctions has been proven effective in getting some Southeast Asian countries to act, as seen with TVPA and the PROTECT Act.¹⁹⁹ Investigative anti-child sex tourism NGOs often play a vital role in capturing Western sexual pedophiles abroad by coordinating key enforcement officials from Western and Asian countries as well.

In 2008, the U.S. recognized the bicentennial of its outlawing the transatlantic slave trade, yet modern day slavery such as child sex exploitation still exists.²⁰⁰ In the *Trafficking in Persons Report 2008*, Ambassador Mark Lagon exhorts: “Those culpable in this crime—traffickers, . . . child sex tourists, and corrupt government officials—must be held to account.”²⁰¹

194. ECPAT, *supra* note 175, at 34.

195. Doyle, *supra* note 132.

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *Trafficking in Persons, supra* note 4.

201. *Id.*