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BOOK REVIEW

MAKING "REGIME CHANGE" MULTILATERAL. THE WAR ON TERROR AND TRANSITIONS TO DEMOCRACY

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Since September 11, American policy at home and abroad has centered on engineering transitions from political contexts that spawn hatred and violence to those that promote peace and the rule of law.[1] Unfortunately, the current Administration has proceeded without considering the experience of countries making transitions to democracy This article suggests that heeding the lessons of their experience would produce policies that are both different and more effective.

To effect transitions, the Administration has relied heavily on military force abroad and the expansion of legal sanctions at home – a top-down set of strategies that comprise what I call the preemptive model.[2] In relying on such strategies, however, the preemptive model also effectively preempts recognition of the crucial role played by global inequality Pervasive media and technology allow groups to perceive inequality transnationally.[3] Inequality shapes social identities, sharpens social comparisons that prod groups to act, and mobilizes social capital dedicated to violence. Pursuit of a preemptive model stressing military force obscures the role of inequality thereby promoting polarization, not transition.

The preemptive approach has attracted criticism from scholars associated with

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Professor of Law, Roger Williams University. I thank Kevin Johnson, Diane Orentlicher and participants at a workshop at the Society of American Law Teachers Conference on Pedagogy and Crisis in October, 2002 for their comments on a previous draft.

1. This project encompasses number of related areas, including the intervention in Iraq, anti-terrorism enforcement, and immigration policy. *See infra* text accompanying notes 2-15 (analyzing these issues).

2. Use of the term "preemptive" in this Article dovetails with the Administration's espousal of a doctrine of preemptive force against perceived threats throughout the globe. *See* The National Security Strategy of the United States (2002) *available at* http://www.whitehouse.gov/nsc/nss.pdf (last visited Apr. 26, 2004). While this national security doctrine is not centerpiece of my discussion here, its application to justify the United States military intervention in Iraq set the stage for the issues involving Iraq' transition to democracy that I analyze in the final section of the piece; *See infra* text accompanying notes 98-140; For a succinct theoretical and historical defense of the preemptive model, see ROBERT KAGAN, PARADISE AND POWER 75 (2003) ("[T]he United States has had the difficult task of trying to abide by, defend, and further the laws of advanced civilized society while simultaneously employing military force against those who refuse to abide by such rules.").

3. *See* Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311, 459-73 (2002), citing BENEDICT ANDERSON, IMAGINED COMMUNITIES (rev. ed. 1991) (discussing globalization of information and information's role in formation of global "imagined communities"); Michael C. Hudson, *Imperial Headaches: Managing Unruly Regions in an Age of Globalization*, 9 MIDDLE E. POL'Y 61, 68-70 (Dec. 2002) (discussing impact of media transmission of images that depict suffering by Arabs and Muslims); Larbi Sadiki, *Popular Uprisings and Arab Democratization*, 32 INT'L J. MIDDLE E. STUD. 71, 83 (2000).

what I call the state-skeptical view While the state-skeptics often advocate for state measures such as increased foreign aid that seek to remedy material inequality they typically oppose new state initiatives involving the use of force or legal sanctions to deter transnational networks' violence against civilians.[4] In their concern with constraining state force, however, the state-skeptics fail to adequately address the threat to equality posed by violent transnational networks, such as Al Qaeda, Hamas, or Kach.[5] These groups, led by "authenticity entrepreneurs, foment violence based on nationality, ethnicity, or religion, and frustrate transitions.[6]

This article advances a multilateral transition model that refines and extends the literature on transitions to democracy [7] Transitions of the kind that the current Administration seeks are multilateral, requiring the cooperation of a multitude of constituencies, including Muslim[8] and Jewish[9] communities that spill across national borders. Law and policy should frame this dialogue of diasporas to promote transitions.

The transition scholars identify three factors as crucial to democratic transi-

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4. *See* David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953 (2002); Letti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575 (2002); Ronald Dworkin, *The Threat to Patriotism*, N.Y REV. BOOKS, Feb. 28, 2002, at 44 (asserting that post-September 11 legislation designed to disrupt terrorist groups' ability to raise funds and recruit new members "sets out new, breathtakingly vague and broad definition of terrorism" and is "not consistent with our established laws and values").

5. *See* Peter Margulies, *The Virtues and Vices of Solidarity: Regulating the Roles of Lawyers for Clients Accused of Terrorist Activity*, 62 MD. L. REV. 173, 197-200 (2003) (discussing violent transnational networks).

6. *Id.*

7 *See* GERARD ALEXANDER, THE SOURCES OF DEMOCRATIC CONSOLIDATION (2002); JUAN J. LINZ & ALFRED STEPAN, PROBLEMS OF DEMOCRATIC TRANSITION AND CONSOLIDATION: SOUTHERN EUROPE, SOUTH AMERICA, AND POST-COMMUNIST EUROPE 7-9 (1996); Philippe C. Schmitter & Terry Lynn Karl, *What Democracy Is and Is Not*, in TRANSITIONS TO DEMOCRACY 3 (Geoffrey Pridham ed., 1995); Gerard Alexander, *Institutionalized Uncertainty, The Rule of Law, and the Sources of Democratic Instability*, 35 Comp. Pol. Stud. 1145 (2002); Guillermo A. O'Donnell, *Democracy, Law, and Comparative Politics*, 36 STUD. COMP INT'L DEV. 7 (Spring 2001); Peter Margulies, *Democratic Transitions and the Future of Asylum Law*, 71 U. COLO. L. REV. 3 (1999). A valuable complement to the comparative politics literature is the law and development literature, in which the theme of inclusion stressed here is a significant focus. *See* AMY L. CHUA, WORLD ON FIRE: HOW EXPORTING FREE MARKET DEMOCRACY BREEDS ETHNIC HATRED AND GLOBAL INSTABILITY (2003); Amy L. Chua, *Markets, Democracy, and Ethnicity: Toward New Paradigm for Law and Development*, 108 YALE L.J. 1 (1998); CHARLES TILLY, THE POLITICS OF COLLECTIVE VIOLENCE (2003) (for comprehensive study that analyzes transition and polarization from historical and social science perspective); MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE (1998); RUTI G. TEITEL, TRANSITIONAL JUSTICE 225 (2000) (for work centering on the appropriate forms of redress for abuses committed by prior regimes); Ruti Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, 106 YALE L.J. 2009 (1997).

8. *See* ROHAN GUNARATNA, INSIDE AL QAEDA: GLOBAL NETWORK OF TERROR 236 (2002) ("It is international neglect of the Muslim interest in the Palestine and Kashmir conflicts, the presence of US troops on Saudi soil and the frequent double standards of the big players that have legitimized the use of violence.").

9. *See* BRUCE HOFFMAN, INSIDE TERRORISM 100-01 (1998) (reporting a speech in Los Angeles by Rabbi Meir Kahane, the New York native who founded the Israeli extremist group Kach, that "described Arabs as 'dogs' as people who 'multiply like fleas' who must be expelled from Israel or eliminated").

tion and consolidation. The first is institutional repertoire, defined as the range of a country's social and political institutions, from the nongovernmental organizations of "civil society" to the executive, legislative, and judicial branches.[10] The second is inclusiveness, defined as the degree to which the country in question treats all of its constituents as full members.[11] The third element is redress, defined as the access to remedies for victims of inequity.[12] Successful multilateral transitions offer all sides a stake in peaceful dispute resolution through inclusion and redress, and deploy force and sanctions authorized by law where necessary to constrain authenticity entrepreneurs who are unwilling to invest in peace.[13]

Transitions are never easy The element of redress, in particular, creates troublesome cross-currents. Ignoring redress can engender disillusionment that undermines transitions.[14] However, scholars of transitional justice have also recognized that the quest for perfect redress can destroy the mutuality on which all transitions depend.[15] For a transition-centered view, balance is everything.

In keeping with this pragmatic outlook, a transition-centered approach integrates difficult measures that might seem mutually exclusive when viewed from either a preemptive or state-skeptical perspective. For example, a transition model would require accountability, acknowledgment, and redress from groups that target civilians for violence, and would uphold the criminalization of assistance to groups such as Hamas, Kach, or the "Real IRA that use violence to undermine efforts at peaceful change.[16] However, a transition-centered model would also stress the importance of fair procedures in the adjudication of charges against alleged terrorists, to do justice and to build perceptions of legitimacy among transnational communities.[17] The integration of such measures bridges fault lines in order to promote peaceful change.

This Article is in three parts. Part I analyzes the problems with approaches to transitions that have sprung up in the wake of September 11. This Part critiques the preemptive model's failure to address inequality, and the state-skeptics' failure to acknowledge the pernicious role of authenticity entrepreneurs. Responding to these flaws, Part II outlines a transition-centered approach based on institutional repertoire, inclusion, and redress. Part III applies the transition-centered approach to three pressing global issues: changes in immigration policy after September 11, regulation of violent transnational networks, and the adjudication of alleged violations of the law of war.

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10. *See* Margulies, *supra* note 7

11. *Id.*

12. *Id.*

13. *See* Peter Margulies, *Uncertain Arrivals: Immigration, Terror, and Democracy After September 11*, 2002 UTAH L. REV. 481, 507-10 (discussing fairness, transparency, and transitions in transnational humanitarian organizations).

14. *See* Ruti G. Teitel, *Transitional Justice in a New Era*, 26 FORDHAM INT'L L.J. 893 (2003) (discussing complexities of transitional redress).

15. *Id.*

16. However, a transition-centered approach would regulate such efforts carefully to guard against the perils of vagueness and law enforcement overreaching. *See infra* text accompanying notes 56-62.

17. *See infra* text accompanying notes 84-91.

I. TERRORISM, TRANSNATIONAL VIOLENCE, AND PROBLEMS OF TRANSITION

Since September 11, 2001, the policy of the United States government has focused on the challenges of transitions in law and culture on an international scale. In Iraq, United States military intervention sought and accomplished a "regime change" that deposed Saddam Hussein and aims to establish a democratic federation. President Bush and his advisors persistently linked the Iraq war to the effort to curb the power and resources of transnational organizations such as Al Qaeda that carry out violence against civilians. The Bush Administration and its intellectual allies have also argued that the Iraq intervention and other steps involving the use of force will aid the cause of transition throughout the Middle East.

After September 11, a transition to democracy, peace, and the rule of law from political environments that generate hatred and violence may be a necessity, not merely an idle aspiration. However, the manifest need for such a transition should not obscure the challenges inherent in the task. The Administration's approach to meeting these challenges has been disturbingly one-dimensional. Adopting a preemptive approach, the Administration has relied on military force and broad legal sanctions applied by the United States and its allies. Inspired in part by the neo-Platonic conception of a natural political aristocracy developed by the philosopher Leo Strauss,[18] champions of the preemptive approach have frequently disdained consultation, consensus, and international law Often, the Administration has acted in a stark manner that discounts human rights and civil liberties at home[19] and abroad,[20] and incurs opportunity costs through the alienation and resentment of those whose support the Administration will need to achieve its goals.[21] Indeed, in a worst case scenario, the preemptive approach threatens a downward drift in which accountability and civil rights are honored more in the breach than in the observance.[22] This combination of resentment in affected communities and erosion of American democracy is a recipe for global polarization,

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18. *See* Leo Strauss, *Plato*, in HISTORY OF POLITICAL PHILOSOPHY 33, 49 (Leo Strauss & Joseph Cropsey eds., 3d ed. 1987) (noting the differences between Platonism and liberal democracy, and observing that for Plato "[t]he founding of the good city started from the fact that men are by nature different, and this proved to mean that men are by nature of unequal rank [a]s result, the good city comes to resemble a caste society"); James Atlas, *Leo-Cons; A Classicist's Legacy: New Empire Builders*, N.Y TIMES, May 4, 2003, Sec. 4, at 1 (noting the intellectual debt of influential Administration figures, such as Paul Wolfowitz, to Strauss, while asserting that the Administration may have neglected Strauss's own warnings about the abuses of empire).

19. *See* Cole, *supra* note 4 (critiquing detention of immigrants after attacks); Margulies, *supra* note 13; Volpp, *supra* note 4 (describing the marginalization of particular communities after September 11); Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001. The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURVEY AM. L. 295 (2002).

20. *See* JOSEPH S. NYE, JR. THE PARADOX OF AMERICAN POWER: WHY THE WORLD'S ONLY SUPERPOWER CAN'T GO IT ALONE 35 (2002) (arguing that preemptive approach by the United States will result in the loss of "important opportunities for cooperation in the solution of global problems such as terrorism").

21. *Id.*

22. *See* Dworkin, *supra* note 4.

rather than the mutuality required for successful transitions.

In addition to the war in Iraq, the preemptive approach has been evident in Administration legal and policy initiatives on three other fronts. In the immigration sphere, the Administration has used nationality, religion, and ethnicity as criteria to selectively register, apprehend, detain, and deport immigrants.[23] By seeking to regulate transnational networks carrying out violence against civilians, the Administration has relied on broad and sometimes vaguely defined statutory language barring "material support" of groups designated by the Secretary of State as terrorist organizations.[24] To prevent future terrorist attacks, the Administration has established military tribunals that lack fundamental procedural safeguards.[25] Each policy has undermined perceptions of legitimacy crucial to the success of antiterrorist efforts.

A. Inequality and Social Dynamics

The core problem with the Administration's strategy is its lack of regard for equality as a factor in the social dynamic that produces violence. The certainty animating the preemptive approach leaves little room for understanding the complex process underlying the formation of social identity in regions, such as the Middle East, that acolytes of the preemptive approach hope to shape. Compounding this lack of comprehension is a failure to appreciate the role of identity in fostering social comparisons that provoke concern about unfairness, and the role of social identity and comparison in turning social capital toward violence.[26]

Social identity is the first component in the terrorism dynamic. Social identity theory suggests that people are essentially social beings, concerned with how they relate to others.[27] While the ruling elites that have been the traditional focus

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23. Patrick J. McDonnell & Russell Carollo, *An Easy Entry for Attackers; Immigration flaws garner attention as authorities track the Sept. 11 hijackers' movements through the United States*, L.A. TIMES, Sept. 30, 2001, at A1 (discussing the new policy, which purported to respond to indications that many of the September 11th attackers manipulated United States immigration law to enter this country, but has attracted widespread criticism by academics and government officials); *See* Cole, *supra* note 4; Akram & Johnson, *supra* note 19; Margulies, *supra* note 13; Volpp, *supra* note 4. *Cf.* Office of the Inspector General, U.S. Dep't of Justice, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* (June 2003), *available at* http://www.usdoj.gov/oig/special/0306/analysis.htm (last visited Apr. 30, 2004).

24. Cole, *supra* note 4; Humanitarian Law Project v. Reno, 205 F.3d 1130, 1135 (9th Cir. 2000), *cert. den. sub nom.* Humanitarian Law Project v. Ashcroft, 532 U.S. 904 (2001) (upholding statute against facial challenge, but finding that certain statutory terms were unconstitutionally vague as applied).

25. *See* Humanitarian Law Project v. Reno, 205 F.3d 1130 (9th Cir. 2000).

26. Critics of the Administration's reliance on force and legal sanctions, whom I refer to collectively as the "state-skeptical" school, also suffer from an incomplete picture of the interaction between inequality and social dynamics. *See infra* text accompanying notes 53-55.

27 *See* David O. Sears, et. al., Cultural Diversity and Multicultural Politics: Is Ethnic Balkanization Psychologically Inevitable?, *in* CULTURAL DIVIDES: UNDERSTANDING AND OVERCOMING GROUP CONFLICT 35, 40-41 (Deborah A. Prentic & Dale T. Miller eds., 1999); Michelle Adams, Intergroup Rivalry, Anti-Competitive Conduct, and Affirmative Action, 82 B.U. L. REV. 1089, 1100-04 (2002);

of American law and policy contribute to the formation of social identity, popularly shared experiences of trauma, oppression, or inequity can also play a significant role.

The role of trauma is evident in the way the tragic events of September 11 contributed to some Americans' sense of their own identity as a people embattled in a hostile world. The experience of displacement has also been constitutive for a broad range of other groups, including African-Americans,[28] Jews,[29] and Palestinians,[30] each fashioning narratives of hope and resistance. For Arabs and Muslims throughout the globe, the Palestinian experience in particular has been a compelling metaphor for threats posed by the West.[31] Media technology makes instances of trauma or perceived disparate treatment, such as the attacks of September 11 against the United States by Al Qaeda, the Israeli government's measures against alleged Palestinian militants, or the United States military's causing of civilian casualties during the war in Iraq, immediately available, graphic, and vivid.[32]

The "social comparisons" fueled by such images can spur change for better or worse. Identification with a group, coupled with the perception that the treatment accorded that group is unfair or unjustified, impels people to take action.[33] Human history and experience teach us, however, that intuitions about equity and fairness can all too easily degenerate into envy, resentment, and rage.[34] Particularly when a group within a society or region that is dominant in terms of numbers, culture, or historical pedigree feels threatened by those perceived as outsiders, social com-

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Diana C. Mutz & Jeffery J. Mondak, Dimensions of Sociotropic Behavior: Group Based Judgments of Fairness and Well-Being, 41 AM. J. POL. SCI. 284 (1997); James N. Baron & Jeffrey Pfeffer, The Social Psychology of Organizations and Inequality, 57 (3) SOC. PSYCHOL. Q. 190, 196-98 (1994). *See* Tilly, *supra* note 7, at 32 (discussing political identities as "networks deploying partially shared histories, cultures, and collective connections with other actors").

28. *See* Adams, *supra* note 27

29. *See generally* ANTON LA GUARDIA, WAR WITHOUT END: ISRAELIS, PALESTINIANS, AND THE STRUGGLE FOR A PROMISED LAND (2001).

30. Graham Usher, *Facing Defeat: The Intifada Two Years On*, 32 J. PALESTINE STUD. 21, 22 (Winter 2003).

31. *See* Sadiki, *supra* note 3 (discussing influence of the Palestinian intifada on expressions of popular sentiment in Jordan and Egypt).

32. *See* Berman, *supra* note 3, at 459-73; Hudson, *supra* note 3, at 68-70; Sadiki, *supra* note 3. (This is not to say that *any* reaction to such trauma or injustice is acceptable. The contours of the right of self-defense and proportionality will always be crucial in evaluating possible responses. Disproportionate responses, such as the attacks of September 11, are a sure sign that organizations with their own agenda have hijacked the formation of social identity.).

33. The African-American struggle for civil rights stemmed from just such dynamic. *See* Adams, *supra* note 27 The Zionist movement stemmed from the sentiment that Jews needed home that could serve as a refuge from the persecution they had encountered in Europe. LA GUARDIA, *supra* note 29. The yearning of Palestinians for meaningful sovereignty and an end to the displacement caused by Israeli settlements has an analogous origin. Usher, *supra* note 30. (discussing Palestinian unrest commencing in September, 2000 as in part a reaction to increased settlement activity subsequent to signing of the Oslo peace accords).

34. *See* TILLY, *supra* note 3, at 141 (discussing "[a]ctivation of available us-them boundaries" in course of Rwandan genocide).

parisons can fuel murderous and even genocidal hatred.[35]

Where social identity and social comparison go, social capital soon emerges. Social capital is the constellation of groups, networks, and organizations that help provide the infrastructure for action.[36] Social identity and social comparison can skew social capital in either positive or negative ways. For example, profound feelings of powerlessness can turn networks toward self-destructive and risk-prone behavior.[37] When the future looks bleak, many people refuse to invest time and effort in building long-term institutions.

Instead they adopt an apocalyptic perspective, creating a vacuum between today and eternity.[38] This is the temporal domain of the suicide bomber. Suicide bombings and other acts of coordinated violence require social capital of a special kind.[39] Discipline and coordination are necessary to construct munitions, select a target, avoid detection, and execute an attack.[40] Unfortunately, this brand of social capital is not readily transferable to the construction of institutions that nurture democracy and the rule of law.

Modes of social capital and the framing of social comparison and identity thus exist in a dialogic relationship. While substantive perspectives on equality and belonging shape the form taken by social organizations, the form that emerges also influences the framing of definitions and claims. For example, highly hierarchical, secretive, or homogeneous groups are likely to perceive both identity and grievances in a far more polarized fashion.[41] In homogeneous groups, new elites can emerge, instilling and exploiting a hunger for "authenticity" within the group – a yearning for an imagined triumphalist past.

These "authenticity entrepreneurs" can help inaugurate social cascades that culminate in extreme violence or even genocide.[42] Indeed, the twentieth century's

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35. *See* James L. Gibson & Amanda Gouws, *Social Identities and Political Intolerance: Linkages within the South African Mass Public*, 44(2) AM. J. POL. SCI. 278, 289 (2000) (discussing linkage between social identity and intolerance among South African whites).

36. *See* ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY 307-18 (2000) (discussing importance of social capital).

37 *See* Hudson, *supra* note 3, at 70 ("the network [of Islamists] produces the social-capital rewards for membership in addition to the instrumental agendas being put forth [c]odes of dress and deportment are among the social cues and pressures that attract and consolidate commitment to the cause[d]uring repressive periods Islamists migrated into the subaltern and protected spaces ").

38. *See* ANDERSON, *supra* note 3.

39. *See* TILLY, *supra* note 7 (discussing "violent specialists"); Bruce Hoffman, *The Logic of Suicide Terrorism*, ATLANTIC MONTHLY, June 2003, at 43 (quoting a journalist who observes that, "We hardly ever find that the suicide bomber came by himself. There is always a handler.").

40. Hoffman, *supra* note 39.

41. *See* Cass R. Sunstein, *Why They Hate Us: The Role of Social Dynamics*, 25 HARV J. L. & PUB. POL'Y 429 (2002).

42. *See* TILLY, *supra* note 7, at 34 (discussing role of "political entrepreneurs" who "promote violence by activating boundaries, stories, and relations that have already accumulated histories of violence; by connecting already violent actors with previously nonviolent allies; by coordinating destructive campaigns; and by representing their constituencies through threats of violence"); Timur Kuran, *Ethnic Norms and their Transformation Through Reputational Cascades*, 27 J. LEGAL STUD. 623 (1998) (discussing how small changes in perceptions and behavior prompted in part by signals from

experiences of genocide, from the Nazis in Germany to the Hutu machete-wielders in Rwanda, often had roots in perceived oppression at the hands of "inauthentic" others.[43] The lay-person Bin Laden's campaign against infidels in the West, articulated in *fatwahs*[44] that traditional Islam allows only clerics to issue,[45] and Kach's calls for the expulsion of Palestinians,[46] along with other grim examples, illustrate how secrecy, homogeneity, and the rhetoric of authenticity have promoted violence against innocents.

B. The Failures of the Preemptive Approach and Its Critics

Unfortunately, the preemptive style, rooted in coercion and legal sanctions, does little to dislodge the processes of social identity construction and social comparison that create a fertile ground for asymmetric violence. Because of this negligible impact on underlying processes, the Administration's approach to disrupting the social capital of groups practicing asymmetric violence is ineffective. Indeed, the punitive approach in some ways enhances the social capital available for asymmetric violence, by sharpening the social comparisons that serve as the best recruiting tools for those committed to extremism.[47]

The recent war with Iraq offers an example of a transition that risks spiraling into polarization. The problem started with the focus of Administration policymakers on efficiently achieving a military victory.[48] Having geared their efforts toward war against the Ba'athist regime, policymakers were ill-prepared for the consequences of the regime's collapse.[49] In particular, policymakers failed to anticipate grass-roots reactions to the power vacuum, such as the protracted cascade

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social and political leaders can snowball into massive political upheavals and ethnic strife); Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683 (1999) (analyzing role of "availability entrepreneurs" in shaping public policy by leveraging stories and images that are cognitively salient). Ironically, authenticity entrepreneurs often appropriate images and group structure from those they identify as enemies. *See, e.g.*, Ladan Boroumand & Roya Boroumand, *Terror, Islam, and Democracy*, 13(2) J. DEMOCRACY 5, 7-8 (2002) (discussing the influence of Fascism and Communism on theorists of violent Islamism, including Sayyid Qutb); JOHN ESPOSITO, UNHOLY WAR: TERROR IN THE NAME OF ISLAM 20, 32 (2002) (noting Islamic strictures against killing noncombatants and Osama bin Laden's disregard of these rules); KHALED ABOU EL FADL, REBELLION AND VIOLENCE IN ISLAMIC LAW 338-39 (2001) (analyzing Qutb's revision of Islamic juridical doctrine on tolerance for rebellion).

43. *See* CHUA, *supra* note 7.

44. *See* ESPOSITO, *supra* note 42.

45. *Id.*

46. *See* Margulies, *supra* note 5.

47 *See, e.g.*, Michael P O'Connor & Celia M. Rumann, *Into the Fire: How to Avoid Getting Burned By the Same Mistakes Made Fighting Terrorism in Northern Ireland*, 24 CARDOZO L. REV. 1657, 1677 (2003) (noting that restrictive legislation enacted by the British to deter terrorism "alienated broad swaths of the Northern Irish community, thereby providing assistance to. paramilitary groups").

48. *See* Eric Schmitt & David E. Sanger, *Aftereffects: Reconstruction Policy; Looting Disrupts Detailed U.S. Plan to Restore Iraq*, N.Y TIMES, May 19, 2003, at A1.

49. *Id.*

of looting that damaged the nation's infrastructure.[50] The devastation deprived post-Ba'athist civil authorities of essential tools of transition, such as the means to provide power, water, and basic services to the populace.[51] These failures triggered Iraqi resentment, hindering the cause of effective transition. Analogous problems with the preemptive approach beset issues of immigration regulation in the wake of September 11, efforts to disrupt the human and financial capital of groups practicing violence against civilians, and attempts to adjudicate violations of the law of war by alleged terrorists.

The defects of the preemptive perspective cry out for an alternative. Unfortunately, the alternative most vigorously pressed, what I call the state-skeptical approach, also suffers from significant flaws. The state-skeptical approach is wary of any expansion of government power. For this reason, champions of the state-skeptical approach oppose measures that would restrict the financial and human capital available to organizations such as Al Qaeda, Hamas, or Kach.[52] However, state-skeptics fail to acknowledge the increase in violence against innocents promoted by the "authenticity entrepreneurs" leading such groups, the hateful stereotypes authenticity entrepreneurs invoke to encourage violence, or the way in which organizational hierarchy, homogeneity and secrecy facilitate violence.[53] State-skeptics also forget that groups practicing violence against innocents provide powerful rhetorical ammunition to advocates of the preemptive approach pressing for punitive responses. This perverse dynamic encourages polarization, and prejudices the prospects for peaceful transitions. Neither the preemptive nor the state-skeptical view deals adequately with the challenges of a violent world.

II. A BETTER ALTERNATIVE TO THE PREEMPTIVE APPROACH: THE TRANSITION-CENTERED VIEW

A transition-centered perspective is better able to respond to these challenges.

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50. *Id. See also* TILLY, *supra* note 7, at 134 (noting that opportunistic "seizure or damage of property" is a hallmark of "low-capacity regimes, like the chaotic governance arrangements in Iraq immediately after Saddam's fall, that exert little or no authority over the conduct of their constituents).

51. TILLY, *supra* note 7, at 134.

52. *See* Cole, *supra* note 4 (conceding that Al Qaeda is an organization so intrinsically devoted to violence that regulation of its access to financial assistance may be appropriate, but offering no readily cognizable standard that would allow courts to separate permissible from impermissible regulation, implicitly conferring upon Al Qaeda the impunity conferred upon organizations such as Hamas).

53. *Id.* (Cole acknowledges that security is a legitimate concern of government. However, he regards as suspect measures that criminalize the development of an institutional capability for violence. Moreover, he argues that the First Amendment bars legislation prohibiting financial aid to organizations like the Palestinian extremist group Hamas, which sponsor both violence and social services. In making this argument, he ignores both the difficulty of regulating the accounting of organizations based outside the United States, and the way in which the provision of social services legitimizes the violence perpetrated by such groups.) *Id. See* Margulies, *supra* note 13 (discussing organizational synergies within organizations providing both violence and social services); Gerald L. Neuman, *Terrorism, Selective Deportation and the First Amendment After Reno v. AADC*, 14 GEO. IMMIG. L.J. 313, 330-32 (2000) (explaining why regulation of transnational organizations practicing violence does not violent first amendment); Humanitarian Law Project v. Reno, 205 F.3d 1130, 1135 (9th Cir. 2000), *cert. denied*, Humanitarian Law Project v. Ashcroft, 532 U.S. 904 (2001).

Unlike the preemptive perspective, the transition-centered strategy recognizes that regime change – either national, regional, or global – is necessarily multilateral. For this reason, a transition-centered strategy requires reflection about the opportunity costs imposed by the use of force. While force and legal sanctions have a role, the transition-centered approach recognizes that using them can set in motion a dynamic that the side using force cannot fully control. The transition-centered approach recognizes that a more refined menu of responses is necessary to move social identity, comparison, and capital away from violence and toward the rule of law. At the same time, the transition-centered approach acknowledges that when the state must use force or sanctions against entities practicing violence, it should use only those measures tailored to the occasion, and should also support the emergence of alternative entities committed to peaceful change.

A transition-centered approach stems from the substantial body of literature striving to make sense of the governmental changes occurring throughout the world in the last quarter-century. Considering regime changes in regions as disparate as Eastern and Southern Europe, Latin America, the Caribbean, and Africa, scholars have identified crucial elements in the transition to democracy [54] These dynamic models recognize that change is complex and unpredictable. As one commentator has pointed out, "[D]emocratic evolution is [not] a steady process that is homogeneous over time. temporal discontinuity is implicit."[55]

Creating and maintaining the right mix of elements is a matter of art and chance, not science. The traditions, institutions, and actors that affect the process of transition do not necessarily respond to the seeming certainties embodied in formal law or the application of force. Indeed, this literature explicitly borrows from conceptions of regime change developed over the centuries by political theorists who viewed such change not as a function of structural or material forces, but instead as the "contingent product of human collective action,"[56] which can move from despotism to democracy, or just as readily travel in the opposite direction.[57]

The account of democracy and the rule of law developed by the transition theorists involve both popular participation and constraint on popular choices. The transition theorists believe that human beings fulfill themselves when they participate in decisions regarding the well-being of the community [58] This expression of self is dynamic, because no mechanical formula — no shorthand of class, race, or economic interest — can conclusively determine how people speak and act as they

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54. *See* Margulies, *supra* note 7.

55. *See* Dankwart A. Rustow, *Transition to Democracy: Toward a Dynamic Model*, in TRANSITIONS TO DEMOCRACY, *supra* note 7, at 67.

56. *See* Philippe C. Schmitter & Terry Lynn Karl, *The Conceptual Travels of Transitologists and Consolidologists: How Far to the East Should They Attempt to Go?* 53 SLAVIC REV 173, 174 (1994).

57 *See id.* ("There is nothing more difficult to execute, nor more dubious of success, nor more dangerous to administer than to introduce a new system of things: for he who introduces it has all those who profit from the old system as his enemies and he has only lukewarm allies in those who might profit from the new system. quoting NICCOLO MACHIAVELLI, THE PRINCE, ch. VI, 21 (1950)).

58. *See* O'Donnell, *supra* note 7, at 113 (arguing that "the discharge of public duties is an ennobling activity" and that "dedication to the public good demands and nurtures the highest values").

engage with the speech and action of others. Regimes must provide for this dynamic element, by permitting political expression, and providing avenues for changing a particular government that incurs popular dissatisfaction. At the same time, the rule of law requires institutions such as courts that can check the popular will in the name of abiding values.[59]

The multilateral transitions required to deal with worldwide issues of asymmetric violence add new layers of uncertainty. Transitions are unpredictable even when they hinge largely on the interaction of institutions and actors within a particular, relatively homogeneous state. When transitions involve ethnic conflict and links with transnational communities, complexity and unpredictability increase exponentially

In multilateral transitions, developments within one country can exert a powerful impact on events abroad. This impact is inescapable when, as in efforts to combat asymmetric violence, one of the countries involved is the world's lone superpower. Moreover, when the locus of transition resides in popular sentiments, matters of tone and imagery become crucial. Such intangible concerns can be decisive in the formation of social identities and the framing of social comparisons. This dynamic process can make the difference between the spiraling violence of polarization and the progress of transition.

While there is no single template for democracy or the rule of law, we can create an operating definition.[60] A pathway to democracy must ensure input from all stakeholders and offer protections against overreaching by government and powerful private groups. The three central elements advanced by the transition theorists for realizing this definition are 1) inclusion, 2) institutional repertoire; and, 3) redress. I address each in turn in the following paragraphs.

A. Inclusion

The premise that participation in politics is the hallmark of democracy indicates the importance of inclusion. All stakeholders must have the opportunity to participate.[61] Multilateral transitions expand the pool of persons who should be considered stakeholders in the process.

Inclusion is important not only for its own sake but because of its instrumental value. The lessons of social identity, comparison, and capital teach us that excluded groups despairing about gaining a stake in government may respond to the urgings of authenticity entrepreneurs.[62] In contrast, the shared stakes promoted by

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59. *See* FAREED ZAKARIA, THE FUTURE OF FREEDOM: ILLIBERAL DEMOCRACY AT HOME AND ABROAD 157-58 (2003) ("Constitutions were meant to tame the passions of the public, creating not simply democratic but also deliberative government.").

60. *See* Tilly, *supra* note 7.

61. The importance of participation in transitions suggests the need for regulating institutions such as markets that can exacerbate inequality. *See* Chua, *supra* note 7; Richard Bilder & Brian Z. Tamanaha, The Lessons of Law-and-Development, 89 AM. J. INT'L L. 470 (1995) (book review).

62. *See generally* William P Alford, *Book* Review, 113 HARV. L. REV 1677, 1704 (2000) (noting that "ethnic tensions" can disrupt transition to democracy).

inclusion give otherwise disparate parties an incentive to cooperate in shaping new institutions.[63] For example, in Northern Ireland, Catholics' resentment over their exclusion from power fueled violence that in turn provided an easy justification for the Unionists' violent response.[64] Recently, more inclusive processes have encouraged Unionists and Catholics to cooperate in a range of complex areas, including health, education, and finance.[65] In Sri Lanka, while violence shows signs of ebbing, decades-long marginalization of the predominantly Hindu Tamil minority by the predominantly Buddhist Sinhalese majority has prompted brutal attacks by the extremist Tamil group the "Liberation Tigers."[66] The Sinhalese have responded in kind.[67] Stopping the violence will require inclusive measures such as progress toward a federated system, allowing autonomy for both groups.[68]

The situations in Northern Ireland and Sri Lanka are examples of multilateral transitions. In multilateral transitions, policymakers and actors in the legal system must appreciate that they have multiple audiences. One audience will consist of persons designated as members of the polity, such as citizens who can vote in national elections.[69] Another audience consists of lawful permanent residents, who cannot at present cast a vote in national elections but typically have or will have the option of becoming citizens in the future, and who participate in the cultural, social, and political life of the polity in a variety of other ways.[70] However, for a nation engaged in a multilateral transition process with other countries, entities, and institutions on a global level, the audience for government decisions is actually far broader. It includes foreign governments and transnational communities with members held together by ties of nationality, ethnicity, religion, or ideology.[71]

The expansion of audiences for multilateral transitions has significant implications for global initiatives undertaken by the United States and other countries.[72] In some cases, policymakers will seek the approval from international bodies such as the United Nations, as the Bush Administration did both before and after the

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63. *See* Tilly, *supra* note 7.

64. *Id.*

65. *See* Colm Campbell & Fionnuala Ni Aolain, *Local Meets Global: Transitional Justice in Northern Ireland*, 26 FORDHAM INT'L L.J. 871, 886 (2003).

66. *See* Neil DeVotta, *Illiberalism and Ethnic Conflict in Sri Lanka*, 13 J. DEMOCRACY 84, 90-91 (Jan. 2002).

67 *Id.*

68. *See id.* at 97 (arguing that solution to conflict will involve "a policy of credible devolution that promotes Tamil self-determination").

69. *See* T. ALEXANDER ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP 177-81 (2002) (arguing that many legal distinctions between citizens and lawful resident aliens stem from faulty premises).

70. *Id.*

71. *See* Tilly, *supra* note 7 (discussing how emigre communities, such as Irish-Americans who supported the Irish Republican Army, can contribute to polarization); Philippe C. Schmitter, *Civil Society East and West*, in CONSOLIDATING THE THIRD WAVE DEMOCRACIES: THEMES AND PERSPECTIVES 239, 250 (Larry Diamond et al. eds., 1997) (discussing "transnational civil society").

72. *See generally* Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181 (1996) (discussing the need for transnational mutuality and reciprocity in legal doctrine and practice).

Iraq war.[73] Other initiatives, such as global anti-terrorism efforts, also require transnational agreements and cooperation. Aspects of United States law regarding foreign nationals, such as refugee law and policy, incorporate provisions from international law.[74] In addition, policymakers in the United States operate within informal dimensions of accountability. Initiatives by the United States, for example those proposed as elements of antiterrorist enforcement, are subject to judgments about legitimacy by an array of audiences including the members of transnational nongovernmental organizations and grass-roots communities abroad. Consent and meaningful participation by each group is often necessary to the success of the underlying multilateral project.

The virtue of this kind of inclusion is evident even in ostensibly domestic judgments.[75] Matters generally viewed as at the heart of the polity's self-definition, such as the admission and removal of immigrants, can shape the effectiveness of multilateral transitions. For example, United States immigration policies that target undocumented immigrants from the Middle East and South Asia may then intensify the view that anti-terrorism efforts constitute a "war against Islam."[76] Sending a more inclusive message offers transnational communities a stake in the success of anti-terrorism efforts.[77]

B. Institutional Repertoire

For transition theorists, inclusion also prompts a healthy development of social and political organizations that I have elsewhere called "institutional repertoire. Policymakers and theorists sometimes equate democracy with the occurrence of elections. However, elections are only one facet of a durable transition to democracy. A repertoire of institutions, including courts, administrative agencies, and nongovernmental organizations, is necessary.

A varied institutional repertoire of both state and nongovernmental organiza-

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73. *See* Bob Deans, *Bush U.N. Speech Targets Iraq*, ATLANTA J. CONST., Sept. 12, 2002, at 18A.

74. *See* Beharry v. Reno, 183 F Supp. 2d 584, 591-93 (E.D.N.Y. 2002), *rev'd on other grounds sub nom.*, Beharry v. Ashcroft, 329 F.3d 51 (2d Cir. 2003).

75. In this fashion, policymakers recognized that domestic battles over inclusion, such as the civil rights struggles of the mid-twentieth century United States, had an impact on transnational judgments of legitimacy regarding the Cold War. *See* Mary L. Dudziak, *Desegregation as a Cold War Imperative*, in CRITICAL RACE THEORY: THE CUTTING EDGE 110, 115-16 (Richard Delgado & Jean Stefancic eds., 1995) (discussing international controversies spurred by racial discrimination within the United States).

76. *See* THOMAS L. FRIEDMAN, *In Pakistan, It's Jihad 101*, in LONGITUDES AND ATTITUES: EXPLORING THE WORLD AFTER SEPTEMBER 11 100, 101 (2002) (quoting student in Pakistan madrasa, or religious school, who described Americans as "unbelievers [who] do not like to befriend Muslims, and want to dominate the world with their power"); GUNARATNA, *supra* note 8, at 236 (discussing roots of resentment of American policies in Muslim world); Abbas Amanat, *Empowered Through Violence: The Reinventing of Islamic Extremism*, in THE AGE OF TERROR: AMERICA AND THE WORLD AFTER SEPTEMBER ELEVEN 25, 51 (Strobe Talbot & Nayan Chanda eds., 2001) ("The U.S. could only benefit from promoting the cause of democracy and open society in the Muslim world and encouraging voices of moderation, religious tolerance, and human rights.").

77 *See infra* text accompanying notes 99-118 (discussing immigration and multilateral transitions).

tions refines deliberation about public issues. It gives participants in the polity a menu of opportunities for nonviolent engagement,[78] and a multitude of perspectives for fostering reflection.[79] The "horizontal accountability" yielded by institutional repertoire also nurtures commitments to both formal and informal separation of powers, thus reducing the risk that any single institution will impose an oppressive homogeneity.[84]

Experienced architects of transitions understand the importance of institutional repertoire. In East Timor, for example, where crimes against humanity occurred in the course of a bitter struggle with Indonesia for independence, the United Nations has invested substantial time, effort, and funding to promote the development of an independent judiciary.[80] In Islamic countries, hopes for transition have been bolstered by the development of indigenous women's organizations.[81]

Authenticity entrepreneurs whose regimes and organizations embrace violent exclusionary practices tend to narrow institutional repertoires. Authenticity entrepreneurs can come in all shapes and sizes, from the genocidal demagogues of Rwanda[82] to government officials who invoke fear of violence committed by others as a justification for expanding state power.[83] Authenticity entrepreneurs accumulate power not through the peaceful resolution of disputes, but through the ratcheting up of violence.

In a multilateral context involving disputes between groups, countries, or regions, this narrowing of repertoires is often contagious. As the Israeli-Palestinian conflict demonstrates, escalating violence discredits those seeking peaceful means for resolving disputes.[84] The result is not transition, but polarization. Confronting

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78. *See* TILLY, *supra* note 7, at 120-27 (noting that ethnic or religious violence in areas such as Northern Ireland has historically been linked with a narrow repertoire of occasions such as holidays that sparked rival public demonstrations).

79. *See* Ziad Abu-Amr, *Pluralism and the Palestinians*, J. DEMOCRACY, July 1996, at 83, 90-91 (noting that the Palestinian Legislative Council has the potential to operate as counter-weight to excesses within the Palestinian Authority).

80. *See Report of the Secretary-General on the United Nations Mission of Support in East Timor*, U.N. SCOR, at 1, U.N. Doc. S/2002/1223 (2002), *available at* http://www.un.org/Docs/sc/reports/2002/sgrep02.htm (last visited Apr. 26, 2004).

81. *See* Janine Astrid Clark & Jillian Schwedler, *Who Opened the Window? Women's Activism in Islamist Parties*, 35 COMP. POL. 293 (2003).

82. *See* TILLY, *supra* note 7.

83. *See generally* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 650 (1952) (Jackson, J., concurring) (observing that "emergency powers would tend to kindle emergencies"); *see also* Cole, *supra* note 4 (criticizing policies of Attorney General Ashcroft); Akram & Johnson, *supra* note 19; Lely T. Djuhari, *President Hints She Will Back Vigilante Teams*, SEATTLE TIMES, July 6, 2003, at A3 (quoting Indonesian president as suggesting that the mobilization of armed groups of citizens, which has already led to substantial human rights violations in the last 5 years in East Timor and elsewhere, may be necessary to deal with separatists in Aceh); Jane Perlez, *Indonesia Says Drive Against Separatists Will Not End Soon*, N.Y. TIMES, July 9, 2003, at A3 (discussing United States efforts to deal with human rights abuses of Indonesian military, complicated by need for military's cooperation in anti-terrorist efforts).

84. *See* Andrew Kydd & Barbara F Walter, *Sabotaging the Peace: The Politics of Extremist Vio-*

violence, policymakers aid the cause of transition by deterring authenticity entrepreneurs, nurturing alternatives, and guarding against their own surrender to authenticity entrepreneurship's temptations.

C. Redress

When authenticity entrepreneurs twist transition into polarization, redress is crucial in putting the process back on track. Redress signals both a commitment to inclusion, and an "all-clear" for those brave souls willing to invest their time, effort, and well-being in the development of a rich and varied institutional repertoire.[85] In this sense, remedies to uphold the claims of the weak against the powerful are a bulwark of democracy and the rule of law.[86] A transition without redress is inherently unstable – a camouflaged continuation of the status quo that will eventually give way to violence. However, demands for complete redress can also destabilize the transition agenda.

Transitional redress is most effective in conjunction with commitments to both inclusion and institutional repertoire. To serve inclusion, avenues for redress should be the product of dialogue. For example, debates about reparations in the United States have brought to the surface subjects submerged in generations of oppression, such as corporate complicity with slavery. Transitions that approach redress in a top-down fashion, categorically ruling out classes of remedies, suppress conversations that are difficult, but necessary. Consider here the eventual failure of the Oslo peace process in the Middle East: the politicians that signed the Oslo accord sought to glide by wrenching issues such as settlements and the return of refugees to Israel. When these crucial issues re-emerged, they combined with failures of leadership on both sides to fuel the polarization of the second Palestinian intifada.[87]

Institutional repertoire also plays a central role in transitional redress. Truth and reconciliation commissions developed in Latin America, South Africa, and elsewhere to supplement and supplant legalistic vehicles for redress such as reparations and criminal prosecution of human rights violators.[88] Such innovations may be particularly appropriate as touchstones for transition in multi-ethnic conflict, in which authenticity entrepreneurs on both sides have fostered a discourse of stereotyped narratives. Allowing people at the grass roots to break through those narratives and model a different kind of conversation for the future can consolidate tran-

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lence, 56 INT'L ORG. 263 (2002).

85. *See* Guillermo O'Donnell, *Illusions About Consolidation*, J. DEMOCRACY, Apr. 1996, at 34, 36-37 (noting that democracy must "include an intertemporal dimension: the generalized expectation that . freedoms will continue into an indefinite future").

86. *See id.* at 45 (noting many states with ostensibly democratic elections still deprive people of rights and participation, citing examples including "[t]he rights of battered women to sue their husbands and of peasants to obtain a fair trial against their landlords, the inviolability of domiciles in poor neighborhoods, and in general the right of the poor and various minorities to decent treatment and fair access to public agencies and courts").

87. *See* Usher, *supra* note 30.

88. *See* Teitel, *supra* note 14, at 902-03.

sitional momentum. However, redress of material inequality should accompany the symbolic and affective benefits of truth and reconciliation commissions. In an emerging democracy such as South Africa, persistent economic inequality has eroded some of the good will accorded post-apartheid reforms, with a rising number of blacks telling pollsters that their lives were better under apartheid.[89]

A pragmatic repertoire of remedies is also vital because the search for perfect redress can undermine transition. In some Eastern Bloc countries, for example, "lustration" – the exposure and prosecution of ex-Communist officials – became a kind of fetish for ostensible reformers such as Solidarity once they acceded to power. The result was a neglect of other policy goals, such as economic development.[90] In dealing with the remnants of a dictatorship, punishment of key figures will send a powerful message of transition, while sparing people who had little choice but to serve the regime and whose help is required for a successful transition.[91] Indeed, in a multilateral transition involving at least two organizations or entities, the demand of one or more sides for complete redress may foster not transition, but increased polarization.

III. APPLYING A TRANSITION-CENTERED APPROACH

The criteria of inclusion, institutional repertoire, and redress can inform law and policy on multilateral transitions. Employing a transition-centered analysis can illustrate the limits of relying on force and legal sanctions. Yet, a transition-centered analysis can also provide a clearer case for state intervention to level the playing field between groups practicing violence and groups seeking non-violent alternatives. This section explores the relevance of transition-centered analysis for three problems related to transnational asymmetric violence: 1) immigration policy after September 11, 2) the regulation of organizations that practice violence against civilians; and 3) the adjudication of alleged violations of international humanitarian law.

A. Immigration Enforcement after September 11

Viewing the struggle against asymmetric violence as a process of multilateral transition can furnish support for a re-framing of bodies of law traditionally left to the discretion of the government, such as laws governing immigration. As noted above, the relevant audience for United States immigration law is not merely do-

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89. *See* Robert Mattes, *South Africa: Democracy Without the People?* J. DEMOCRACY, Jan. 2002, at 22, 32; Brandon Hamber, *Dealing with the Past: Rights and Reasons: Challenges for Truth Recovery in South Africa and Northern Ireland*, 26 FORDHAM INT'L L.J. 1074, 1074-87 (2003) (discussing disappointment felt by some victims of apartheid in work of South African truth and reconciliation commission).

90. *See* Denise V Powers & James H. Cox, *Echoes from the Past: The Relationship between Satisfaction with Economic Reforms and Voting Behavior in Poland*, 91 AM. POL. SCI. REV 617, 627-28 (1997) (discussing disillusionment engendered by undue focus on rooting out former Communist functionaries).

91. *Id.*

mestic in nature, but transnational.[92] Perceptions of unfairness shared by the transnational audience undercut the legitimacy of United States law, and the effectiveness of United States antiterrorist policy The use by courts of international instruments, such as the International Covenant on Civil and Political Rights and the International Convention on the Rights of the Child to inform the interpretation of statutory rights under United States immigration law would bolster international perceptions of the legitimacy of United States law by promoting the values of inclusion, institutional repertoire, and redress.[93]

Current United States immigration jurisprudence gives plenary substantive authority to Congress and broad enforcement discretion to the executive branch.[94] Substantial authority and discretion are not necessarily inconsistent with the multilateral transition paradigm.[95] However, the degree of authority exercised by the political branches in the United States over immigration can also frustrate multilateral transitions.

This frustration stems from the way in which the authority over immigration exercised in the United States by the political branches of government lends itself to the scapegoating practiced by governmental authenticity entrepreneurs. When government faces challenging problems, officials can target immigrants.[96] Principles of liberty and equality that typically constrain the government are often not available to check such measures in the immigration context.[97] The Justice Department's effort in the wake of September 11 to detain and deport undocumented immigrants from the Middle East and South Asia and conduct immigration proceedings in secret was a product of this lack of accountability [98]

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92. *See supra* text accompanying notes 74-80.

93. International Covenant on Civil and Political Rights, *entry into force* Mar. 23, 1976, *available at* www.unhchr.ch/html/menu3/b/a_ccpr.htm (last visited Apr. 24, 2004).

94. *See* Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471 (1999).

95. The ability of sovereign states to define themselves through criteria for entry preserves an international repertoire of heterogeneity, providing useful check on the homogenizing force of trends toward globalization of culture and commerce. *See* MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY (1983). Furthermore, some authority over entry is necessary to deter authenticity entrepreneurs and their organizations outside the polity from using the immigration system to stage violent attacks on the polity's population and institutions. The ability of the September 11 attackers to "game the system" through the use and abuse of student and visitors' visas demonstrates the importance and difficulty of immigration enforcement.

96. *See* BONNIE HONIG, DEMOCRACY AND THE FOREIGNER 33-38 (2001) (discussing invocation in public discourse of "us versus them" stereotypes that justify restrictive immigration measures).

97. *See* Ping v. United States, 130 U.S. 581, 609 (1889) (holding that Congress has "plenary power" over immigration); Aleinikoff, *supra* note 68 (critiquing plenary power doctrine); Linda Kelly, *Defying Membership: The Evolving Role of Immigration Jurisprudence*, 67 U. CIN. L. REV. 185 (1998); Linda S. Bosniak, *Membership, Equality, and the Difference That Alienage Makes*, 69 N.Y.U. L. REV 1047, 1130-33 (1994) (analyzing disparities in First Amendment rights between aliens and citizens).

98. *See* David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953 (2002) (critiquing detention of immigrants after attacks); Margulies, *Uncertain Arrivals,supra* note 13; Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575 (2002) (describing the marginalization of particular communities after September 11); Akram & Johnson, *supra* note 19. *See generally* Oren Gross, *Chaos and Rules: Should Responses to Violent Crisis Always Be Constitutional?* 112 YALE L.J. 1011 (2003) (arguing that government officials should fashion criteria for national emergencies justifying relaxation of constitutional

The government's reliance after September 11 on nationality, ethnicity, and religion as criteria for immigration enforcement has uprooted many persons with no connection to asymmetric violence.[99] For example, the government's registration program, which requires immigrants from designated countries with substantial Muslim populations to register with the government, will result in the deportation of thousand of Pakistanis who are not documented, but have often been living and working in this country for a number of years.[100] Many of these immigrants have been performing low-paid jobs that in effect subsidize American consumers.[101] Many immigrant children also find themselves in this hapless group.[102] These children, who often came to this country at a young age, had no control over their parents' decision to seek to emigrate from their country or origin. The government's policy of registration followed by deportation fails to take into account the ties immigrants have developed in this country, the value of the work they have performed, or the hardship immigrant children would undergo in returning to a country that they barely know.[103]

In addition to its direct human cost, the harshness of post-September 11 immigration policy frustrates the process of multilateral transition required to reduce the threat of asymmetric violence. A harsh immigration policy buttresses the widespread view in the Middle East and South Asia that the United States has targeted Muslims. Repeated disavowals by the Administration of an intent to trigger a "clash of civilizations" have little resonance when juxtaposed with the spectacle of thousands of displaced people.[104] In a worst-case scenario, such policies make the "clash of civilizations" a self-fulfilling prophecy, alienating crucial communities abroad.

A greater judicial role in reviewing immigration decisions in light of international agreements could remedy the myopia that afflicts current Administration

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regimes, and be held accountable for defending those criteria and implementing them consistently).

99. *See* Ctr. for Nat'l Sec. Studies v. United States Dep't of Justice, 215 F Supp.2d 94, 98 n.4 (D.D.C. 2002) (noting government concession that many aliens detained or deported after September 11 had no terrorist ties), *rev'd on other grounds*, 331 F.3d 918 (D.C. Cir. 2003); Stephen J. Ellmann, *Racial Profiling and Terrorism*, 46 N.Y.L. SCH. L. REV 675, 724-26 (2003) (discussing lack of concrete information about terrorism yielded by government's immigration measures); Adam Liptak, *The Pursuit of Immigrants in America After Sept. 11*, N.Y. TIMES, June 8, 2003, at 4.

100. Catherine Utley, *Fear and Loathing of US Immigrant Rule*, BBC World Service News, Jan. 27, 2003, *available at* http://news.bbc.co.uk/2/hi/south_asia/2698467.stm (last visited Apr. 24, 2004).

101. *See* HONIG, *supra* note 95.

102. *Id.*

103. Post-September 11 immigration restrictions have also had an adverse impact on other groups, such as Mexican immigrants who, before the attacks, had hoped for greater coordination and cooperation between the United States and Mexico on opportunities to earn legal status. *See* Kevin R. Johnson, *Beyond Belonging: Challenging the Boundaries of Nationality: September 11 and Mexican Immigrants: Collateral Damage Comes Home*, 52 DEPAUL L. REV 849, 858-59 (2003) (discussing new obstacles for approval of visas for prospective Mexican immigrants after attacks).

104. While the Administration states the law accurately in asserting that undocumented immigrants have no legal expectation of remaining in the United States, these assertions are unconvincing as a policy matter. Given the small percentage of undocumented immigrants from South Asia or the Middle East, policy that did not single out these individuals would be at least as effective from an immigration enforcement perspective.

policy and the polarization thereby produced. Recent Supreme Court precedent provides a narrow window for such efforts to broaden the institutional repertoire available in immigration law, particularly on the issue of executive discretion.[105] At least one venturesome court has sought to deal with the problems of displacement of immigrant children and families created by draconian pre-September 11 legislative measures by reading into legislation the anti-displacement mandate in the International Covenant on Civil and Political Rights (CCPR) and the International Convention on the Rights of the Child (CRC).[106] While the Court's effort foundered on appeal because of both doctrinal and procedural obstacles,[107] this result does not preclude a renewed effort centering on post-September 11 enforcement actions by the executive.

Courts could read the statute authorizing removal of undocumented immigrants to allow for a hearing on the issue of disruption to families and hardship to immigrant children.[108] This initiative would also provide a form of redress for immigrants used as low-cost labor in the United States economy and then cast aside because authenticity entrepreneurs in government reacting to the trauma of September 11 needed to "round up the usual suspects. Alternatively, courts could focus on inclusion directly by holding that the clear intent to target immigrants from the Middle East and South Asia, the discriminatory effect of such targeting, and the lack of fit between such targeting and bona fide antiterrorism efforts, fall within the narrow ambit of selective enforcement claims that the courts would entertain in the immigration context.

While significant difficulties, including the courts' tendency to view any ostensible anti-terrorism measure as a function of the war and foreign affairs power, would attend such a judicial approach, the effort is worth making. Even if unsuccessful, a case could provide a focus for mobilizing people and narratives that

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105. *See* Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471 (1999) (arguing for wide prosecutorial discretion, but suggesting that some cases may be sufficiently egregious to warrant judicial intervention).

106. *See* Beharry v. Reno, 329 F.3d 51 (2d Cir. 2003) *citing* CCPR Article 23(1) (noting the fundamental nature of the family) and CRC Article 3 (asserting that best interests of child should be the "primary consideration" of courts, agencies, and legislatures)), *rev'd on other grounds sub nom.* Beharry v. Ashcroft, 329 F.3d 51 (2d Cir. 2003). *See also* Maria v. McElroy, 68 F Supp. 2d 206, 219-20 (E.D.N.Y. 1999) (discussing role of international law in determining whether immigration legislation that expanded grounds for deportation should be retroactive); Sonja Starr & Lea Brilmayer, *Family Separation as Violation of International Law*, 21 BERKELEY J. INT'L L. 213 (2003) (discussing *Beharry* and *Maria* district court opinions). *See* Linda Kelly, *Family Planning, American Style*, 52 ALA. L. REV. 943 (2001) (discussing limitations of conceptions of family in American immigration law); Joan Fitzpatrick, *The Gender Dimension of U.S. Immigration Policy*, 9 YALE J.L. & FEMINISM 23 (1997) (analyzing invidious gender consequences of United States immigration policy).

107. *See* Beharry v. Reno, 329 F.3d 51 (2d Cir. 2003).

108. *See generally* Ralph G. Steinhardt, *The Role of International Law As Canon of Domestic Statutory Construction*, 43 VAND. L. REV 1103 (1990); Lawrence v. Texas, 123 S. Ct. 2472, 2481 (2003) (invalidating sodomy law as invasion of privacy, citing Dudgeon v. United Kingdom, 4 Eur. Ct. H.R. (1981), which held that anti-sodomy laws were invalid under European Convention on Human Rights).

could prompt legislative or administrative reform.[109] Legal reform would promote the good will of transnational constituencies vital for a multilateral transition in the struggle against asymmetric violence.

B. Regulating Organizations That Practice Violence

A multilateral transition approach can also help shape the legal and policy landscape populated by terrorist organizations and governments seeking to combat terrorist threats. Governments can appropriately regulate the flow of human and financial capital to transnational authenticity entrepreneurs who practice violence. A multilateral approach would recognize, however, that the application of legal sanctions is merely one element in a repertoire of responses. Over-reliance on legal sanctions can promote polarization and provide a vehicle for government officials tempted by the advantages yielded by authenticity entrepreneurship. A transition-centered approach would restrain government officials here and abroad who invoke the threat of terrorism as a basis for repressive measures. In addition, a transition-centered approach would seek out and support indigenous, inclusive alternatives to the violent enterprises of authenticity entrepreneurs.

Authenticity entrepreneurs in government or oppositional roles who practice organized violence undermine core transition values. The violence they authorize and promote damages inclusion, often targeting civilians on the basis of ethnicity, nationality, or religion. For example, in the Israeli-Palestinian conflict, one oppositional group has targeted Jews,[110] while another group seeks to evict Palestinians.[111] Violence against innocents also narrows institutional repertoire. As the Israeli-Palestinian conflict demonstrates, the use of violence on one side bolsters the credibility of those on the other side who wish to reply in kind, and discredits moderates.[112] The Israeli-Palestinian conflict offers convincing evidence that the trauma wrought by violence multiplies claims for redress on each side of a multilateral transition, creating further hurdles for a peaceful outcome.

The polarizing violence sought by authenticity entrepreneurs emerges not only from substantive grievances, but also from an infrastructure of social capital common to most "coordinated destruction."[113] Whatever the sentiments of those

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109. Reform could occur through special legislative action to provide relief to the substantial Pakistani undocumented community. Concerns about hardship and fairness produced significant legislation of this kind in the 1990's. *See* Nicaraguan Adjustment and Central American Relief Act, H.R. 2607, 105th Cong. (1997) (enacted), *discussed in* Kelly, *supra* note 105. Administrative reform could occur through adopting a regime of deliberative enforcement that focused on the opportunity costs, such as alienation and resentment, of mechanical application of immigration law to communities selected on the basis of nationality, ethnicity, or religion.

110. *See* LA GUARDIA, *supra* note 29, at 295 (noting that the Palestinian extremist group Hamas claims that, "[T]he Jews were the instigators of the First World War, which led to the destruction of the Islamic caliphate, and set up the United Nations as a means of ruling the world").

111. *See* HOFFMAN, *supra* note 9 (discussing Kach).

112. *See* Andrew Kydd & Barbara F Walter, *Sabotaging the Peace: The Politics of Extremist Violence*, 56 INT'L ORG. 263 (2002).

113. *See* TILLY, *supra* note 7.

persons persuaded by authenticity entrepreneurs to destroy themselves in order to kill others, executing attacks requires a core cadre of "violent specialists," who have a vested interest in continuing their activities and discouraging other forms of dispute resolution. This cadre performs an array of organizational tasks, including selecting a target, making explosives, producing the bomber's valedictory videotape, conferring financial rewards on the bomber's family, and soliciting financial contributions to the enterprise, sometimes from unwitting donors.[114] Violent specialists often require secrecy, and rarely sponsor reflection.[115]

To allow each side of a multilateral dispute to foster inclusion and develop a richer institutional repertoire, governments must stem the flow of human and financial capital to violent authenticity entrepreneurs. The United States Congress, for example, has prohibited the provision of "material support" to organizations such as Kach and Hamas designated by the Secretary of State as pursuing a strategy of asymmetric violence.[116] Such legislation is permissible if it does not bar purely political speech, but instead focuses on the organization's command structure for acts of violence, its solicitation of financial services and support, and its provision of logistical assistance and specialized instruction such as explosives training.[117]

Stemming the flow of human and financial capital to groups practicing violence has aided the progress of multilateral transitions in places as diverse as Northern Ireland and Sri Lanka.[118] Regulating capital flows prompts greater transparency in fund-raising and accounting, denting the secrecy and deception central to violent organizations. Regulation of capital flows can encourage transnational communities that support such organizations to become more vigilant, asking probing questions about the activities funded by their contributions.[119] When organizations cannot furnish satisfactory answers, underwriting communities may start new organizations that promote nonviolent reform.

However, regulating capital flows to organizations practicing asymmetric violence also has perils. In some cases, government designations of groups as terrorist organizations may be hasty or inaccurate. Such "false positives" can create irremediable harm, particularly where organizations, such as Al Barakaat in Somalia, are central to the economy of a country or region.[120] Investigations of

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114. *See* HOFFMAN, *supra* note 9.

115. *See* Kuran & Sunstein, *supra* note 42.

116. *See* 18 U.S.C. § 2339A (2003).

117 Humanitarian Law Project v. Reno, 205 F.3d 1130, 1135 (9th Cir. 2000), *cert. denied sub nom* Humanitarian Law Project v. Ashcroft, 532 U.S. 904 (2001). *But see* Cole, *supra* note 4 (arguing that statute violates first amendment).

118. *See* Thomas L. Friedman, *Lessons from Sri Lanka*, N.Y TIMES, Aug. 7, 2002, at A17 (noting moderating force on LTTE "Tigers" group in Sri Lanka when "Tamil diaspora started choking off their funds").

119. *See generally* ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 30-43 (1970) (discussing role of "voice" in curing group complacency).

120. *See* Margulies, *supra* note 13, at 510 (noting lack of fairness in Somalia episode); Donald G. McNeil, Jr., *A Nation Challenged: Sanctions; How Blocking Assets Erased a Wisp of Prosperity*, N.Y

suspected groups may be unduly intrusive, such as the F.B.I. raids on Muslim organizations in the Spring of 2002 that have thus far yielded no indictments, but created substantial fear and resentment in the community [121] Statutes that expand the threshold of culpability by prohibiting activity such as "material support" of terrorist organizations can also be vague as applied, chilling protected activities such as legal defense or expressions of solidarity from members of the public.[122] In such cases of overreaching, anti-terrorist enforcement becomes a tool to enhance the authority of authenticity entrepreneurs within the government.

Regulation of capital flows to organizations engaged in multilateral disputes can also prompt polarization if transnational constituencies perceive regulation as favoring an oppressive status quo. By definition, such regulation does not target friendly governments that may pursue inequitable policies subsidized directly or indirectly by the regulating country's taxpayers, such as the Israeli government's expansion of settlements on the West Bank. To rectify such imbalances, regulating countries must use their leverage to promote more equitable policies on the part of friendly regimes.

A pragmatic approach to redress is also important in regulating organizational violence. If a regulating government erroneously classifies an organization as a terrorist group, it should seek to compensate persons and entities affected by the resulting dislocation. By the same token, to consummate a transition, an organization that has practiced violence should be prepared to acknowledge the harm it has caused and implement procedures that reflect accountability, transparency, and a commitment to non-violence. Groups that take this route should be eligible to seek a legal safe harbor. This legal device, which the approach suggested in this Article would refer to as "transition relief," would operate much like bankruptcy, limiting claims for organizations that sought to make a fresh start. Groups that reject such transitional steps should not expect relief from regulation.[123]

The justifications for regulation and redress regarding organizations do not extend to extralegal remedies. The "targeted killing" or assassination of suspected practitioners of violence by government, including the Israeli government's killing

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TIMES, Apr. 13, 2002, at A10 (discussing hardship in Somalia caused by asset freeze); *See* Nat'l Council of Resistance of Iran v. Dep't of State, 251 F.3d 192, 208 (D.C. Cir. 2001) (holding that Secretary of State had to provide organization with an opportunity to present evidence demonstrating it does not support terrorism prior to freezing assets).

121. *See* Panel, Civil Liberties and Muslims in the U.S. After 9-11: What is Really Happening?, Sponsored by Karamah and the Journal of Law and Religion, El Hibri Foundation, Washington, D.C., (Jan. 3, 2003); *See* Douglas Farah & John Mintz, *U.S. Trails Va. Muslim Money, Ties; Clues Raise Questions About Terror Funding*, WASH. POST, Oct. 7, 2002, at A1 (quoting members of Muslim community who criticized what they viewed as heavy-handed government methods).

122. *See* Margulies, *supra* note 5, at 203-06.

123. To ensure that redress is also effective to curb abuses by friendly governments, survivors of such excesses should be able to pursue claims under statutes such as the Alien Tort Claims Act to hold multinational corporations accountable for participating in or benefiting from repressive practices. *See* Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443 (2001) (arguing that multinational corporations should be held accountable for human rights violations resulting from enterprises over which they have control).

of Hamas leaders,[124] suffers from the same flaws as killings carried out by transnational oppositional organizations. Such summary measures do not comfortably fit within the procedural safeguards of law enforcement, the temporal and geographic bounds of most wars,[125] or the obligations to a civilian population undertaken by an occupying power.[126] Targeted killings shrink institutional repertoire by decreasing the stake of each side in peaceful means of dispute resolution. They also undermine inclusion, because they tend to affect not only specifically intended targets, but also civilians from the same communities who happen to be in the way.

Finally, the regulation of organizational asymmetric violence must also entail assistance to nonviolent organizations. Such assistance expands institutional repertoire, and combats the exclusion that can stem from blanket assumptions about transnational communities.[127] For example, conventional wisdom in the West seems to hold that Islamic parties offer women few opportunities for voice, and reject democratic values.[128] However, the reality is far more complex. Women have been able to develop substantive roles in many Islamic organizations, and

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124. *See* Laila El-Haddad, *Israel Continues Assassination Policy*, Aljazeera.net *at* http://english.aljazeera.net/NR/exeres/75B25D3C-1FF3-4F75-9B1E-9E7A160F0DBF.htm (Jan. 4, 2003) (last visited Mar. 23, 2004).

125. *See* Noah Feldman, *Choices of Law, Choices of War* 25 HARV. J.L. & PUB. POL'Y 457 (2002) (discussing uneasy fit of both terrorism and anti-terrorism enforcement within "war" or "crime" paradigms).

126. Some experts defending the Israeli government's use of "targeted killings" argue that the situation in the West Bank and Gaza is tantamount to what in the law of war is called "belligerent occupation, under which substantial parts of the disputed territory are under the control of the enemy. A state of belligerent occupation would give the occupying force more leeway to take lethal action against suspected enemy personnel, subject to the constraints of proportionality and reasonableness. Even under this more permissive standard, however, substantial doubt exists as to whether the IDF has taken into account the likelihood of civilian casualties resulting from targeted killings. *See generally* Kathleen A. Cavanaugh, *Selective Justice: The Case of Israel and the Occupied Territories*, 26 FORDHAM INT'L L.J. 934, 943-44 (2003) (citing Hague Convention Respecting the Law and Customs of War on Land, Oct. 18, 1907, Annex, Sec. III, 36 Stat. 2277, T.S. No. 539). *Cf.* Emanuel Gross, *Democracy in the War Against Terrorism – The Israeli Experience*, 35 LOY. L.A. L. REV. 1161, 1194 (2002) (arguing that the IDF has acted consistently with proportionality and reasonableness). In Gaza in the Summer of 2002, for example, more than ten civilians died when IDF aircraft attacked an apartment complex to kill Hamas military leader. Other punitive measures pursued by the IDF including the demolition of the houses occupied by the families of accused terrorists, are equally troubling. While the legality of targeted killing is sub judice at the Supreme Court of Israel, the Court has upheld the practice of house demolitions. The Court's holding, while requiring some showing of a link between other residents of the household and the alleged terrorist, accepts the military's contention that house demolitions have a "deterrent" effect on violence. *See, e.g.*, Alamarin v. IDF Commander in Gaza Strip, HCJ 2722/92 (IDF commander has discretion to destroy single-family home if one occupant has committed terrorist act, but may lack authority to order destruction of multiple-unit dwelling absent proof that residents of separate units were complicit in behavior). However, both the law of occupation, with its limits on collective punishment, and the insights of the transition scholars, demonstrate the contrary. Each holds expressly or implicitly that over-broad punitive actions will merely galvanize occupied communities to engage in further violence.

127 *See* Adrien Katherine Wing, *The Palestinian Basic Law: Embryonic Constitutionalism*, 31 CASE W RES. J. INT'L L. 383, 392-94 (1999) (discussing strengths and weaknesses of disparate Palestinian civil society).

128. *See* Volpp, *supra* note 4 (critiquing this view as essentialist).

scholars have articulated visions of Islamic law that embrace women's rights.[129] The same can be said for democratic values. Governments can nurture such efforts not only with direct assistance, but with reforms in their own policies that respond to legitimate grievances.[130]

C. Adjudicating Violations of the Law of War and Crimes against Humanity

Few matters since September 11 have excited more scholarly commentary than issues regarding the appropriate forum and procedures for the adjudication of alleged violations of the law of war. In the wake of the United States-led military intervention in Iraq, analogous questions have begun to arise about the adjudication of alleged crimes against humanity perpetrated by Saddam Hussein and his subordinates. Much of the debate has conflated issues regarding the appropriate forum for such decisions and the fairness of procedures applicable in a particular forum, such as the military tribunals established by the current Administration.[131]

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129. *See* Madhavi Sunder, *Piercing the Veil*, 112 YALE L.J. 1399 (2003); Janine A. Clark & Jillian Schwedler, *Who Opened the Door? Women's Activism in Islamist Parties*, 35 COMP. POLITICS 293 (April 2003); Heiner Bielefeldt, *"Western Versus "Islamic Human Rights Conceptions? A Critique of Cultural Essentialism in the Discussion on Human Rights*, 28 POL. THEORY 90, 109-12 (2000). *See generally* NOAH FELDMAN, AFTER JIHAD: AMERICAN AND THE STRUGGLE FOR ISLAMIC DEMOCRACY 62-68 (2003) (discussing gender, political, and religious equality in Islamic polities).

130. In the Middle East, for example, Israel's creation by the United Nations offfered both necessary redress for the worldwide persecution of Jews and sanctuary from future persecution, *See* LA GUARDIA, *supra* note 29, at 360 (noting that "the U.N. partitioned Palestine to create a Jewish state as an act of expiation for the Holocaust") However, it also displaced significant numbers of Palestinians; George E. Bisharat, *Land, Law, and Legitimacy in Israel and the Occupied Territories*, 43 AM. U. L. REV. 467 (1994) (discussing history of displacement of Palestinians); Benny Morris, *The Rejection*, NEW REPUBLIC, April 21, 2003, at 31 (book review) (critiquing persistent hold of authenticity entrepreneurs over Palestinian nationalist efforts, while acknowledging that Israeli government policies succeeded in "ultimately displacing more than half the Palestinians from their homes" inside Israel). Such actions have compounded processes of social comparison that increase the credibility of violent authenticity entrepreneurs on each side. Crucial steps taken by Israel, in conjunction with reforms undertaken by the Palestinian Authority, could include an apology for the government's role in spurring the outflow of refugees in 1948, compensation for Palestinians displaced at that time, and the recognition of enhanced but not absolute immigration rights for Arab Israelis seeking to sponsor relatives, including refugees from 1948 and their descendants, for lawful residence. Such family reunification policy, phased in over time, would be limited version of "right of return" for Palestinians that would also preserve the sanctuary for Jews contemplated in the United Nations' creation of the State of Israel; International Covenant on Civil and Political Rights, G.A. Res. 2200A, U.N. GAOR, Article 12(4) (1966) (providing that refugees wishing to return to their country of origin have right to repatriation, although countries of origin can derogate from their obligations upon declaration of state of emergency); *Cf.* Vic Ullom, *Voluntary Repatriation of Refugees and Customary International Law*, 29 DENVER J. INT'L L. & POL'Y 115, 142 (2001); John Quigley, *Displaced Palestinians and Right of Return*, 39 HARV. INT'L L.J. 171 (1998).

131. For sampling of this extensive debate, compare Curtis A. Bradley & Jack L. Goldsmith, *The Constitutional Validity of Military Commissions*, 5 GREEN BAG 249 (2002) (arguing for validity of Administration's Military Order establishing military tribunals); Jack Goldsmith & Cass R. Sunstein, *Military Tribunals and Legal Culture: What Difference Sixty Years Makes*, 19 CONST. COMMENT. 261, 274-75 (2002) (discussing statutory authority for military tribunals); Kenneth Anderson, *What to Do with Bin Laden and Al Qaeda Terrorists? · A Qualified Defense of Military Commissions and United States Policy on Detainees at Guantanamo Bay Naval Base*, 25 HARV. J.L. & PUB. POL'Y 591, 613-20

A transition-centered approach would disaggregate those issues. In the realm of procedure, it would consider whether safeguards exist to assure the international community that a forum's determinations are fair. To resolve issues of forum selection, a transition-centered approach would consider the stake of a particular state in adjudicating such cases, as well as the accuracy and reliability of the forum proposed.[132]

Critics have rightly focused on the problematic nature of procedures for the military jurisdiction of the tribunals, which encompass not merely violations of the law of war such as the killing of civilians or the conduct of hostilities by forces acting without appropriate identification, but also expressions of status such as membership in Al Qaeda.[133] This broad jurisdiction takes the tribunals far beyond the adjudication of cases involving "enemy belligerents" engaged in specific operations directed at United States persons or property.[134] A second procedural problem is the treatment of counsel for the accused, who are subjected to monitoring of conversations with clients.[135] Thirdly, Administration sources have indicated in undocumented conversations with journalists that core guarantees of the criminal justice system, such as access to exculpatory evidence, might be unavailable.[136] Finally, the Administration has resisted any express provision for judicial review,[137] and has argued, thus far successfully, that the courts lack jurisdiction over proceedings at the United States Naval Base at Guantanamo Bay, Cuba.[138] These

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(2002) (arguing that military tribunals are appropriate under international law); Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259 (2002) (arguing that express legislative authority, including declaration of war, is required); Jonathan Turley, *Tribunals and Tribulations: The Antithetical Elements of Military Governance in Madisonian Democracy*, 70 GEO. WASH. L. REV. 649, 735-39 (2002) (critiquing *Quirin*); Diane F Orentlicher & Robert Kogod Goldman, *When Justice Goes to War: Prosecuting Terrorists Before Military Commissions*, 25 HARV. J.L. & PUB. POL'Y 653, 656-57 (2002) (critiquing *Quirin*).

132. *See generally* Gerald L. Neuman, *Human Rights and Constitutional Rights: Harmony and Dissonance*, 55 STAN. L. REV. 1863, 1869-71 (2003) (discussing institutional aspects of interaction between human and constitutional rights).

133. *See* Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57, 833 (Nov. 13, 2001). *cf.* Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism, 68 Fed. Reg. 39, 374 (March 21, 2002).

134. *See Ex parte Quirin*, 317 U.S. 1 (1942) (authorizing military tribunals in cases involving "enemy belligerents").

135. *See* Jonathan D. Glater, *A.B.A. Urges Wider Rights in Cases Tried By Tribunals*, N.Y. TIMES, Aug. 13, 2003, at A18.

136. *See* Philip Shenon, *White House Called Target of Plane Plot*, N.Y. TIMES, Aug. 8, 2003, at A7 (reporting that alleged "twentieth hijacker" Zacarias Moussaoui would be tried before military tribunal if civilian courts required government to grant Moussaoui access to detainee allegedly in possession of exculpatory information).

137 No provision for judicial review is contained in the Military Order. Counsel to the President Alberto Gonzalez has indicated that the Administration believes that habeas corpus review is available, although the Administration has argued that the applicable standard on habeas review is exceedingly deferential. *See* Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003), *reh g and reh'g en banc denied*, Pagels v. Morrison, 2003 U.S. App. Lexis 13717 (4th Cir. July 9, 2003) (supporting Administration's position).

138. *See* Rasul v. Bush, 2004 U.S. LEXIS 4760 (S. Ct. June 28, 2004) (holding that federal courts had jurisdiction under the habeas statute to hear petitions from Guatanamo detainees).*Cf.* Paul Schiff

problems undermine the global legitimacy of the military tribunals established by the Administration.

Critics of the Administration have combined concern about these procedural problems with concern about the appropriateness of military tribunals as a forum for adjudicating cases involving alleged terrorist activity. They argue that either civilian courts or international tribunals are more appropriate.[139] In particular, critics assert that judges in military tribunals are intrinsically biased, because they remain part of the military command structure.[140]

Arguments that military tribunals are per se inappropriate ignore contrary evidence and countervailing values. Historical evidence suggests that when the right procedures are in place, military tribunals can make accurate determinations of culpability In *Ex Parte Quirin*, for example, a military tribunal convened during World War II found after a three-week trial that the defendants had undertaken a mission on orders of the German High Command to operate clandestinely in the United States for the purpose of harming persons and property essential to the war effort.[141] While scholars have criticized aspects of the role played by the civilian judiciary in the case,[142] no scholar has expressed doubt about the accuracy of the military tribunal's finding.[143]

The Framers of the Constitution recognized that military tribunals had developed a tradition of adjudicating violations of the law of war, and found no conflict between performance of that specified task and a sound constitutional order.[144] Indeed, for the detainees at Guantanamo Bay captured on the battlefield, a military tribunal with a grasp of the exigencies of combat is arguably a far more appropriate forum than a civilian or international court lacking such knowledge. For cases re-

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Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311, 459-73 (2002) (arguing that jurisdictional distinction between cases within U.S. territory and cases outside that territory has been rendered obsolete).

139. *See, e.g.*, Laura M. Dickinson, *Using Legal Process to Fight Terrorism: Detentions, Military Commissions, International Tribunals, and the Rule of Law*, 75 S. CAL. L. REV. 1407 (2002).

140. *See* ORENTLICHER & GOLDMAN, *supra* note 131, at 660.

141. *See Ex parte Quirin*, 317 U.S., at 20-21.

142. *See* TURLEY, *supra* note 130, at 735-39 (discussing series of ex parte contacts between Justices and Administration).

143. *See id.* (Two of the *Quirin* petitioners introduced evidence at their trial that they had withdrawn from the conspiracy by contacting the Federal Bureau of Investigation. They sought to withdraw, however, only after attempting to buy the silence of Coast Guardsman who had observed their surreptitious landing in the United States. Under the law of conspiracy, withdrawal is an affirmative defense to liability for subsequent acts committed by co-conspirators, but not complete defense to the charge of conspiracy itself); U.S. v. Robinson, 217 F.3d 560, 564 (8th Cir. 2000). *Cf.* Neal Kumar Katyal, *Conspiracy Theory*, 112 YALE L.J. 1307, 1379 (2003) (arguing that withdrawal is appropriately only partial defense because public interest favors deterrence of initial entry into conspiracy). The efforts of the two defendants, while not sufficient to convince the finder of fact to acquit, ultimately resulted in pardons dispensed by the President. TURLEY, *supra* note 130.

144. *See Ex parte Quirin*, 317 U.S., at 31 (noting the case of British Army Major John Andre, who was tried and convicted before a military commission convened by George Washington in 1780 after being apprehended in disguise and with false papers within United States lines on mission to contact the traitorous General Benedict Arnold).

moved from the battlefield paradigm involving collateral activities such as fund-raising for Al Qaeda, military tribunals may not be appropriate.[145] However, the analysis of appropriateness should turn on procedural issues such as the scope of jurisdiction asserted in the President's Order, not speculation regarding the inherent nature of the forum.[146]

The usefulness of disaggregating choice of forum and procedural concerns is even more apparent when one considers the flaws of a proposed alternative such as an international tribunal for alleged Al Qaeda combatants apprehended on the battlefield. Problems with an international tribunal in this context emerge in the interpretation of governing law and the choice of law rules that such a tribunal might adopt. The Geneva Convention provides that combatants without uniforms may still be considered lawful if they have taken up arms "spontaneously" to resist an invading military force, and respect the laws of war.[147] A federal court has found that members of the Taliban cannot invoke protection under this provision, since they violated the laws of war by targeting civilians.[148] However, an international tribunal may be tempted to downplay the disqualifying effect of the Taliban's ac tions.[149] An international tribunal may also apply to the Taliban and their Al Qaeda allies the Protocol added to the Geneva Convention that protects combatants in "wars of national liberation, even though the United States expressly declined to ratify this Protocol because of concerns about terrorism.[150]

Commentators who argue that an international tribunal is inherently superior also offer a flawed account of accuracy in adjudication. While courts and commentators have rightly focused on the importance of minimizing "false positives" – individuals incorrectly convicted of an offense[151] – they have also acknowledged the importance of minimizing "false negatives" – culpable individuals wrongly adjudicated as blameless.[152] Particularly in low-level cases of persons captured on

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145. *See* Katyal & Tribe, *supra* note 130, at 1260-66 (discussing problems with jurisdictional sweep of President's Military Order); Orentlicher & Goldman, *supra* note 130.

146. *See* Anderson, *supra* note 130, at 613-20.

147 *See* Multilateral Prtotection of War Victims, Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 3322, 75 U.N.T.S. 135, 138-40.

148. *See* U.S. v. Lindh, 212 F Supp. 2d 541, 557-58 (E.D. Va. 2002).

149. In so doing, members of an international tribunal would be echoing two distinguished American law professors who made similar omission in an otherwise incisive analysis of the flaws in the President's Military Order establishing military tribunals. *See* Katyal & Tribe, *supra* note 130, at 1264 (suggesting in passing that members of the Taliban might qualify for protection under the Geneva Convention, while failing to note that the provision protecting combatants who "spontaneously take up arms" also requires that such combatants refrain from targeting civilians).

150. *See* Derek Jinks, *September 11 and the Laws of War*, 28 YALE J. INT'L L. 1, 14 (2003) (discussing unratified Protocols). *See also* Letter of Transmittal from President Ronald Regan to the the U.S. Decision Not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims (Jan. 29, 1987), *reprinted in* 81 AM. J. INT'L L. 910 (1987) (explaining rationale for recommending against ratification of Protocol).

151. *See In re* Winship, 397 U.S. 358 (1970) (holding that due process requires that the prosecution show a defendant's guilt beyond a reasonable doubt) (Justice Harlan concurring viewed the Court's holding as "bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.") *Id.* at 372.

152. *See* Kiareldeen v. Ashcroft, 273 F.3d 542 (3d Cir. 2001) (asserting that the government, in

the battlefield, international judges may have incentives to unduly discount the risk of false negatives.

Consider here the case of Yaser Esam Hamdi, an apparent American citizen allegedly apprehended with a weapon on the battlefield in Afghanistan, now detained by the United States as an "enemy combatant" without charges.[153] While Hamdi should be either charged or released, if he were charged an international tribunal would not necessarily provide a more accurate determination than a military court. Hamdi's father has argued that his son was actually providing humanitarian aid to Afghans.[154] International judges whose countries have not been targeted by transnational networks such as Al Qaeda may wish to credit this account, either to avoid retaliation against their countries,[155] or because of a reluctance to scrutinize allegedly humanitarian work.[156] A judge influenced by these factors could make an inaccurate determination of culpability Of course, the government's indefinite detention of Hamdi or of individuals held at Guantanamo Bay might itself be based on inaccurate or biased information.[157] Addressing that issue requires adequate *procedures*, not necessarily an international forum.

The same analysis obtains for the prosecution of officials in Saddam Hussein's regime in Iraq. Here the most appropriate forum is neither a military nor an

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deciding to apprehend an individual suspected of plotting terrorist activity – in that case an alleged pre-September 11 plan to bomb the World Trade Center – could consider not only the probability that an individual had engaged in such activity, but also the extent of the destruction that might have resulted if the plan had been successful); ALAN DERSHOWITZ, WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE 187-96 (2002) (acknowledging constitutional concern with false positives, while arguing that the challenge of terrorism complicates issue); Laurence H. Tribe, *Trial By Fury: Why Congress Must Curb Bush Military Courts*, THE NEW REP Dec. 10, 2001, at 18, 20 (arguing that public interest requires adjustment of balance between false positives and false negatives in terrorism cases); *but see generally* Ronald Dworkin, *The Threat to Patriotism*, N.Y REV. BOOKS, Feb. 28, 2002, at 44 (warning against lowering standards of proof in terrorism cases).

153. *See Hamdi* 316 F.3d, *reh'g and reh'g en banc denied*; *Pagels* 2003 U.S. App. Lexis (upholding indefinite detention with evidentiary hearing or access to counsel); *cf.* Padilla v. Bush, 233 F Supp.2d 564 (S.D.N.Y 2002) (upholding indefinite detention but requiring hearing and assistance of counsel); Anthony Lewis, *Civil Liberties in a Time of Terror* 2003 WIS. L. REV. 257 (2003) (discussing enemy combatant detention).

154. Other detainees have made similar claims, asserting that they were caught up in the chaos of war, and either denying that they possessed weapons at the time of their apprehension or preserving their option to justify the need for firearms in the delivery of humanitarian aid. *See* Richard A. Serrano, *Detainees Launch Legal Step*, L.A. TIMES, Oct. 16, 2002, at 1 (describing Kuwaiti nationals detained at Guantanamo Bay who claimed that tribesmen had turned them over to American forces in Afghanistan in exchange for bounty).

155. *See* Charles Hill, *A Herculean Task: The Myth and Reality of Arab Terrorism*, *in* THE AGE OF TERROR: AMERICA AND THE WORLD AFTER SEPT. 11 83, 104 (Strobe Talbott & Nayan Chanda eds., Basic Books 2001) ("European countries have taken a benign view of the presence of foreign terrorist organizations in their cities in a kind of tacit agreement that 'we won't bother you if you don't target us. ").

156. *See* Don Van Natta Jr. with Timothy L. O'Brien, *Flow of Saudis' Cash to Hamas is Scrutinized*, N.Y TIMES, Sept. 17, 2003, at A1, 10 (quoting an American diplomat as saying that, "It is considered rude in the kingdom to inquire about the motives behind charity, and so Saudis don't do it.").

157 *See generally* LEWIS, *supra* note 152 (criticizing Hamdi's detention and appellate court's deferential review).

international tribunal, but an Iraqi court.[158] No other tribunal has a comparable stake in such prosecutions, which will help set the tone and direction of subsequent regimes.[159] An American military tribunal may err on the side of culpability, lacking a comprehensive understanding of the pressures experienced by Iraqis under Saddam Hussein. An international tribunal will not provide the sense of empowerment that will emerge from Iraqis confronting and coping with challenges from their own past.[160]

In choosing the appropriate forum, a transition-centered approach would consider 1) the stake of the entity sponsoring the forum,[161] 2) the likelihood of error,[162] and, 3) the availability of a functional forum in the entity with the greatest stake.[163] Procedural protections such as limits on the jurisdiction of military tribunals, judicial review, access to exculpatory evidence, and unimpaired access to counsel would also obtain. These conditions would fulfill the transition-based criteria of inclusion, institutional repertoire, and redress.

Considering these factors promotes a forum-selection process that can adapt to changing contexts and circumstances. For matters regarding September 11 and related Al Qaeda efforts to attack persons or property within the United States, America clearly has the greatest stake. However, other nations also have an interest, given the presence of nationals from many countries among the victims of September 11.[164] Assuming that both the United States and the international community could provide a functioning system the dispositive factor would be the likelihood of error.

For alleged low-level Al Qaeda combatants purportedly captured on the battlefield, such as those held at Guantanamo Bay, an international tribunal might yield too many false negatives, if judges unduly discounted the threat posed by "little fish."[165] A military tribunal operating with the benefit of procedural safeguards would be appropriate for trying such individuals. However, limiting the jurisdiction of military tribunals to cases of "enemy belligerents" would require trials in United States civilian courts for alleged Al Qaeda operatives engaged not

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158. *See* Richard A. Oppel Jr. & Patrick E. Tyler, *Iraqis Plan War-Crimes Court; G.I.s to Stay Until Elections*, N.Y TIMES, July 16, 2003, at A9.

159. *See generally* Diane F Orentlicher, *Settling Accounts: the Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537 (1991) (arguing for the prosecution of primary perpetrators of human rights abuses).

160. *See* MINOW, *supra* note 7, at 61-83 (discussing importance of redress and voice for victims in developing democratic traditions).

161. *See* Gary J. Simson, *The Choice-of-Law Revolution in the United States: Notes on Rereading Von Mehren*, 36 CORNELL INT'L L.J. 125, 126-28 (2003) (discussing choice of law principles).

162. *See* Mathews v. Eldridge, 424 U.S. 319, 344 (1976) (one element of procedural due process analysis is "risk of error").

163. *See Ex parte* Milligan, 71 U.S. 2 (1866) (holding that long-time resident of Indiana with no demonstrated ties to Confederate military could not be tried before military tribunal when civilian courts were functioning).

164. Mark A Drumbl, *Victimhood in Our Neighborhood: Terroritst Crim, Taliban Guilt, and the Asymentires of the International Legal Order*, 81 N.C.L. Rev 1, 67-69 (2002).

165. *See* Tribe, *supra* note 151, at 18.

in active hostilities but instead in collateral activities such as fundraising. Al Qaeda higher-ups, including those presently confined in undisclosed locations subject to United States control, might be more appropriate candidates for eventual trial before international tribunals. Animus against such individuals might run too high in the United States to control the risk of false positives. In contrast, factfinders on an international tribunal might be sufficiently dispassionate to control this risk, while also being cognizant of the danger posed by major players in Al Qaeda.[166]

In considering the appropriate forum for the trial of former Ba'athist officials, considerations of stake are paramount, making Iraqi courts the best choice. Although a desire for retribution might increase the risk of false positives, such a risk would be minimized by procedures to ensure representation of a cross-section of Iraqis, including members of the Sunni minority most supportive of the Ba'athist regime. However, years of Ba'athist rule and the chaos attending military intervention have required the rebuilding of the Iraqi judiciary.[167] Trial by Iraqi courts could challenge the fragile security framework in Iraq and exacerbate ethnic strife. If Iraqi or coalition officials could not respond to such concerns, Iraq would be left without a functional forum for trying such cases. An international tribunal would be the second-best choice, given the international community's stake in holding major Ba'athist officials accountable for the crimes against humanity committed during Saddam's rule.Disaggregating forum and procedure in this fashion would promote transitions. The flexibility built into the forum-choice factors would serve inclusion, as would commitment to norms of procedural fairness accepted under international law. The forum-choice factors would expand institutional repertoire, avoiding the rigid consequences risked by both the Administration and its critics. Finally focusing on stake would emphasize redress for the victims of attacks on civilians.[168] Disaggregating forum and procedure would build legitimacy for anti-

166. This might hold especially for mainstream Islamic jurists, who understand the corruption of Islamic teaching wrought by Bin Laden. *See* ESPOSITO, *supra* note 42, at 20, 32 (noting bin Laden's departures from mainstream Islamic thought); EL FADL, *supra* note 42, at 205-09 (analyzing arguments of jurists that persons who kill innocents in pursuit of political goals lose the consideration accorded rebels under Islamic teaching); GRAHAM E. FULLER, THE FUTURE OF POLITICAL ISLAM 60 (2003) ("[E]rroneous and distorted understandings of Islam can emerge that can serve to justify violence or even terror.").

167. *See* Hassan bin Talal, *Can Democracy Take Root in the Islamic World? Seeing Iraq's Future By Looking at Its Past*, N.Y. TIMES, July 18, 2003, at A17 (focusing on need for functioning judiciary in Iraq); *cf.* Ahmed Hashim, *Saddam Hussain and Civil-Military Relations in Iraq: The Quest for Legitimacy and Power*, 57 MIDDLE EAST J. 9, 29-32 (2003) (discussing Saddam's efforts to destroy the Iraqi military as an institution that could challenge his rule). *See generally* KANAN MAKIYA, REPUBLIC OF FEAR: THE POLITICS OF MODERN IRAQ 46-72 (1998) (discussing torture and repression under Ba'athist regime).

168. In addition, redress would require compensation for "false positives" wrongfully detained and for civilians harmed in the course of antiterrorism efforts. The failure to spend money appropriated by Congress to assist civilians injured by the United States military intervention against the Taliban and Al Qaeda in Afghanistan is a vivid example of a recent failure of redress. *See* April Witt, *After the Airstrikes, Just Silence; No Compensation, Little Aid for Afghan Victims of U.S. Raids*, WASH. POST, April 28, 2003, at A17 In Northern Iraq, United States Army commander operating largely autonomously from the central occupation authority has been successful in part by promptly compensating Iraqi civil-

terrorism efforts, and defuse processes of social comparison that exacerbate polarization.

CONCLUSION

Measures to effect transitions toward democracy and the rule of law have dominated United States policy in the aftermath of September 11. The current Administration has generally pursued a preemptive approach, emphasizing force and punitive measures, dealing largely with elites, and downplaying demands for equality made by popular movements abroad. Unfortunately, the preemptive approach often generates polarization, not transition. Social science research indicates that excessive reliance on force and punitive measures can spawn social identities shaped by opposition to American interests and social comparisons such as views of the Arab-Israeli conflict that portray the United States as subsidizing unjust policies. The preemptive approach also yields forms of social capital such as authenticity entrepreneurship that leverage oppositional identities and comparisons to produce violence against innocents. Critiquing the preemptive approach is easier than devising a constructive alternative. One alternative, the state-skeptical approach, abjures force and punitive measures. While state-skeptics may ease transitions through the re-framing of social identities and comparisons, they fail to address the "spoiler" role played by authenticity entrepreneurs.

To avoid these blind spots, a multilateral transition approach integrates the insights of social science research and comparative law and politics. Responding to social identity, social comparison, and social capital formation requires a multilateral perspective focused on transnational communities. In a diasporated world knit together by technology, attention to the transnational flow of people, information, and resources is crucial.

A multilateral approach seeks to influence these flows, guided by three overlapping factors identified by comparative scholars: institutional repertoire, inclusion, and redress. Institutional repertoire requires a range of organizational structures, strategies, and discourses, each operating as a check on the power of the others. The flourishing of civil society is one element of this repertoire, complemented by a viable governmental authority that can resort to force and legal sanctions when necessary to achieve legitimate public objectives. Inclusiveness requires a polity such as the United States, which seeks to exert influence around the world, to acknowledge that its relevant audience is not merely domestic but transnational, by acting to minimize global inequality

Redress requires the most delicate balance of the transitional elements. A polity such as the United States that seeks to defend its interests and effect transitions on a global scale should acknowledge responsibility for damage to innocents

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ians for losses suffered during ongoing efforts to defeat guerilla forces; Michael R. Gordon, *101st Airborne Scores Success in Northern Iraq; A Reconstruction Effort is Led by the Military*, N.Y TIMES, Sept. 4, 2003, at A1, (analyzing approach used by Army unit, which also includes substantial delegation to newly established Iraqi local governmental units).

caused by efforts to vindicate these goals. Redress also mandates that survivors of past abuses and overreaching have access to remedies, to effect closure on disputes and clear the way for new institution-building.

A multilateral transition approach clarifies analysis of current issues such as the enforcement of immigration law after September 11, the regulation of terrorist organizations, and the adjudication of alleged violations of international humanitarian law. A transition-centered approach to immigration policy would curb nationality-based immigration enforcement and promote family unity, thereby leveraging immigration to the United States to give other areas in the world a broader stake in the struggle against terrorist organizations such as Al Qaeda. Regulation of terrorist organizations would stress not only legal sanctions to disrupt the infrastructure relied on by violent authenticity entrepreneurs, but also support for nonviolent alternatives, reform of governmental policies that catalyze violent opposition, and a fresh start through "transition relief" for organizations that demonstrated that they had implemented substantial and durable institutional reforms to materially reduce violence. Adjudication of alleged violations of international humanitarian law would disaggregate issues of forum selection and procedure, allowing for flexibility in the forum selection process and requiring procedures in all forums to ensure justice and preserve legitimacy.

Adopting a multilateral transition approach stressing institutional repertoire, inclusion, and redress will not ensure the rule of law or erase transnational violence. Transitions are unpredictable. Forms of social capital that foster violence and undermine the rule of law can always emerge from the social identities and comparisons generated by collective human endeavors. However, a transition-based approach at least highlights the right questions. That is a necessary first step in setting the course of transnational law and policy after September 11.

IF THE NON-PERSON KING GETS NO DUE PROCESS, WILL *INTERNATIONAL SHOE* GET THE BOOT?

JAMES COOPER-HILL

In *Price v. Socialist People s Libyan Arab Jamahiriya*,[1] a terrorism suit brought against Libya under the Foreign Sovereign Immunities Act (FSIA), the D.C. Circuit Court of Appeals became the first appellate court to unequivocally hold that a foreign sovereign is not a person entitled to due process pursuant to the Fifth Amendment to the U.S. Constitution.[2] In order to weigh the import of the holding, one must indulge in a two-pronged historical analysis, focusing first on the concept of sovereign immunity and second, on the due process entitlement of any entity, sovereign or otherwise. Of further interest is whether *Price* will affect the benchmark case, *International Shoe v. Washington*,[3] which established the concept of minimum contacts consistent with the traditional notions of fair play and justice.

BRIEF HISTORY OF SOVEREIGN IMMUNITY

The concept of sovereign immunity is said to stem from the quasi-theological notion of the divine right of kings.[4] It was held from the Middle Ages forward that the King could do no wrong, although modern legal scholars differ on the exact origin of sovereign immunity and whether it is truly based on the divine right of kings.[5] Sovereign immunity was supposedly imported to the United States by way of the often cited *Russell v. The Men of Devon*.[6] However, at least one court has

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1. Price v. Socialist People's Libyan Arab Jamahiriya, 294 F.3d 82 (D.C. Cir. 2002) [hereinafter *Price II*].

2. Foreign Sovereign Immunities Act of 1976, 28 U.S.C.A. §§ 1602-1611 (2004).

3. Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945).

4. *See* Wilcox v. United States, 117 F Supp. 119-20 (S.D.N.Y 1953).

5. *See* Ryll v. Columbus Fireworks Display Co., Inc., 769 N.E.2d 372, 374, 378-379 (Ohio 2002); Butler v. Jordan, 750 N.E.2d 554, 558-59 (Ohio 2001); Hayes v. Cedar Grove, 30 S.E.2d 726, 728 (W Va. 1944).

6. Russell v. Men of Devon, 100 Eng. Rep. 359 (K.B. 1788) (Numerous states have cited to *Russell v. Men of Devon* in cases of first impression involving sovereign immunity including Massachusetts (Hill v. City of Boston, 122 Mass. 344, 346 (Mass. 1877)), West Virginia (Long v. City of Weirton, 214 S.E.2d 832, 851 (W Va. 1975)), Ohio (Bd. of Comm'rs of Hamilton County v.

stressed that the first adoption of the *Russell* theory of immunity was misplaced.[7]

The United States has witnessed all three branches of its government wrestling with the issue of foreign sovereign immunity The concept has evolved over three distinct time periods. First, the U.S. Supreme Court accorded absolute immunity to sovereigns in 1812.[8] Second, in 1952, the U.S. Department of State, on behalf of the Executive branch, imposed a system of qualified immunity[9] In 1976, the Foreign Sovereign Immunities Act (FSIA) laid out broad exceptions to immunity as did further amendments in 1996.[10] Under the concept of absolute immunity noted by the U.S. Supreme Court in the early 19th century and later during the period of qualified immunity the U.S. Department of State wielded the power of the Executive branch.[11]

At least in part, commercial activity in the United States conducted by foreign sovereigns in direct competition with American private enterprise eroded absolute immunity[12] That many foreign states engaged in quasi-private enterprise resulted in the governmental-proprietary dichotomy that prevails at both the state and federal level today[13] Commencing in 1952, the Tate Letter established a qualified immunity that the Executive branch, acting through the State Department, controlled.[14] During the twenty-four years of qualified immunity the Executive branch was clearly in charge of and had apparent authority over the Judicial branch.[15] Qualified immunity was codified by the enactment of the FSIA in

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Mighels, 7 Ohio St. 109, 122 (Ohio 1857)) and Texas (City of Galveston v. Posnainsky, 62 Tex. 118 (Tex. 1884)).

7. *Wilcox*, 117 F Supp. at 119 (mistakenly basing sovereign immunity in the United States on the maxim of the king: "Immunity of the sovereign from suit stemming from the political doctrine that the King can do no wrong, had been transplanted and preserved inviolate as part of the American common law until relatively recent times. *Id.* at 120). However, the Supreme Court of Appeals of West Virginia in *Hayes*, 30 S.E.2d at 728, had earlier taken an opposite position.

8. Schooner Exch. v. McFaddon, 11 U.S. 116, 124 (1812).

9. Changed Policy Concerning the Granting of Sovereign Immunity to Foreign Governments, Letter from Attorney General Legal Advisor, Jack B. Tate to Attorney General Philip B. Perlman, 26 Dept. State Bull. 984-85 (1952) *available in* Dunhill v. Cuba, 425 U.S. 682, 711-16 (1976)) [hereinafter Tate Letter].

10. FSIA, 28 U.S.C.A. §§ 1602-1611, as amended by the Antiterrorism & Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 28 U.S.C.).

11. *See* Tate Letter, *supra* note 9.

12. The governmental/proprietary dichotomy is based on the following distinction: an activity that generates revenue in competition with private enterprise is subject to liability while an activity which is mandated by law as a governmental service is immune. *See* OSBORNE M. REYNOLDS, JR., HANDBOOK OF LOCAL GOVERNMENT LAW § 167 at 670 (2d ed. 2001). Note the commercial exception in the FSIA in 28 U.S.C.A. § 1605(a)(2).

13. *See* Thon v. Los Angeles, 21 Cal.Rptr. 398, 400 (Cal. Dist. Ct. App. 1962) (concluding that fire-fighting is clearly governmental function); Byrnes v. Jackson, 105 So. 861, 863 (Miss. 1925) (finding that operating a zoo is an implied governmental function.).

14. Tate Letter, *supra* note 9.

15. The position of the Department of State was accorded great weight by the court in *Ocean Transport Co. v. Gov. of the Republic of Ivory Coast*, 269 F.Supp. 703, 704 (E.D.La. 1967) and other cases discussed *infra*.

1976.[16] However, the FSIA was interpreted in such a way that no plaintiff prevailed during the first four years of its enactment.[17] Even then, the first non-commercial plaintiff's verdict involved a car-bombing assassination in the District of Columbia, eliminating the minimum contacts-due process issue from consideration.[18]

Similar acts of terrorism perpetrated upon U.S. citizens *outside* the United States were not successfully prosecuted under the 1976 FSIA.[19] The only plaintiff's judgment for what could be considered terrorism under the 1976 FSIA can be attributed to the foreign sovereign's failure to timely seek to set aside a default judgment.[20] It took the enactment of the Anti Terrorism & Effective Death Penalty Act of 1996[21] for the first plaintiffs to obtain judgments against a foreign sovereign.[22] Even then, the basis for bringing such actions, and the trial court exercising both subject matter and personal jurisdiction, was very limited. The four criteria which established subject matter jurisdiction were: extrajudicial killing, aircraft sabotage, hostage taking, and torture.[23] Even when horrendous acts

16. FSIA, 28 U.S.C.A. §§ 1602, 1604.

17. *See generally* Chicago Bridge & Iron Co. v. Islamic Republic of Iran, 506 F Supp. 981 (N.D. Ill. 1980) (finding that government could not waive sovereign immunity based on FSIA waiver provision because Iranian defendants still lacked minimum contacts); Castro v. Saudi Arabia, 510 F Supp. 309 (W.D. Tex. 1980) (finding that none of the exceptions in the FSIA operate to deprive Saudi Arabia of sovereign immunity from suit in the United States); Carey v. Libyan Arab Republic, 453 F Supp. 1097 (S.D.N.Y. 1978) (granting defendants' motion to dismiss on jurisdictional grounds based on immunity provided under the FSIA).

18. *See* Letelier v. Republic of Chile, 488 F Supp. 665, 673-74 (D.D.C. 1980).

19. *See generally* Cicippio v. Islamic Republic of Iran, 30 F.3d 164 (D.C. Cir. 1994) [hereinafter *Cicippio II*] (granting defendant Iran's motion to dismiss for lack of subject matter jurisdiction for suit involving U.S. citizens who were kidnapped in Beirut); Hall v. People's Republic of Iraq, 80 F.3d 558 (D.C. Cir. 1996) (finding district court correctly concluded that it lacked subject matter jurisdiction); Princz v. Federal Republic of Germany, 26 F.3d 1166 (D.D.C. 1994) (finding district court lacked subject matter jurisdiction over suit involving Americans kidnapped in Nazi Germany under either retroactive application of the FSIA or pre-FSIA law of sovereign immunity).

20. Dadesho v. Gov't of Iraq, 139 F.3d 766, 767 (9th Cir. 1998).

21. Antiterrorism & Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 1241 (codified as amended at 28 U.S.C. §1605(a)(7) (1996)) (allowing lawsuits against any nation designated as a state sponsor of terrorism, even when the conduct took place outside the United States and was perpetrated against a U.S. citizen).

22. Alejandre v. Republic of Cuba, 996 F Supp. 1239, 1247 (S.D. Fla. 1997); *see* Daliberti v. Republic of Iraq, 146 F Supp. 2d 19 (D.D.C. 2001) [hereinafter *Daliberti II*]; Sutherland v. Islamic Republic of Iran, 151 F Supp. 2d 27 (D.D.C. 2001); Higgins v. Islamic Republic of Iran, 2000 WL 33674311 (D.D.C. 2000); Jenco v. Islamic Republic of Iran, 154 F Supp. 2d 27 (D.D.C. 2001); Simpson v. Socialist People's Libyan Arab Jamahiriya, 180 F Supp. 2d 78 (D.D.C. 2001); Wagner v. Islamic Republic of Iran, 172 F Supp. 2d 128 (D.D.C. 2001); Weinstein v. Islamic Republic of Iran, 175 F Supp. 2d 13 (D.D.C. 2001); Hill v. Republic of Iraq, 175 F Supp. 2d 36 (D.D.C. 2001); Mousa v. Islamic Republic of Iran, 238 F Supp. 2d 1 (D.D.C. 2001); Boim v. Quranic Literacy Institute, 127 F Supp. 2d 1002 (N.D. Ill. 2001); Price v. Socialist People's Libyan Arab Jamahiriya, 110 F Supp. 2d 10 (D.D.C. 2000); Elahi v. Islamic Republic of Iran, 124 F Supp. 2d 97 (D.D.C. 2000); Eisenfeld v. Islamic Republic of Iran, 172 F Supp. 2d 1 (D.D.C. 2000); Anderson v. Islamic Republic of Iran, 90 F Supp. 2d 107 (D.D.C. 2000); Flatow v. Islamic Republic of Iran, 999 F Supp. 1 (D.D.C. 1998) [hereinafter *Flatow I*]; Cicippio v. Islamic Republic of Iran, 18 F Supp. 2d 62 (D.D.C. 1998) [hereinafter *Cicippio III*].

23. Antiterrorism and Effective Death Penalty Act, 28 U.S.C § 1605(a)(7). See also Alejandre,

of violence were inflicted upon U.S. citizens without justification, foreign sovereigns pleaded "police brutality" and relied on a pre-1996 decision, *Nelson v. Saudi Arabia.*[24]

Finally, in a logical opinion, a trial court held that a foreign sovereign was not a person for purposes of due process, but then went on to consider the minimum contacts analysis, suggesting that the diplomatic relations with the country in question, Iran, were sufficient to find personal jurisdiction.[25] It was not until *Daliberti v. Republic of Iraq*[26] that a contested case was brought before the court and the issue of due process was raised. In *Daliberti*, after the denial of Iraq's motion to dismiss, Iraq chose not to participate in the trial.[27] Subsequently, in *Price et al v. Socialist People's Libyan Arab Jamahiriya*,[28] the due process issue was raised by the defendant sovereign and addressed by the U.S. District Court. The same court which had held that a foreign sovereign was not a person entitled to due process in *Flatow I*,[29] denied Libya's Rule 12 motion to dismiss, based in pertinent part, on the due process argument.[30] The U.S. Court of Appeals for the District of Columbia Circuit became the first appellate court to hand down a decision squarely facing the due process issue and ruling that a foreign sovereign was not a person for purposes of due process.[31] This ruling was not appealed. Given the mandatory venue of the U.S. District Courts for the District of Columbia in terrorism suits brought pursuant to the FSIA, this decision should be the last word on this issue. However, disingenuously Libya has raised this same issue both in the remand to the district court,[32] and in other similarly situated cases now pending in the district court. A more detailed analysis of the Court of Appeals' analysis in the *Price* case follows.

Russell v. Men of Devon and its Progeny: Both Legitimate and Otherwise

Russell v. Men of Devon[33] was cited by courts in the United States over 150 times before a federal statute adopting any concept of foreign immunity was enacted. The *Russell* decision is a far better one on which to provide a foundation for municipal government law than for crossing the Atlantic with a theory based on the power of the King. Factually, the *Russell* decision is simple. A local bridge

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966 F Supp. At 1247

24. *See* Saudi Arabia v. Nelson, 507 U.S. 349, 351 (1993).

25. *Flatow I*, 999 F Supp. at 22.

26. Daliberti v. Republic of Iraq, 97 F Supp. 2d 38, 42 (D.D.C. 2000) [hereinafter *Daliberti I*].

27. *Daliberti II*, 146 F Supp. 2d at 20.

28. Price v. People's Socialist Libyan Arab Jamahiriya, 110 F Supp. 2d 10, 14-15 (D.D.C. 2000) [hereinafter *Price I*].

29. *Flatow I*, 999 F Supp. at 19.

30. *Price II*, 294 F.3d at 96-100

31. *Id.* at 96 (stating "with the issue directly before us, we hold that foreign states are not 'persons' protected by the Fifth Amendment.").

32. *See* Price v. People's Socialist Libyan Arab Jamahiriya, 274 F Supp. 2d 20 (D.D.C. 2003) [hereinafter *Price III*].

33. 100 Eng. Rep. 359 (K.B. 1788).

fell into disrepair resulting in the plaintiff's wagon being damaged.[34] Because Devonshire had no fund with which to compensate the owner of the damaged wagon, it was held immune from judgment.[35] Many of the subsequent citations in American courts have opined that *Russell* was the foundation for the concept of sovereign immunity in the United States but have erroneously added the maxim that the king can do no wrong, which does not appear in *Russell*.[36] However, the first case reciting the infallibility of the king in the newly formed United States was handed down without mention of the *Russell* decision less than a month after George Washington became the first president. The case of *Benedict Calvert's Lessee v. Sir Robert Eden*[37] resolved a knotty title and possession problem which arose under a grant of the Province of Maryland from King Charles I.[38]

The Court went to great lengths to stress the continued importance of the English king's exercise of appellate jurisdiction as had been done since the earliest days of the colonies.[39] Of course, the exercise of appellate authority over land title disputes by the King of England could hardly have continued longer, notwithstanding the Maryland court's genuflection to the king in this case.

While *Benedict Calvert's Lessee* is the earliest case in the United States to refer to the king being unable to commit a wrong, the first United States Supreme Court decision regarding sovereign immunity was *Chisholm v. Georgia*.[40] In *Chisholm*, it was argued that "until the time of Edward I. the King might have been sued in all actions as a common person. but now none can have an action against the King "[41] Justice Wilson finds that it is the people of the United States who are the true sovereign and not the government or the State, thus allowing the suit against Georgia to go forward.[42]

Two decades later the first American citation to the *Russell* case is found in *Riddle v. The Proprietors of the Locks and Canals on Merrimack River* [43] in which no mention of the authority of the king is made. The Supreme Judicial Court of Massachusetts stated that while a county, referred to as a quasi corporation, can be held liable on an indictment for neglect of a public duty, no private action can be maintained, citing *Russell* as the settling authority.[44] A scant two years later, Massachusetts again found that there was no liability for quasi corporations, in this

34. *Russell*, 100 Eng. Rep. at 362.

35. *Id.*

36. For example, *see* cases *supra* note 7.

37. Benedict Calvert's Lessee v. Sir Robert Eden, 2 H. & McH. 279 (Md. 1789).

38. *Id.* In the argument before the court: "The king cannot by his writ command himself *Id.* at 290. Further argument was made: "A tenant in tail, making a feoffment, discontinues the estate-tail. But if the king, being tenant in tail, grants patent of the land, it does not operate as discontinuance, being a wrong, for it is a maxim that the king can do no wrong. *Id.* at 310.

39. *Id.* at 334. The Court noted: "It has been the prevailing doctrine here that the lord proprietary, like the king at home, cannot be disseised.

40. Chisolm v. Georgia, 2 U.S. 419 (1793).

41. *Id.* at 437.

42. *Id.* at 454.

43. Riddle v. Proprietors of the Locks and Canals on Merrimack River, 7 Mass. 169, 187 (1810).

44. *Id.* at 187.

case the inhabitants of Leicester, absent a statute to that effect, citing *Russell* but without any mention of the King.[45]

Countless cases for the next century and a half cited to *Russell* and many others referenced the maxim, "the king can do no wrong."[46] Often both were joined together as if it were the king whose authority prevented the damaged wagon's owner from recovery in *Russell.* Over time, the authority of the king has been invoked in a democratic republic that, since its inception, has never had a king.

Only a few decades after independence from the king, the Court of Appeals of Kentucky found the theory of sovereign immunity more than simply a good idea.[47] Contrary to the conventional wisdom both before and after, however, that court found that the king can indeed do wrong; it is just that when the king errs, he goes unpunished:

> [S]overeignty has a fictitious perfection and purity, which must be taken as real, and which can not be controverted, and of course the abuse of its power can be imputed to a sovereign, in restraint of its legitimate energies. The maxim, that 'the king can do no wrong' is not an idle device of royalty, formed to amuse or beguile the multitude[48]

The same court noted:

> It is not, that the king, in a monarchy, or the people in a democracy can do no wrong ... it is the sovereignty with which they are invested, and in which they are merged, that is incapable of error; and this capacity in the sovereign to err is matter of necessity.[49]

Clearly, a difference of opinion existed just beneath the surface, with one court stating that "[i]mmunity of the sovereign from suit stemming from the political doctrine that the King can do no wrong, had been transplanted and preserved inviolate as part of the American common law until relatively recent times."[50] Note a pragmatic and different approach yet a decade earlier: ... the State should not be deprived or dispossessed of its property without its consent; not on the maxim of the English law that the king can do no wrong, a maxim which has no existence in American law."[51]

It took a twenty-first century Ohio court to provide the most thorough historical analysis of both the American concept of sovereign immunity and the reliance on the *Russell* case, although it overlooked the *Riddle* case as the initial mention of *Russell.* The Ohio Supreme Court in *Butler v. Jordan*[52] recited that the

45. Mower v. Inhabitants of Leicester, 9 Mass 247, 250 (Mass. 1812).
46. *See supra* notes 6-7.
47. *See* Commonwealth v. Morrison, 2 A.K. Marsh 75, 93 (Ky. 1819).
48. *Id.*
49. *Id.*
50. *Wilcox*, 117 F Supp. at 119.
51. *Hayes*, 30 S.E.2d at 728-29.
52. Butler v. Jordan, 750 N.E.2d 554 (Ohio 2000).

doctrine of sovereign immunity was associated with the English common-law concept that "the King can do no wrong."[53] While that is not an accurate portrayal of the first two American cases citing to *Russell,* the Ohio court did allude to the analogy now found in the sovereign immunity privilege in the U.S. courts of immunity extending to freedom from trial and not just from judgment.[54] In the English feudal system, any lord of the manor who held his own lower level court could not be brought into his own court.[55] The king, being the highest authority, likewise enjoyed such "protection on the theory that no court was above him."[56]

The *Butler* court explained in detail the *Russell* decision and concluded that "[t]his rule of local government immunity then became the general American rule."[57] Sovereign immunity in the United States was born starting with government at the most local level. It quickly led to a higher level. Soon thereafter, the same court stated that the concept of sovereign immunity had evolved from the English common law concept that "the king can do no wrong" and cited to *Russell.*

The U.S. Supreme Court, in deciding that sovereign immunity law of Nevada was not applicable to a cause of action arising in the State of California,[58] foreshadowed the coming conflict that would arise out of the passage of the 1996 FSIA Amendment. Mr. Justice Stevens speaking for the Court found that sovereign immunity has two faces: "The doctrine of sovereign immunity is an amalgam of two quite different concepts, one applicable to suits in the sovereign's own courts and the other to suits in the courts of another sovereign."[59]

The Absolute Immunity Period

The Absolute Immunity era began with the involvement of a foreign sovereign, albeit not a king. The government involved was that of France and the case condoned piracy on the high seas based on sovereign immunity.[60] The year was 1812 and the case *The Schooner Exchange v. McFaddon.*[61] McFaddon and his partner Greetham were the owners of the schooner Exchange that was forcibly and violently taken from them by the French pursuant to orders from Napoleon.[62] The vessel, having been converted to a military vessel for France, encountered great stress of weather and sailed into the port of Philadelphia for repairs.[63] McFaddon and Greetham filed suit for the vessel's return.[64] At the time the schooner sailed

53. *Id.* at 564.
54. *See id.* at 566.
55. *Id.* at 559.
56. *Id.*
57. *Id.* at 560.
58. Nevada v. Hall, 440 U.S. 410 (1978).
59. *Id.* at 414.
60. Schooner Exchange v. McFaddon, 11 U.S. 116 (1812).
61. *Id.* at 116.
62. *Id.* at 117.
63. *Id.*
64. *Id.*

into port, a state of peace existed between France and the United States.[65] McFaddon lost in the trial court but appealed to the Circuit Court of the United States, which reversed and ordered the vessel returned to McFaddon and Greetham.[66]

Justice Marshall, in reversing the Court of Appeals, concluded in part: "It seems then to the Court, to be a principle of public law, that national ships of war, entering the port of a friendly power open for their reception, are to be considered as exempted by the consent of that power from its jurisdiction."[67] Justice Marshall's holding is that the vessel of a foreign sovereign entering a U.S. port in a friendly manner during a time of peace should be exempt from the jurisdiction of a United States Court.[68] This demonstrates a serious regard for a foreign sovereign whose ownership of the vessel in question arose from piracy on the high seas. If the Schooner McFaddon were put in the context of the 1996 FSIA amendment, and if the French had treated the owners of the schooner accordingly the result might have been different, provided that the erring sovereign was designated a terrorist state and thus amenable to an exception from immunity

The Tate Letter and Qualified Immunity from 1952-1976

In 1952, there was a shift from absolute immunity In a letter issued by Jack B. Tate, Acting Legal Advisor at the U.S. Department of State, to Acting Attorney General Philip B. Perlman, the State Department unilaterally purported to restrict immunity to governmental or public acts, thus creating a qualified sovereign immunity [69] While the State Department's position was justified by the increase in commercial activity by nations competing with private enterprise of the capitalist countries, the letter itself clearly reflected an extension of power by the U.S. Department of State.[70] The State Department's success in this regard was enhanced by an abdication of Congressional power for twenty-four years and the courts' acquiescence during the same period.

The Tate Letter required a foreign sovereign to seek a ruling of immunity from the State Department, which in turn would file with the court in which that sovereign had been sued, a "suggestion of immunity,"[71] not unlike a suggestion of bankruptcy to stop judicial proceedings against one who has sought the protections of the Bankruptcy Act. Courts differed in their reaction to the Tate Letter, but by

65. *See id.* at 118.

66. *Id.* at 117.

67. *Id.* at 145-146.

68. *Id.* at 147.

69. Tate Letter, *supra* note 9 (suggesting that immunity be recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with regard to private acts (*jure gestionis*)); *see also* Pan Am. Tankers Corp. v. Republic of Vietnam, 296 F Supp. 361, 363 (S.D.N.Y 1969) (applying restrictive interpretation of sovereign immunity set forth in the Tate Letter).

70. *See id.* Although Congress constrained State's authority by enacting the FSIA and its subsequent amendments *supra note* 2, at 10, the State Dept. has been reluctant to cede authority.

71. *See Pan Am. Tankers Corp.*, 296 F Supp. at 363.

and large concurred with the authority of State.[72] The courts' deferential attitude towards the State Department was approved by the U.S. Supreme Court in *National City Bank of New York v. Republic of China.*[73] This attitude led to critical commentary by noted legal scholar and jurist, Michael H. Cardozo.[74]

The general attitude of the courts was that whatever suggestion was made by the State Department, the courts lacked discretion to take a differing position.[75] A trial court in the District of Columbia, in finding an absence of immunity noted: "The State Department's determination that immunity need not be extended is binding on this Court."[76] The appellate court in the same jurisdiction concluded: "In delineating the scope of a doctrine designed to avert possible embarrassment to the conduct of our foreign relations, the courts have quite naturally deferred to the policy pronouncements of the State Department."[77] Another court, while finding immunity, agreed with the process: Accordingly, both parties agree that a suggestion of immunity is conclusive and binding on the courts."[78]

Other courts criticized the absence of criteria by which public acts could be distinguished from private acts, whether by the courts or by the State Department, but one court concluded that the suggestion or absence thereof of immunity by the State Department was "highly persuasive and the authorities dictate that it must be given great weight."[79]

The Tate Letter differentiated the public acts of foreign governments, *jure imperii*, from private acts, *juri gestionis.*[80] Similar differentiation has been followed regarding the liability of state governments engaged in quasi or non-governmental activity [81]

That a foreign government should escape liability and even trial while engaged in commerce and competing with non-government business entities is hardly justified and seems to warrant inroads into absolute sovereign immunity. It seems questionable today that the interests of American business or U.S. citizens

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72. *See id.*

73. *See* Nat'l City Bank of New York v. Republic of China, 348 U.S. 356, 360-61 (1955).

74. *See generally* Michael H. Cardozo, *Judicial Deference to State Department Suggestions: Recognition of Prerogative or Abdication to Usurper* 48 CORNELL L.Q. 461, 498 (1963) (advocating judicial deference to the State Department in foreign relations to present unified voice, not as abdication of judiciary's responsibility but as recognition of the executive's prerogative).

75. *Id.*

76. Amkor Corp. v. Bank of Korea, 298 F Supp. 143, 144 (S.D.N.Y. 1969).

77. Victory Transp. Inc. v. Comisaria General de Abastecimientos Transportes, 336 F.2d 354, 358 (2d Cir. 1964).

78. Renchard v. Humphreys & Harding, Inc., 381 F Supp. 382, 383 (D. D.C. 1974).

79. Ocean Transp. Co. v. Gov't of the Republic of the Ivory Coast, 269 F Supp. 703, 705 (1967).

80. Tate Letter, *supra* note 9

81. *See* REYNOLDS, *supra* note 12, at 670. For an activity which is exclusively governmental in nature, there is generally no liability for a tort which causes injury or damage to a person. *Id.* However, for an activity which is proprietary, such as the operation of business which competes with private enterprise, there can be liability. *Id.* The difficulty arises in those cases which do not clearly fall into one category or the other, such as garbage collection. *Id.* The distinction has been extended to the federal law as applicable to foreign governments doing business. FSIA, 28 U.S.C.A. §1605(a)(2) imposes liability on foreign sovereigns engaged in commerce.

injured at the hand of foreign governments should be left to the State Department instead of the judicial system. However, at least one court justified its deference on the grounds of separation of powers:

> Just as the Executive is not permitted, under the separation of powers, to interfere with the Judiciary, so also the Judiciary should avoid any conflict with the Executive in the field of international relations. The President, as the elected representative of the people of the United States, is the final word on the subject in the absence of Congressional legislation.[82]

The concept of separation of powers is a subject somewhat blurred today in light of the position of the State Department regarding the 1996 amendments to the FSIA and Congress' action permitting judgment creditors against foreign terrorist states to have such judgments satisfied from the terrorist states' frozen assets.[83]

One troublesome aspect of the theory of qualified immunity was the diplomatic pressure brought to bear on the State Department for political considerations.[84] This resulted in the State Department issuing a "suggestion of immunity" which would ordinarily not be available in similar circumstances absent the political considerations.[85] The other difficulty arose when foreign sovereigns ignored litigation in U.S. courts. Absent a diplomatic note to the State Department seeking a suggestion of immunity, it was left to the State Department to determine whether immunity should be extended or not.[86] The two-branch approach in these situations failed to establish consistent standards or uniformity of application.[87]

Litigation with Foreign Sovereigns under the FSIA 1976-1996

In 1976, Congress codified the previous policy and eliminated the "suggestion of immunity" procedure which the State Department had implemented for twenty-four years.[88] This act of Congress clearly put the courts in charge instead of having to yield to the dictates of the State Department. For the first time, the bases for immunity were established by statute.[89]

The first case clearly worthy of the terrorism label resulted in a plaintiff's verdict due to the fact that the event, a car bombing assassination, occurred within

82. Rich v. Naviera Vacuba, S.A. and Republic of Cuba, 197 F Supp. 710, 724 (E.D. Va. 1961).

83. *Price II*, 294 F.3d at 99. In holding that a foreign State was not a person entitled to due process, the appellate court referred to the frozen assets of such nations, which have long been the goal of virtually all plaintiffs who filed suits based on terrorism after the 1996 Amendment to the FSIA. The *Price II* court said: "For example, the power of Congress and the President to freeze the assets of foreign nations, or to impose economic sanctions on them, could be challenged as deprivations of property without due process of law. *Id.*

84. Verlinden B.V v. Cent. Bank of Nigeria, 461 U.S. 480, 487 (1983)

85. *Id.*

86. *See id.*

87. *Id.* at 488.

88. *See id.*

89. FSIA, 28 U.S.C.A. §§ 1602-1611.

the District of Columbia.[90] Chile's ambassador to the United States under the Allende government, who was in disfavor with the usurping Pinochet regime, was assassinated.[91]

Although the judgment entered against the Republic of Chile was the first under the FSIA for an act of terrorism before the 1996 amendment, it is less significant in that during the qualified immunity period, it is unlikely that Chile would have been afforded immunity for an act of assassination.

The important cases of this era are the ones involving American victims of foreign terrorism that occurred outside the United States but that the courts dismissed for lack of subject matter or personal jurisdiction. Some of these cases returned for a second bite at the immunity apple after the enactment of the 1996 Amendment.[92] Only one case reached judgment for an act of intended but unsuccessful terrorism.[93] That judgment continued to accrue interest and became one of but three judgments to receive satisfaction from Iraq's frozen assets upon the commencement of the second war against Iraq.[94] Others were resolved without further litigation,[95] while some are still pending.[96]

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90. *Letelier* 488 F Supp. at 665.

91. *See* Vernon Loeb, *Documents Link Chile Pinochet to Letelier Murder*, WASHINGTON POST, Nov. 14, 2000, at A16.

92. Joseph Cicippio's pre-1996 case was dismissed without prejudice for lack of jurisdiction. Cicippio v. Islamic Republic of Iran, 1993 WL 730748, *3 (D.D.C. 1993) [hereinafter *Cicippio II*]. However, it reached judgment in a later suit. *Cicippio III*, 18 F Supp. 2d at 70. Likewise, the dismissal of Chad Hall's 1992 suit was affirmed without opinion in Hall v. Iraq, 80 F.3d 558 (D.C. Cir. 1996). Hall later became a successful plaintiff in Daliberti v. Republic of Iraq, 146 F Supp. 2d 19, 27 (D.D.C. 2001).

93. Dadesho v. Gov't of Iraq, 139 F.3d 766, 766-67 (9th Cir. 1998) (dismissing defendant's appeal of judgment for plaintiff). Sargon Dadesho was the intended victim in hired assassination case. After the assassin was apprehended and incarcerated, Dadesho filed suit in 1992 against the Government of Iraq for plotting to murder him. *Id.* at 766. A default judgment was entered in the plaintiff's favor. *Id.* at 767. The court ruled that the plaintiff was not entitled to default judgment, but granted judgment for plaintiff on one count of intentional infliction of emotional distress. *Id.* Iraq was tardy in attempting to set aside the default. *Id.* at 767 Dadesho was one of three judgments against Iraq which were within the parameters of the President's Executive Order which confiscated Iraq's frozen assets. *See* Exec. Order No. 13,290, 68 Fed. Reg. 14,307 § 1(b) (Mar. 20, 2003) [hereinafter Exec. Order 13,290]. Dadesho, having levied on frozen bank account of Iraqi funds and qualified under the exception spelled out in the Executive Order, was paid his judgment in full, $2,407,000 from Iraqi funds controlled by the U.S. Treasury. Sargon Dadesho v. Government of Iraq; Garnishment in the Supreme Court of the State of New York, County of New York, Execution with Notice to Garnishee, based on a federal judgment in California, Action No. CV- 92-05491-REC.

94. Exec. Order No. 13,290 at 14,307 § 1(b).

95. *See* Princz v. Fed. Republic of Germany, 813 F Supp. 22 (D.D.C. 1992). Princz would not have qualified as plaintiff after the 1996 amendment since his defendant was the Republic of Germany, not terrorist nation. However, it was reported that Princz was ultimately paid a settlement from the re-unified government of Germany.

96. *See, e.g.*, Smith v. Socialist People's Libyan Arab Jamahiriya, 886 F Supp. 306 (E.D.N.Y. 1995), *aff'd*, 101 F.3d 239 (2d Cir 1991). The initial suit brought by the families of the victims of the bombing of Pan Am Flight 103 was dismissed for lack of subject matter jurisdiction, the bombing having occurred in Scotland in 1988. *Smith*, 886 F Supp. at 315. However, after the passage of the 1996 amendment, the suit was re-filed as Rein v. People's Socialist Libyan Arab Jamahiriya, 995 F Supp. 325, 328 (E.D.N.Y. 1998), *aff'd*, 162 F3d 748 (2d Cir 1998).

Litigation under the Anti Terrorism & Effective Death Penalty Act of 1996

After the enactment of the Anti Terrorism & Effective Death Penalty Act of 1996, half a dozen cases reached judgment, all in cases against Iran,[97] except *Alejandre v. Cuba*,[98] known as the *Brothers-to-the Rescue* case. In 2000, Congress addressed the issue of satisfaction of these outstanding judgments with the passage of what amounted to special legislation for a few victims of terrorism.[99] The act provided for payment to judgment creditors of several judgments against Iran from taxpayer funds although a subrogation clause provided that ultimately the compensation would come from frozen Iranian assets.[100] However, two suits against Iran that had not reached judgment were also included so that when judgment was entered in those suits, satisfaction was made. While mentioned in the Conference Committee report, pending suits against Libya and Iraq received no authorization for payment in the 2000 legislation.[101]

THE EARLY DUE PROCESS CASES

The issue of due process arose with the ratification of the Fourteenth Amendment to the Constitution of the United States.[102] Until that time, the only issue of due process arose out of the Fifth Amendment, applicable only to the federal government.[103] However, the Fourteenth Amendment extended this requirement to all the States of the Union.[104] Given commerce across borders among the citizens of the States, conflicts were inevitable. A resolution of these conflicts and a system used for such resolution ultimately giving rise to such phrases as "traditional notions of fair play and justice" and "substantial contacts"

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97. *See, e.g.*, Anderson v. Islamic Republic of Iran, 90 F Supp. 2d 107, 113-4 (D.D.C. 2000); *Cicippio III*, 18 F Supp. 2d at 70; *Flatow I*, 999 F Supp. at 34.

98. Alejandre v. Republic of Cuba, 996 F Supp. 1239 (S.D. Fla. 1997)

99. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000) (codified as amended in scattered sections of 22 U.S.C.).

100. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464, 1541 § 2002 (codified as amended at scattered sections of 8, 20, 22, 27, 28, and 42 U.S.C.).

101. Victims of Trafficking and Violence Protection Act, 22 U.S.C. § 2002(b)-2. The Conference Committee Report stated:

> The Committee intends that this legislation will similarly help other pending and future Antiterrorism Act plaintiffs as and when U.S. courts issue judgments against the foreign state sponsors of specific terrorist acts. The Committee shares the particular interest of the sponsors of this legislation in ensuring that the families of the victims of Pan Am flight 103 should be able to collect damages promptly if they can demonstrate to the satisfaction of a U.S. court that Libya is indeed responsible for that heinous bombing. The Committee is similarly interested in pending suits against Iraq.

H.R. REP. NO. 106-939 at 118 (2000).

102. U.S. CONST. amend. XIV § 1.

103. U.S. CONST. amend. V

104. U.S. CONST. amend. XIV § 1.

arose primarily in three cases: *International Shoe v. State of Washington*,[105] *Milliken v. Meyer* [106] and *Pennoyer v. Neff*.[107]

The effectiveness of service by publication to establish *in personam* jurisdiction arose in the *Pennoyer* case.[108] Pennoyer brought an action against Neff in the state courts of Oregon and effected service by publication on the defendant who was a California resident.[109] Neff failed to appear and the court entered a default judgment resulting in an execution sale by the Oregon sheriff of land Neff owned in Oregon.[110] Neff subsequently brought suit to recover title to the land, asserting his ownership based on a patent issued by the United States.[111] The controlling issue was the effectiveness of a judgment based on obtaining personal jurisdiction against a non-resident by publication of service.[112]

The Oregon statute provided that subject matter jurisdiction was established over a non-resident who owned property within Oregon through publication.[113] Oregon law also provided for *in rem* jurisdiction if the subject matter was property located within the State of Oregon. However, *in rem* jurisdiction was inapplicable since the suit was brought *in personam* and the real property became involved in post-judgment proceedings.[114] The language of the opinion setting forth the possibility of an Oregon court's jurisdiction over persons outside the territory of the State sovereign is analogous to the process established by the 1996 FSIA Amendment.[115]

In distinguishing between subject matter and personal jurisdiction, the *Pennoyer* court relied on a Massachusetts decision,[116] one of the earliest to distinguish the two types of jurisdiction. That case, *Bissell v. Briggs*,[117] required both subject matter and personal jurisdiction in order to issue a judgment entitled to full faith and credit in other states.[118] The *Pennoyer* court adopted that same simple principle.[119]

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105. Int'l Shoe Co. v. State of Washington, 326 U.S. 310 (1945).

106. Milliken v. Meyer, 311 U.S. 457 (1940).

107. Pennoyer v. Neff, 95 U.S. 714 (1877).

108. *Id.* at 715.

109. *Id.* at 714.

110. *Id.* Neff was sued in Oregon at time when he was resident of California. *Id.* at 717 He was served by publication and never given personal or actual notice. *Id.* at 716.

111. *Id.* at 715.

112. *Id.* at 720.

113. *Id.*

114. *Id.*

115. *See id. See also* Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 221(a).

116. *See Pennoyer*, 95 U.S. at 731.

117 Bissell v. Briggs, 9 Mass. 462 (1 Tyng) (Mass. 1813).

118. "In order to entitle the judgment rendered in any court of the *United States* to the full faith and credit mentioned in the federal constitution, the court must have had jurisdiction, not only of the cause, but of the parties. *Id.* at 468.

119. *Pennoyer* 95 U.S. at 731 (citing *Bissell*, 9 Mass. at 468-469) ("[I]t was held that over the property within the State the court had jurisdiction by the attachment, but had none over his person; and that any determination of his liability, except so far as was necessary for the disposition of the property, was invalid.").

The conclusion that could be asserted by a foreign sovereign, relying on the *Pennoyer* case alone, is that the Constitution demands due process for its citizens, thus precluding the exercise of authority over persons, or property, outside the territory of the United States.[120]

Following this logic, one must determine, *ipso facto*, that the 1996 FSIA Amendment is unconstitutional.[121] The escape from this inevitable conclusion is the absence of status as a person, eliminating the need for due process.

Fourteenth Amendment due process based on service on a non-resident gave rise to the phrase "traditional notions of fair play and substantial justice" in *Milliken v. Meyer* [122] turning on factual considerations and the adequacy of notice given. That the defendant Meyer was personally served and received actual notice of Wyoming proceedings while located in the State of Colorado gave him the opportunity to assert his defense in the Wyoming court.[123] The Court found that Meyer had in fact been afforded due process and noted the difference between its holding and the earlier finding in *Pennoyer* based on service by publication.[124]

Next, in the case of *International Shoe*, the Court distinguished *Pennoyer* and said that previously, the presence of a defendant within the territory of the court's jurisdiction was a prerequisite to a binding personal judgment.[125] However, *International Shoe* did not require the physical presence of the defendant in the territory of the court's jurisdiction, but only that the defendant have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice."[126]

Further, *International Shoe* extended the concept of the due process requirement beyond humans to corporations without addressing the issue of who is

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120. *See id.*

121. If a foreign sovereign is person requiring due process, it follows that it must have minimum contacts for the U.S. Courts to have jurisdiction. Since the 1996 amendment to the FSIA provides for jurisdiction over foreign sovereigns for acts outside the United States in a setting which precludes any contacts, then it follows that either the act is unconstitutional or the sovereign is not person entitled to due process. It must be one or the other.

122. 311 U.S. 457 (1940).

123. The court said:

> Its adequacy so far as due process is concerned is dependent on whether or not the form of substituted service provided is reasonably calculated to give him actual notice of the proceedings and an opportunity to be heard. If it is, the traditional notions of fair play and substantial justice implicit in due process are satisfied. Here there can be no question on that score.

Id. at 463 (internal citation omitted).

124. *Id.*

125. Int'l Shoe, 326 U.S. at 316. See also Pennoyer, 95 U.S. at 733.

126. 326 U.S. at 316. Moreover, the court concluded:

> But now that the *capias ad respondendum* has given way to personal service of summons or other form of notice, due process requires only that in order to subject defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice.

Id.

a person for purposes of due process. The appellant, International Shoe Company, was a Delaware corporation which had no office in Washington.[127] However, during the pertinent time period, it did employ salesmen in Washington who were merely order-takers.[128] All contracts for the purchase of merchandise were consummated in Missouri.[129] The merchandise was shipped f.o.b. from Missouri to Washington so that the corporation had no dominium over the merchandise once it was delivered to the shipper.[130]

The issue, arising out of a suit to collect a portion of the commissions paid pursuant to Washington's Unemployment Compensation Act,[131] was whether personal service on the salesmen in Washington and service by registered mail in Missouri conferred personal jurisdiction of the Washington court over the International Shoe, so that it was afforded due process.[132] Because International Shoe's activities in Washington were neither casual nor irregular; and, because the service by registered mail was reasonably calculated to give such defendant actual notice, it could not be said that the corporation was not afforded due process.[133] The Court noted of the demands of due process:

> Those demands may be met by such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there. An "estimate of the inconveniences" which would result to the corporation from a trial away from its "home" or principal place of business is relevant in this connection.[134]

The concept which evolved in *Pennoyer Milliken*, and *International Shoe*, was logically extended in the FSIA substituting "direct effect" for minimum contacts, thus enabling litigation in U.S. courts for conduct occurring wholly outside the United States but perpetrated upon U.S. citizens.[135]

The Early Non-Human Persons Afforded Due Process

Until the ratification of the Fourteenth Amendment, due process existed only in the context of the Fifth Amendment, limiting the focus to the federal government.[136] International Shoe extended Fourteenth Amendment due process arising from State action to various entities other than corporations: partnerships,[137]

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127. *Id.*

128. *Id.* at 313-14.

129. *Id.* at 314.

130. *Id.*

131. Washington Unemployment Compensation Act, Wash. Rev. Stats., §§ 9998-103a-9998-123a, (1941) (codified as amended at WASH. REV CODE § 50.24.010 (2004)).

132. 326 U.S. at 311-12.

133. The Corporation received due process so status as a person was not a deciding factor. *Id.* at 316.

134. *Id.* at 317.

135. FSIA, 28 U.S.C.A. § 1605(a)(2).

136. U.S. CONST. amend. V

137. Kaffenberger v. Kremer, 63 F Supp. 924, 926 (E.D. Pa. 1945).

mutual life insurance companies,[138] and labor unions.[139] The issue of whether a State of the Union was considered a person entitled to due process was raised when South Carolina filed suit to avoid enforcement of recently passed civil rights laws.

A State of the Union is not Entitled to Due Process: Katzenbach v. South Carolina[140]

The case which acted as a benchmark for the *Price* decision was *Katzenbach v. South Carolina.* South Carolina had brought suit against the Attorney General to suppress enforcement of certain civil rights acts passed during 1964-1965.[141] One basis for resisting enforcement of these acts was the denial of due process.[142] The *Katzenbach* decision squarely addressed the issue, holding that a State was not a person for purposes of due process.[143] The case left little doubt that if a State of the Union could not be a person for purposes of due process, then neither could a foreign sovereign.[144]

The Weltover Conflict

The next case to address the due process issue took a giant step backwards by merely assuming that a foreign sovereign was in fact a person entitled to due process.[145] Making the due process assumption for a foreign sovereign would have rendered the provisions of the 1996 FSIA Amendment unconstitutional, except for acts that occurred within U.S. territory. This might have been the last word on this issue but for a cryptic "but see" reference in the *Weltover* case, citing to *Katzenbach.*[146]

In *Weltover* the holders of bonds payable in dollars issued by the Republic of Argentina's central bank, which extended the date of payment, brought suit against the Republic of Argentina.[147] Issuing government bonds sold in the United States was considered a commercial activity, because Argentina was acting as a private player and not as a regulator of the bond market.[148] The unilateral extension of the payment date by Argentina caused a "direct effect" in the United States, thus creating jurisdiction under 28 U.S.C. § 1605(a)(2).[149] But did the statutory "direct effect" equate to minimum contacts sufficient to satisfy traditional notions of fair play and substantial justice? Or was Argentina even required to be afforded due process?

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138. Conn. Mut. Life Ins. Co. v. Moore, 333 U.S. 541, 551(1948).
139. American Fed'n of Labor v. Watson, 60 F Supp. 1010 (1945).
140. Katzenbach v. South Carolina, 383 U.S. 301, 323-24 (1966).
141. *Id.* at 307.
142. *Id.* at 323.
143. *Id.*
144. *Id.*
145. *See* Republic of Argentina v. Weltover, Inc., 504 U.S. 607 (1992).
146. *Id.* at 619.
147. *Id.* at 609.
148. *Id.* at 620.
149. *Id.*

The Court assumed, without deciding, that a foreign state was a person for purposes of due process but side-stepped the issue by holding that the issuance of bonds sold in the United States and paid in U.S. dollars amounted to sufficient minimum contacts to satisfy the constitutional test.[150] It is the reference to *Katzenbach* which raised the issue by pointing out that States of the Union were not persons for purposes of due process. This not only left the door open to a finding that a foreign sovereign could not be a person for due process purposes, but also it gave subsequent courts a road map for resolving these issues.

THE THREE CASES LEADING TO A DUE PROCESS RESOLUTION

Personal due process hardly created an issue in the context of the 1976 Act, in that most cases were commercial in nature, thus creating either the minimum contacts or direct effect in the United States. In non-commercial cases, until *Letelier* there was a finding of no jurisdiction by the courts, so that due process did not arise.[151] However, in the context of the 1996 FSIA Amendment, due process clearly became an issue for courts and commentators. The reaction was wide and disparate, ranging from supportive[152] to critical[153] to indifferent.[154] However, a series of three cases dealt with the issue.

The first, *Flatow v. Islamic Republic of Iran*,[155] was unchallenged by the defendant but the issue was raised *sua sponte*. In the second case, *Daliberti et al. v. Republic of Iraq*,[156] the defendant Republic of Iraq raised the issue in its Rule 12 motion to dismiss but abandoned its defense upon an unfavorable ruling and failed to appeal. In the third such case, *Price et al. v. Socialist People s Libyan Arab Jamahiriya*,[157] the defendant not only asserted the absence of due process, but appealed when the court denied its motion to dismiss on such grounds. *Price* yielded the only appellate decision.

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150. *Id.* at 619.

151. *Letelier*, 488 F Supp. at 672 n.6.

152. *See* Kevin Todd Shook, *State Sponsors of Terrorism are Persons Too: The Flatow Mistake*, 61 OHIO ST. L.J. 1301 (2000) (describing 1996 Amendment as compatible with due process based on general jurisdiction and the reasonableness prong of the minimum contacts analysis); Lee M. Caplan, *The Constitution and Jurisdiction over Foreign States: The 1996 Amendment to the Foreign Sovereign Immunities Act in Perspective*, 41 VA. J. INT'L L. 369, 420-22 (2001) (asserting that the 1996 amendment withstands constitutional scrutiny because minimum contacts should not control personal jurisdiction over foreign states).

153. Keith Sealing, *State Sponsors of Terrorism is Question, Not an Answer: The Terrorism Amendment to the FSIA Makes Less Sense Now Than it did Before 9/11*, 38 TEX. INT'L L.J. 119, 141 (2003) (criticizing the FSIA and arguing that foreign states are "persons" entitled to due process).

154. *See* Karen Halverson, *Is Foreign State 'Person'? Does it Matter?: Personal Jurisdiction, Due Process and the Foreign Sovereign Immunities Act*, 34 N.Y.U. J. INT'L. L. & POL. 115, 142 (2001) (arguing that jurisdiction over foreign states should be analyzed not on due process grounds but under international law).

155. *Flatow I*, 999 F Supp. 1 (D.D.C. 1998)

156. *Daliberti I*, 97 F Supp. 2d 38 (D.D.C. 2001).

157. *Price II*, 294 F.3d at 85.

Flatow v. Islamic Republic of Iran

Since the 1996 FSIA Amendment, the issue has remained whether the foreign sovereign defendant is a person for purposes of due process, raising the substantial contacts factor. In order for a foreign sovereign to be exempt from traditional immunity under the FSIA, that sovereign must be on the list of terrorist states.[158] Once on that list, diplomatic relations no longer exist with the country, with the exception of Syria, thus limiting or eliminating contacts between that nation and the United States.[159] If a foreign sovereign lacks the presumed substantial contacts, how can that nation be subjected to trial, that which immunity avoids? While two trial courts dealt with the issue more than peripherally, neither utilized a finding that a foreign sovereign could not be a person for purposes of due process as the basis for the court's ruling.[160] Further, it is a less onerous task for the court to raise *sua sponte* the issue of due process in a matter being tried without the presence of the defendant in the courtroom.

In the *Flatow I* case, Iran had never appeared and the matter was tried with no defense whatsoever on its part.[161] The court, quite properly, conducted the trial as if there were a defendant present, raising *sua sponte* those issues which required resolution in order to enter a judgment. The court in *Flatow I* said that the U.S. Supreme Court had only addressed the issue of due process for a foreign sovereign twice, citing to both *Verlindin*[162] and *Weltover*[163] and in those cases only in dicta.[164] *Weltover* the *Flatow I* court noted, particularly avoided the issue by: (1) assuming without deciding that a foreign sovereign was a person for due process; (2) finding minimum contacts sufficient to establish the due process requirement; and (3) contradicting itself through the *Katzenbach* reference.[165]

The *Flatow III* court then found it unnecessary, much like the court in *Weltover* to base its decision on the non-person status of the foreign sovereign, but gave a cogent discussion of the merger of subject matter jurisdiction and personal jurisdiction and the confusion this has caused courts and legal scholars.[166] Particularly, the *Flatow III* court did find a close resemblance between "minimum contacts" and "direct effects" by finding that in fact and in law due process had been afforded to Iran.[167]

It should be noted that while the *Flatow III* court gave a thoughtful and thorough analysis of its many considerations, the argument was all raised *sua*

158. FSIA, 28 U.S.C.A. § 1605(a)(7)(A).

159. Glenn Kessler, *Powell to Detail Concerns to Syria; At Meeting Intended to Ease Tensions, Secretary to Seek Specific Action*, WASHINGTON POST, May 3, 2003, at A14.

160. *Flatow II*, 67 F Supp. 2d 535 (D. Md. 1999); *Flatow III*, 74 F Supp. 2d 18 (D.D.C. 1999).

161. Mona Conway, *Terrorism, the Law and Politics as Usual: A Comparison of Anti-Terrorism Legislation Before and After 9/11*, 18 TOURO L. REV 735, 743 n.46 (2002).

162. Verlinden B.V v. Cent. Bank of Nigeria, 461 U.S. 480 (1983).

163. Republic of Argentina v. Weltover, Inc., 504 U.S. 607 (1992).

164. *Flatow III*, 74 F Supp. 2d at 19-20.

165. *Id.*

166. *Id.*

167. *See id.* at 20-21.

sponte, as Iran filed no pleadings and made no appearance whatsoever in the *Flatow III* case.[168] Its importance is that it is the first post-1996 FSIA amendment case in which personal due process is mentioned.[169]

Daliberti v. Republic of Iraq

The next such case, *Daliberti v. Republic of Iraq*, went one step further in that Iraq, as it had done in two previous FSIA cases, both pre-1996, sought dismissal and vigorously contested the plaintiffs' assertions.[170] Iraq had appeared by counsel and had argued a motion to dismiss in *Hall v. People s Republic of Iraq*[171] and had appealed, without success, the entry of a default in *Dadesho v. Government of Iraq*.[172] However, once its motion to dismiss in *Daliberti I* had been denied, Iraq abandoned the courtroom, rendering the trial for all practical purposes a default hearing.[173]

Iraq sought dismissal on constitutional grounds in the *Daliberti* case, including the denial of equal protection by treating state sponsors of terrorism differently from other nations and by abrogating the minimum contacts requirements essential for personal jurisdiction.[174] It is the latter of these that is germane to the appellate case of first impression and the question that decision raises.[175] Iraq's motion to dismiss specifically alleged that because the behavior of that which Plaintiffs complained occurred outside the United States, and within the Republic of Iraq (as well as in Kuwait for at least one plaintiff), that the defendant did not have fair warning that a particular activity would subject it to the

168. Conway, *supra* note 166, at 743 n.46.

169. *See Flatow III*, 74 F Supp. 2d at 19.

170. 97 F Supp. 2d 38 (D. D.C. 2000).

171. 80 F.3d 558 (D.C. Cir. 1996).

172. 139 F.3d 766 (9th Cir. 1998).

173. Judge Oberdorfer commented at the commencement of the *Daliberti I* trial:

> I have been sensitive to the fact that—to the effect on the trial of there being no defense counsel present. I've been tempted but haven't interjected what would be, in effect, objections to leading questions and to the admission of what—if there were alert defense counsel, they would probably be tested as to whether the evidence or the material was hearsay. I'm toying with an idea. I want to mention it to you now so you may think about it, of having you, maybe you've done it anyway, annotate your findings with reference to the transcript or document that is the item of evidence which would when you look at it as a lawyer you would believe conscientiously to be manifestly admissible. Trial tr., at 273, Daliberti v. Republic of Iraq, 97 F Supp. 2d 38 (D.D.C. 2000). Judge Oberdorfer also engaged trial counsel in a dialogue as if objections were made by an opposing counsel and ruled upon: "Court: Now what would your objection be if you were defense counsel to the admission?" Cooper-Hill: If I were the defense counsel I would object on the basis of hearsay and if I were the Court I would overrule the objection on the basis of business records. Court: You are a lawyer. What would you answer? Cooper-Hill: It's a business record, your Honor, under 803 of the Federal Rules of Evidence. Court: So I ratify the Order receiving it.

Trial tr., at 306, Daliberti v. Republic of Iraq, 97 F Supp. 2d 38 (D.D.C. 2000).

174. *Daliberti I*, 97 F Supp. 2d at 52.

175. *See id.*

jurisdiction of the United States, citing *Burger King*.[176] Iraq further alleged that maintenance of the *Daliberti I* suit would offend traditional notions of fair play and substantial justice, citing *International Shoe*.[177] When the testimony adduced at trial demonstrated that one of the plaintiffs was stripped naked, blindfolded and threatened with electrocution through his testicles if he did not sign a confession of espionage,[178] it is difficult to suggest that Iraq had no warning that such conduct might subject it to the jurisdiction of an American court.

Judge Friedman, in denying Iraq's motion to dismiss, quoted from the Congressional Report[179] on the 1976 enactment of the FSIA which equated the conduct giving rise to subject matter jurisdiction with sufficient contacts. He went on to state:

> In the context of this statute, the purpose for which it was enacted, and the nature of the activity toward which it was enacted, and the nature of the activity toward which it is directed, the Court concludes that it is reasonable that foreign states be held accountable in the courts of the United States for terrorist actions perpetrated against U.S. Citizens anywhere.[180]

Further, in the opinion denying Iraq's motion to dismiss based on due process, the judge in *Daliberti I* first cited to *Flatow, Weltover* and *Katzenbach* but stated: "It would seem that a foreign sovereign should enjoy no greater due process rights than the sovereign States of the Union. As Judge Richey noted: 'If the States of the Union have no due process rights, then a "foreign mission" *qua* "foreign mission" surely can have none.'"[181]

Daliberti I was the first post-1996 FSIA Amendment case in which the defendant sovereign raised the issue of due process; this makes *Daliberti I* the second of the three case evolution on the due process issue. Notwithstanding that the opinion in *Daliberti I*denying Iraq's motion to dismiss was straightforward and did not hesitate to hold Iraq to trial in a United States court, it still is but a trial court opinion. It fell to the U.S. Court of Appeals for the District of Columbia Circuit to make the first appellate ruling as to the lack of due process being afforded a foreign sovereign.

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176. *Id.* at 53 (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985)).

177. *Daliberti I*, 97 F Supp. 2d at 53 (citing *Int'l Shoe*, 326 U.S. at 316).

178. Chad Hall: "He said to get started we'll pull your fingernails out. If that doesn't work we'll cut your knuckles off one at time. Question: Cut your what? Your fingertips off one at a time? Chad Hall: Yes. He said if that doesn't work. .(indicating). Question: What did he say? Chad Hall: He said we'll take an electric cord to you and shock you. Question: Shock you where? Chad Hall: In the gonads. Question: In your testicles, correct? Chad Hall: Yes. *in* Trial tr., at 121-122, Daliberti v. Republic of Iraq, 97 F Supp. 2d 38 (D.D.C. 2000).

179. H.R. REP. NO. 94-1487, at 13-14 (1976) (footnotes omitted), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6612, *quoted in* Thos. P Gonzalez Corp. v. Consejo Nacional de Produccion de Costa Rica, 614 F.2d 1247, 1255 n.5 (9th Cir. 1980).

180. *Daliberti I*, 97 F Supp. 2d at 54.

181. *Id.* at 49 (citing Palestine Information Office v. Shultz, 674 F Supp. 910, 919 (D.D.C. 1987)).

Price v. Socialist People s Libyan Arab Jamahiriya

The *Price I* case became the first post-1996 FSIA Amendment case in which the defendant designated terrorist state not only appeared by filing a motion to dismiss, but also appealed the denial of such motion.[182] After first reciting the *International Shoe* criteria of certain minimum contacts, and in their absence, the protection a person has from the burden of litigating in the forum in which suit has been commenced, the *Price I* court first found that Libya has no contacts, minimum or otherwise, sufficient to satisfy due process requirements.[183]

However, Libya's argument asserted that, as a matter of law, it was a person for purposes of due process.[184] The court acknowledged having previously proceeded as if this were true but had never so held.[185] The U.S. Supreme Court in the *Weltover* case, as noted above, assumed without holding that Argentina was entitled to due process, notwithstanding its cryptic footnote to *Katzenbach,* but did not find due process lacking.[186] The same court which decided *Price* had previously stated that a foreign state being entitled to constitutional due process was an unchallenged assumption in *Creighton Ltd. V Government of Qatar* [187] But in *Price II* the issue of due process, as a means of challenging the personal jurisdiction over Libya, was placed squarely before the court and contested by the plaintiffs.[188]

Noting that prior decisions had danced around the issue both before and after the *Katzenbach* case, the *Price II* court found nothing equivocal about its ruling which could conceivably support Libya's position.[189] The incongruity of holding a State of the Union not a person entitled to due process but providing due process comfort to a foreign state alien to our system of constitutional law was pointed out.[190]

Of all the compelling arguments the court put forth to justify the negative finding regarding a foreign sovereign, the most significant in the context of an FSIA suit brought for acts of terrorism was related to the practical problems arising

182. *Price I,* 110 F Supp. 2d 10 (D. D.C. 2000); *aff'd Price II,* 294 F.3d 82 (D.C. Cir. 2000).

183. *Price I,* 110 F Supp. 2d at 14 (noting that "Libya has no presence in the United States, does not conduct any business in the United States either directly or through an agent, and has no other affiliating contacts with the United States").

184. *Price II,* 294 F.3d at 95.

185. *Id.*

186. *Weltover,* 504 U.S. at 619.

187. 181 F.3d 118, 125 (D.C. Cir. 1999).

188. *Price II,* 294 F.3d at 85.

189. *See id.* at 90. The Court of Appeals in *Price* acknowledged the absence of due process, if applicable, by stating: "Thus, §1605(a)(7) now allows personal jurisdiction to be maintained over defendants in circumstances that do not appear to satisfy the 'minimum contacts' requirement of the Due Process Clause. *Id.* at 90. However, the Court of Appeals further stated that the term 'person' did not include a sovereign, and, unequivocally denied the right of due process to foreign sovereign: "Indeed, we think it would be highly incongruous to afford greater Fifth Amendment rights to foreign nations, who are entirely alien to our constitutional system, than are afforded to the states, who help make up the very fabric of that system. *Id.* at 96.

190. *Price II,* 294 F.3d at 96, 99.

from vesting a foreign state with such constitutional protections as Libya sought.[191] Foremost among these was the power of the executive branch to freeze the assets of foreign nations or to impose sanctions upon them, thus giving rise to the argument that such executive conduct deprived the foreign state of its property without benefit of due process.[192] It should be noted that ultimately the issue of granting U.S. courts jurisdiction over foreign sovereigns coincided inextricably with the right to collect judgments from those frozen assets.

In an earlier draft of an FSIA amendment that never made it to the floor of the senate, the sponsor Arlen Specter (R.-PA) testified that his then pending bill would not only grant a forum but a means to satisfy any judgment awarded.[193] The form of the FSIA under which *Flatow, Daliberti* and *Price* were brought included language instructing the Secretaries of State and Treasury to use their best efforts to "fully, promptly and effectively assist any judgment creditor "[194] The refusal to so do and the relentless resistance to be of any assistance to former hostage judgment creditors resulted in additional litigation in the *Daliberti I* case against those Secretaries in a mandamus action.[195] This internal conflict was resolved by two events involving the frozen assets of Iraq. First, the enactment of the Terrorism Risk Insurance Act of 2002 amended by the addition of the Terrorism Victims Access to Compensation[196] clearly conferred upon judgment creditors that right which had only been hinted at in committee reports and the

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191. *Id.*

192. *Id.*

193. The Senator noted:

> This legislation would amend the Foreign Sovereign Immunities Act by giving Federal courts jurisdiction over any suit brought in this country against any foreign country that has been formally listed by the State Department as supporter of international terrorism, if that foreign state has committed, caused, or supported an act of terrorism against an American citizen. The legislation would also enable the court to freeze all assets of the defendant country located within the United States sufficient to satisfy judgment.

Hearing before the Subcomm. on Courts and Admin. Practice of the Comm. on the Judiciary; for Consideration on S. 825 S. Hrg. 103-1077 June 21, 1994 (statement of Senator Arlen Specter). While approved by the committee, the bill was never brought to the floor of the Senate and thus died at the end of the session in 1994.

194. FSIA, 28 U.S.C.A. § 1610(f)(2)(A). The FSIA sets out:

> At the request of any party in whose favor a judgment has been issued with respect to claim for which the foreign state is not immune under section 1605(a)(7), the Secretary of the Treasury and the Secretary of State should make every effort to fully, promptly and effectively assist any judgment creditor or any court that has issued any such judgment in identifying, locating, and executing against the property of that foreign state or any agency or instrumentality of such state.

FSIA, 28 U.S.C.A. § 1610(f)(2)(A).

195. When the Secretaries of State and Treasury refused to comply with the requirements of 28 U.S.C. 1605(a)(2), the plaintiffs in Daliberti, post-judgment, collectively filed Civil Action 02-CV-1120-(LFO) in the U.S. District Court for the District of Columbia, Daliberti et al v. Colin L. Powell, Secretary of State of the United States and Paul H. O'Neil, Secretary of Treasury of the United States, a Petition for a Writ of Mandamus. The matter was continued on several occasions at the request of the Department of Justice for ten months, at which time plaintiffs received satisfaction of their judgment. The mandamus action was then dismissed.

196. Terrorism Risk Insurance Act of 2002, 15 U.S.C. §§ 6701, 1610, 12 U.S.C. § 248 (2002).

suggestion of help from State and Treasury· access to the frozen assets for purposes of satisfaction of judgments.[197] Even after that statutory enactment, the combined resistance of State and Treasury was only overcome by the Executive Order of the President.[198] That Order confiscated all frozen assets of the Republic of Iraq, over 2 billion in U.S. dollars, except for assets previously located by judgment creditors, accomplished in three cases without the aid of State and Treasury, and subject to levy or writ.[199] Had Iraq been afforded due process, the *Daliberti* plaintiffs and plaintiffs in two other cases could not have been paid. The confiscation of Iraq's frozen assets by Executive Order would in and of itself have been a denial of due process.

The same Court of Appeals earlier had said: "No one would suppose that a foreign national had a due process right to notice and a hearing before the Executive imposed an embargo on it for the purpose of coercing a change in policy."[200]

IS *INTERNATIONAL SHOE* IN DANGER OF LOSING ITS EFFECT?

Judges and lawyers should not construe the *Price II* case to mean the end of *International Shoe*'s requirement of minimum contacts so that the maintenance of a suit does not offend the traditional notions of fair play and justice. The *Price II* court specifically left open the prospect that entities other than a specific government of a foreign sovereign might still be considered persons for purposes of due process.[201] Consistent with this specific reservation by the *Price II* court, the U.S. District Court for the Eastern District of New York in post-judgment proceedings in *Daliberti* allowed bank accounts of the government of Iraq, frozen by Executive Order,[202] to be disbursed forthwith to satisfy the *Daliberti* and *Frazier* judgments, while requiring specific notice, translated into Arabic, and thirty days opportunity within which to come into such court and be heard by subsidiary corporations which were wholly owned by the Republic of Iraq.[203]

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197. *See id.*

198. Exec. Order No. 13,290, 68 Fed. Reg. 14,307 (Mar. 20, 2003).

199. *Id.*

200. *Price II*, 294 F.3d at 99 (citing People's Mojahedin Org. of Iran v. Dep't of State, 182 F.3d 17, 22 (D.C. Cir. 1999)).

201. *Price II*, 294 F.3d at 99-100.

202. Exec. Order No. 12,724, 55 Fed. Reg. 33,089 (Aug. 9, 1990). President Bush's Executive Order No. 12,724 included the agencies, instrumentalities, controlled interests and the Central Bank of Iraq.

203. The District Court in post-judgment proceedings in *Daliberti v. Iraq* and *Frazier v. Iraq* required thirty day notice in Arabic, with the opportunity to be heard, for the Central Bank of Iraq, Bank Rashid and Raffidan Bank, all wholly owned and operated agencies of the Republic of Iraq. Judge Sprizzo's Order for providing notice to the banks which were wholly owned by the Republic of Iraq provided alternative means of notice as follows:

> (a) [B]y delivery by U.S. Global Express Mail, together with the Cover Memorandum. .initiated by the Clerk of the Court and by JPM Chase and Bank of New York. .with proof of delivery to be provided with the procedures established for U.S. Global Express Mail; (b) by delivery by any other mail or courier service. .that will provide either proof or acknowledgment of delivery; (c) by delivery to the Permanent

While not specifically expressing the issue of due process, the Court in those proceedings clearly set forth a procedure of its own design which would undoubtedly have been held to amount to due process for the Iraqi subsidiaries whose assets were subject to levy and execution. The *Price II* court left open the possibility that a subsidiary corporation, such as Rafidain Bank in the *Daliberti* case, might require treatment affording due process.[204]

The *Price II* court finally reiterated the availability of *forum non conveniens* not withstanding the unavailability of due process for foreign sovereigns, thus mitigating the concern that "United States courts will become the courts of choice for local disputes between foreign plaintiffs and foreign sovereign defendants and thus be reduced to international courts of claims."[205]

Given the possible exceptions to the opinion which the court left available in *Price II*, it is unlikely that *International Shoe*, and the rule regarding minimum contacts, will fade away Conversely, if a designated terrorist sovereign mistreats U.S. citizens in a manner which fulfills the criteria of the FSIA that such treatment amounts to having a direct effect in the United States, notwithstanding the fact that the contacts occur outside the United States, minimum contacts should not be an issue. *International Shoe* still has many miles to travel.

Mission of Iraq to the United Nations and to the Iraq Interest Section of the Algerian Embassy to the United States with instructions for transshipment of same to the Iraqi bank; (d) by delivery to any agent appointed for service of process or to any other person designated by the Iraqi Banks to receive notification with respect to any activity in their accounts within or outside the United States in connection with accounts maintained in New York, or identified in agreements entered into with JPM Chase or BNY by any of the Iraqi Banks; (e) by delivery to the branch of Rafidain Bank located in Amman, Jordan; (f) by delivery to the branch of Rafidain Bank located in Amman, Jordan, with instructions for transshipment of same to the Iraqi Banks' head offices in Baghdad, Iraq, as per BNY's arrangement with Rafidain Bank for delivery of periodic account statements to the Central Bank of Iraq, Bank Rafidain or Bank Rashead; and, (g) by electronic delivery (including fax, e-mail and/or telex) to the Iraqi Banks

Judge Sprizo's Order, *In re* Daliberti v. J.P Morgan Chase & Co., *et al.*, Cause No. 2002 CV 9778 in the United States District Court for the Southern District of New York. After service of such notice but before the thirty days had expired, the Executive Order carved out an exception to the President's confiscation of all of Iraq's frozen assets which was applicable only to *Daliberti v. Republic of Iraq*, *Frazier v. Republic of Iraq* and *Dadesho v. Government of Iraq*. Exec. Order No. 13290: Confiscating & Vesting Certain Iraqi Property, March 20, 2003.

204. *Price II*, 294 F.3d at 96 (noting that .with the issue directly before us, we hold that foreign states are not 'persons' protected by the Fifth Amendment").

205. The *Price II* court, after noting the remaining availability of the doctrine of forum *non conveniens*, concluded: "the forum *non conveniens* doctrine helps mitigate the concern that 'United States courts will become the courts of choice for local disputes between foreign plaintiffs and foreign sovereign defendants and thus be reduced to international courts of claims.'" *Id.* at 100 (quoting Proyecfin de Venezuela, S.A. v. Banco Industrial de Venezuela, S.A., 760 F.2d 390, 394 (2d Cir. 1985)).

TOWARD A DEFINITION OF NATIONAL MINORITY

JOHN R. VALENTINE*

I. INTRODUCTION

Viktor Orban, Hungary's former prime minister, recently said that protecting national minorities is a "European value"[1] and one that Hungary will work to have enshrined in the constitution of the European Union.[2] But what is a "national minority"? Is a purely ethnic, religious, or linguistic minority a national minority? If not, how can we tell the difference between these minorities and a national minority?

There appears to be no easy answers to these questions. The Council of Europe Framework Convention for the Protection of National Minorities (the "Framework Convention, or the "Convention"), which came into effect in 1998,[3] "contains no definition of national minorities, *none having received the consent of all Council of Europe member states*."[4] Because there is no agreed upon definition of national minority, we are left to wonder: What is this "European value" that is to be protected and what minorities may receive protection under the Framework Convention? This paper will discuss the possible meaning of the term "national minority, with special emphasis given to the Framework Convention for the Protection of National Minorities.

I will argue that a national minority is distinct from an ethnic, religious, or linguistic minority,[5] and I will suggest some possible characteristics that can be looked at to discern what is a national minority This paper will begin in Part II

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1. Ahto Lobjakas, *Hungary: Ex-Prime Minister Says EU Enlargement Will Solve the Hungarian Minority Issue*, Radio Free Europe/Radio Liberty, *at* http://www.rferl.org/nca/features/2003/10/17102003164603.asp (Oct. 17, 2003).

2. *Id.*

3. Framework Convention for the Protection of National Minorities, *opened for signature* Feb. 1, 1995, C.E.T.S. No. 157 (entered into force Feb. 1, 1998), *available at* http://conventions.coe.int/Treaty/EN/cadreprincipal.htm (last visited Feb. 24, 2004) [hereinafter Framework Convention].

4. Francesco Capotorti, *The First European Legislation on the Protection of National Minorities*, *in* THE CHALLENGES OF A GREATER EUROPE: THE COUNCIL OF EUROPE AND DEMOCRATIC SECURITY 147 (Council of Europe Publ'g 1996) (emphasis added).

5. At least one scholar suggests similar distinction: "The [Framework Convention for the Protection of National Minorities] protects only 'national' not religious minorities Thomas Giegerich, *Freedom of Religion as Source of Claims for Equality and Problems for Equality*, 34 ISR. L. REV 211, 227 n.66 (2000).

6. The definition of "national minority" may have a significant impact in the freedom of religion area, particularly for those religions which actively proselytize converts. Proselytizing religions are

by generally discussing the differing approaches to minority rights. Part III will focus on efforts to protect minority rights between World War I and World War II. Part IV will focus on developments between World War II and the end of the Cold War, and Part V will focus on the period immediately following the Cold War. Part VI will be devoted to a discussion of efforts to protect national minorities following the Cold War. Finally Part VII will offer a brief conclusion.

II. GENERAL APPROACHES TO PROTECTING MINORITY RIGHTS

Protection of minorities' rights can follow one of two general approaches: an individual rights or a group rights approach.[7] The individual rights approach requires that a person who has been discriminated against petition the government (usually the courts) for redress. By granting that individual relief, the court (at least theoretically) sends a message to all would-be discriminators that such discrimination will not be tolerated. As a result, discrimination in society *as a whole*, as well as discrimination against the specific minority group the petitioner represents, should decrease based upon the government's efforts to protect the rights of that one individual.[8]

The group rights approach, on the other hand, "guarantees the rights of groups, by name, [and] specifically reserves for groups a certain proportion of posts in government, in civil services, in the universities, [and] in business."[9] The group rights approach operates by way of a quota or some other preference for stated minorities, guaranteeing those minorities representation in the major centers of power within a country (in the government, universities, etc.) Individuals from each minority group who hold these positions of power will, it is rationally assumed, act to protect the rights of the minority they represent. The idea behind the U.S. affirmative action movement is arguably based upon a group approach to minority rights.[10]

An individual rights approach is responsive by nature. Courts may only respond to an individual's complaint of a violation of his/her minority rights after the violation has occurred. An individual rights approach will punish discrimination after-the-fact, but it does not contemplate positive action to prevent such discrimination from happening again. A group rights approach, on the other

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likely to draw converts from all racial, cultural, and linguistic groups within a country. While the adherents of a proselytizing religion are likely (at least initially) to be minority within given country, they are also likely to have only one characteristic in common, namely religion.

7 For a good discussion of both the individual rights and group rights approaches to minority rights, see Nathan Glazer, *Individual Rights against Group Rights*, *in* THE RIGHTS OF MINORITY CULTURES 123, 123-24 (Will Kymlicka, ed., 1995).

8. In questioning the validity of the individual rights approach, Glazer asks, "Does not every other individual who is a member of the group also require satisfaction and compensation?" *Id.* at 124.

9. *Id.* at 126.

10. *See* Jack Greenberg, *Affirmative Action in Higher Education: Confronting the Condition and Theory*, 43 B.C. L. REV. 521, 580-81 (acknowledging and challenging the argument that affirmative action is based on group rights approach to minority rights and is therefore violation of the equal protection clause).

hand, is prospective by nature. By guaranteeing each minority a certain number of positions within government, education, etc., the group rights approach acts prospectively to guarantee minority representation in these vital institutions of society even before specific acts of discrimination are alleged.

Nathan Glazer argues that "the *form* of a nation's response to diversity—individual rights or group rights—should have no bearing on whether we consider that nation responsive to human rights and to civil rights."[11] Furthermore, he notes that neither approach is more consistent with democracy, as is evidenced by the fact that the some democracies (for example, the United States, the United Kingdom, France, and Australia) tend to prefer the individual rights approach while other democracies (Canada, Belgium, Malaysia, and India) prefer the group rights approach.[12]

Which approach to minority rights a country chooses will, however, have a profound effect upon the future of that country If the country sees itself (or hopes to see itself) as a single, unified society, a group rights approach would defeat that goal by further ingraining group identities rather than helping to dissolve them. A group rights approach

> make[s] a statement to all [of a country's] individuals and groups that people derive rights not only from a general citizenship but *from another kind of citizenship within a group.* And just as laws and regulations are required to determine who is a citizen of the state and may exercise the rights of a citizen, so would laws and regulations be required to determine who is a citizen of subsidiary group, and who may exercise the rights of such a citizenship.[13]

However, if a country sees itself as a "confederation of groups"[14] rather than as a single, unified society, a group rights approach would be appropriate. Thus, the individual rights approach is the proverbial "melting pot. In terms of human rights, each person has the same rights as every other person, regardless of individual characteristics such as race, creed, nationality, language, or religion. The group rights approach sees society as something more akin to beef stew, with each group (like the carrot, the potato, and the beef) maintaining its integrity while still being mixed in the same pot. The individual rights approach seeks to be "color-blind, while the group rights approach openly acknowledges the full rainbow of human diversity and seeks to have each "color" respect the other.

While Glazer acknowledges that both approaches to minority rights can legitimately provide protection for minorities, he also seems to acknowledge that the group rights approach has certain drawbacks of its own:

> If we choose the group-rights approach we say that the differences between some groups are so great that they cannot achieve satisfaction on the basis of individual rights. We say, too, that—whether we want to or not—we will permanently

11. Glazer, *supra* note 7, at 133.
12. *Id.*
13. *Id.* at 134 (emphasis added).
14. *Id.*

> section the society into ethnic groups by law. Even if advocates of group rights claim this is a temporary solution to problems of inequality, as they do in India and in the United States, it is inconceivable to me that benefits given in law on the basis of group membership will not strengthen groups, will not make necessary *the policing of their boundaries*, and will not become permanent in a democratic society, where benefits once given cannot be withdrawn.[15]

Because the Framework Convention adopts elements of a group rights approach, it is just this policing of boundaries that makes the definition of national minority so important to understanding the protections provided by the Framework Convention.

The human rights movement for most of the latter half of the twentieth century approached minority rights through individual rights avenues. This approach may be necessary given the international nature of most human rights instruments: A group rights approach to minority rights requires a micro-managed system for determining how many persons from each minority should be allocated positions within government, education, etc. Such decisions are probably better left to individual countries to make, and a pure group rights approach would therefore be a less suitable mechanism for an international treaty on the protection of minority rights.

III. BETWEEN WORLD WAR I AND WORLD WAR II

The term "national minority" appears to be a peculiarly European term, as it does not appear in the Universal Declaration of Human Rights (the "UDHR"),[16] the International Covenant on Civil and Political Rights (the "ICCPR"),[17] the International Covenant on Economic, Social and Cultural Rights (the "ICESCR"),[18] the American Convention on Human Rights,[19] or the African Charter on Human and Peoples' Rights.[20] Besides the Council of Europe Framework Convention for the Protection of National Minorities, it appears that the term "national minority" is only used with the same meaning[21] in the European

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15. *Id.* at 137 (emphasis added).

16. *See Universal Declaration of Human Rights*, G.A. Res. 217A(III), U.N. GAOR, 3d Sess., art. 2 (1948), *available at* http://www.un.org/Overview/rights.html (last visited Feb. 24, 2004) [hereinafter UDHR].

17. *See* International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S 171(entered into force Mar. 23, 1976), *available at* http://www.hrweb.org/legal/cpr.html (last visited Feb. 24, 2004) [hereinafter ICCPR].

18. *See* International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 19, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976), *available at* http://www.unhchr.ch/html/menu3/b/a_cescr.htm (last visited Feb. 24, 2004) [hereinafter ICESCR].

19. *See* American Convention on Human Rights, 1144 U.N.T.S. 123 (entered into force July 18, 1978), *available at* http://www1.umn.edu/humanrts/oasinstr/zoas3con.htm (last visited Feb. 24, 2004).

20. *See* African Charter on Human and Peoples' Rights, *adopted* June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, *available at* http://www1.umn.edu/humanrts/instree/z1afchar.htm (last visited Feb. 24, 2004).

21. The term does appear in the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, but it appears to carry a different meaning than that

Convention for the Protection of Human Rights and Fundamental Freedoms (the "ECHR")[22] and in the Draft Treaty establishing a Constitution for Europe, which notes that "[a]ny discrimination based on any ground such as ethnic or social origin [or] membership in a national minority shall be prohibited."[23] Thus, a basic understanding of the history of minority rights, particularly in the context of European history, is important to understanding the Framework Convention and the term "national minority

A. Nationalism

The prevailing theory at the end of World War I was nationalism; that is, "the notion that the boundaries of the nation and the state should coincide."[24] A nationality (or nation) is "a people having a common origin, tradition, and language and capable of forming or actually constituting a nation-state."[25] The goal at the end of World War I was to give each nation a state and thereby make each state nearly homogenous in terms of the characteristics of its inhabitants.

However, the Paris Conference was soon faced with "the practical impossibility of a coherent territorial division of Europe given the difficulties connected with the multiplicity of nationalities,"[26] and the result was that "some 20-30 million people found themselves continuing in, or newly cast in, the role of national minorities."[27] For example, the Allies "placed German-speaking minorities under the rule of weak central and east European states."[28] The Jewish minorities in these newly created states were also a concern.[29] In the early stages of the drafting of the Covenant of the League of Nations, the existence of these minorities in the newly-defined countries of Europe was recognized as a threat to international peace.[30]

During the drafting of the Covenant of the League of Nations, some of the

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contemplated by the Framework Convention. *See* discussion *infra* Part V

22. *See* Convention for the Protection of Human Rights and Fundamental Freedoms, art. 14, *opened for signature* Nov. 4, 1950, C.E.T.S. No. 005 (entered into force Sept. 3, 1953), *available at* http://conventions.coe.int/treaty/en/Treaties/Html/005.htm (last visited Feb. 24, 2004) [hereinafter ECHR].

23. Draft Treaty establishing Constitution for Europe, art. II-21(1), CONV 850/03, *at* http://european-convention.eu.int/docs/Treaty/cv00850.en03.pdf (July 18, 2003).

24. David Wippman, *The Evolution and Implementation of Minority Rights*, 66 FORDHAM L. REV 597, 599 (1997).

25. Merriam-Webster Dictionary, *available at* http://www.m-w.com/cgi-bin/dictionary?book=Dictionary&va=nationality (last visited Feb. 24, 2004).

26. *Study of Control and Monitoring Systems in International Conventions: Proposals for a Control or Monitoring System Under a Framework Convention on the Protection of Minorities*, para. 22, Ad Hoc Comm. for the Prot. of Nat'l Minorities, CAHMIN (94) 7 (Apr. 12, 1994) (photocopy on file with author) [hereinafter CAHMIN (94) 7].

27. Wippman, *supra* note 24, at 599. Wippman also notes that "the vagaries of history, geography, and politics made it impossible to give every nation a state of its own. *Id.*

28. Hugh Miall, *Introduction* to MINORITY RIGHTS IN EUROPE 2 (Hugh Miall, ed., 1994).

29. *See* MALCOLM D. EVANS, RELIGIOUS LIBERTY AND INTERNATIONAL LAW IN EUROPE 104 (1997).

30. *Id.* at 86.

participants suggested that protecting freedom of religion was also important to protecting international security.[31] They recognized that religious persecution could lead to open conflict and even war.[32] A clause providing for the protection of religious freedom was considered[33] but ultimately rejected.[34]

B. The Minorities Treaties

Also absent from the Covenant of the League of Nations was a provision for the protection of minority rights. Instead, protection for minority rights was provided through a series of Minorities Treaties signed by the newly-created and the newly-expanded nations of Europe.[35] The Allied and Associated Powers negotiated minorities' treaties with Poland, Czechoslovakia, the Serb-Croat-Slovene state, Romania, and Greece.[36] All of these treaties were based on the treaty with Poland, but each varied somewhat according to the specific needs of the newly-created (or newly-expanded) country and the specific concerns of the Allied powers for that country.[37]

Although the Polish treaty is termed a *minorities* treaty the main concern of the treaty was the protection of Polish Jews:[38]

> Above all else, [the Polish minorities' treaty] was designed to protect the Jewish population in the new State of Poland and it was the Jewish lobby that made the treaty a reality. *Its applicability to other minority groups was little more than a side effect.* Although concern was expressed for other minorities and their needs made known, they had little impact upon the discussions and some amendments distinctly disadvantageous to other minorities were accepted in order to placate Polish unease at the extent of the protection being offered to the Jews.[39]

The Jewish minority was of particular concern given the centuries of anti-Semitism that had persisted in Europe. The fact that the Jewish minority had in common a single culture, religion, and language was not without significance. It was precisely because of the combination of the Jews' unique culture, religion, and language that they were separated from and feared by the communities in which they lived.

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31. *See id.* at 90.

32. *See id.*

33. *See generally id.* at 93-103 (explaining that the drafters' attempts to include a include a provision concerning religious freedom were hindered by disagreements about the scope of protection that the Covenant should afford).

34. *Id.* at 104.

35. *See id.*

36. *Id.* at 125. Other states joining the League were requested to comply with the Minorities treaties as well. *Id.* at 139. Latvia, Lithuania, and Estonia joined and made declarations for the protection of minorities within their borders. *Id.* at 142. One final minorities declaration was made by Iraq in May 1932. *Id.*

37. *See id.* at 125.

38. *Id.* at 105.

39. *Id.* (emphasis added).

Despite the relatively large population of Jews within the country, Germany was not forced to sign a Minorities Treaty because Germany "was still a Great Power and the refusal of the Allies to accept similar obligations [for the protection of minorities] would be put into bold relief by imposing a general regime of minorities obligations upon her."[40] The Minorities Treaties system was thus a less-than-uniform attempt at protecting minorities.

The absence of a provision within the Covenant of the League of Nations for the protection of religious freedom[41] was probably due to the belief that freedom of religion would be a part of the protection of the rights of minorities through the Minorities Treaties. Thus, the Minorities Treaties stayed far clear of recognizing freedom of religion as a fundamental right. Religious freedom was, in essence, guaranteed to minorities as an aspect of their minority status, but no provision was made for religious freedom for those in the majority Persons not covered by the Minorities Treaties could protect their freedom of religion only through the political process (that is, through the legislative and executive branches) rather than through the judiciary.

The Minorities Treaties technically followed an individual rights approach to minority rights.[42] However, because the rights protected could only be asserted by minorities, the Minorities Treaties "had the practical effect of advancing the interests of minorities *as collectivities*. Thus, as a practical matter, the League of Nations' protection regime superimposed some elements of *collective rights* on a *formally individual rights approach* to moderating majority-minority tensions."[43]

Although the Minorities Treaties were concluded with the Allied and Associated Powers, the League of Nations was responsible for treaty enforcement.[44] This move was significant as it was the first time that the protection of minorities had been given to an international organization.[45] However, League of Nations oversight of the Minorities Treaties was unpopular with many of the States bound by them. Delegates from Romania, Poland, Czechoslovakia, and the Serb-Croat-Slovene state argued that allowing the League of Nations to oversee the implementation of the treaties would undermine their sovereignty by giving minorities the right to look beyond national governments to the international community for the protection of their rights.[46] While these arguments did not prevail,[47] the opposition of these states to international supervision of minority rights shows dislike of the system from the outset.

40. *Id.* at 129.
41. *Id.* at 104.
42. Wippman, *supra* note 24, at 600.
43. EVANS, *supra* note 29, at 104 (emphasis added).
44. *Id.* at 129.
45. CAHMIN (94) 7, *supra* note 26, at para. 23.
46. *See* EVANS, *supra* note 29, at 127.
47. *See id.*

C. League Assembly Resolution of September 1921

Despite the Allied Powers' reluctance to take upon themselves the obligations of the Minorities Treaties, a resolution was passed during the Second Session of the League Assembly in September 1921 which stated:

> [T]hose states which are not bound by any legal obligation with respect to minorities treaties will nevertheless observe, in their treatment of their own racial, religious and linguistic minorities, at least as high a standard of justice and toleration as is required by any of the treaties and by the regular action of the Council.[48]

It is interesting here to note the difference between the Minorities Treaties and this League Assembly resolution. The Minorities Treaties were crafted with the protection of one minority in mind, namely the Jewish minority and, as noted above, the applicability of the Minorities Treaties to other minorities was attenuated at best.[49] The League Assembly resolution was meant to apply only to those states in the League of Nations which were not already bound by a minorities' treaty, which suggests that the resolution was meant to impose upon these countries the same obligations that the parties to the Minorities Treaties had undertaken. Unlike the Minorities Treaties, however, this resolution requires states to treat with justice and toleration three distinct kinds of minorities—racial minorities, religious minorities, and linguistic minorities.[50] It is unclear whether this difference was intended or even noted by the members of the League of Nations. However, since the resolution appears to have been intended to impose the same obligations on the members of the League of Nations as imposed by the Minorities Treaties, it could be argued that even the Minorities Treaties themselves were meant to protect purely racial, religious, or linguistic minorities. However, the actual practice of the Minorities Treaties shows little support for this interpretation.

D. The Demise of the Minorities Treaties System

The September 1921 Resolution of the League Assembly did not satisfy the Minorities Treaties countries' demands for a uniform system of minorities' protection. During the fifteenth Session of the League in 1934, Poland went as far as to propose a resolution that a general minorities' convention should be concluded.[51] Such a convention would have provided uniform protection for the rights of minorities among all members of the League of Nations and not just the states of Europe. Although the suggestion received some degree of support, Poland ultimately withdrew the resolution.[52] "The lack of a general and uniform

48. *Id.* at 142.
49. *See id.* at 105.
50. EVANS, *supra* note 29, at 142.
51. *Id.* at 143.
52. *Id.*

system of obligations regarding minorities provided a convenient weapon for those States who wished to avoid their own treaty obligations and Poland ultimately withdrew from the supervisory mechanisms of the League on this basis, undermining the entire system."[53] The lack of *uniformity* within the Minorities Treaties system ultimately proved to be the system's downfall. Although the system failed, it was important as the first international effort to protect minority rights.

IV WORLD WAR II TO THE END OF THE COLD WAR

World War II proved that the concerns over minority rights expressed at the end of World War I were well founded. Germany invaded its neighbors to the east under the pretext of protecting the rights of German minorities living there,[54] and the Holocaust accompanying the war was the most violent expression of anti-Semitism in world history The human rights movement, particularly the Universal Declaration of Human Rights ("UDHR"), was a direct response to these tragedies. The UDHR adopted a purely individual rights approach, within which a discussion of the rights of minorities *as minorities* would have had little meaning. By adopting a universal and uniform approach to human and minority rights, the UDHR (discussed in depth in the next section) addressed the biggest defect in the Minorities Treaties system, namely lack of uniformity and universality

The end of World War II also led to the beginning of the Cold War:

> The Cold War subsequently froze the political map, incidentally bequeathing to the [European] continent the most stable borders it has enjoyed since the French Revolution. Simply put, self-determination was not a real issue between 1945 and 1989. States were sovereign, or if they were not, there was nothing that could be done about it.[55]

Thus, *states* rather than *nations* were sovereign, regardless of the mix of peoples occupying the state. The Cold War pushed the idea of minority rights to a position of secondary importance as the superpowers vied for political and ideological supremacy

A. The Universal Declaration of Human Rights

Because the Universal Declaration of Human Rights adopted an individual rights approach to minority rights, no mention is made of minority rights in either the UN Charter[56] or the Universal Declaration of Human Rights.[57] The most

53. *Id.* at 143-44.

54. James Mayall, *Sovereignty and Self-Determination in the New Europe*, *in* MINORITY RIGHTS IN EUROPE 7, 9 (Hugh Miall ed., 1994).

55. *Id.*

56. Charter of the United Nations, *available at* http://www.unhchr.ch/pdf/UNcharter.pdf (last visited Mar. 2, 2004).

57. UDHR, *supra* note 16, at art. 2. *See also* Patrick Thornberry, *International and European Standards on Minority Rights*, *in* MINORITY RIGHTS IN EUROPE 14 (Hugh Miall ed., 1994).

important right enumerated in the UDHR for the protection of minorities is the principle of non-discrimination. Article 2 of the UDHR declares: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[58] The principle of non-discrimination protects the rights of minorities because a country that cannot discriminate cannot give greater rights to the majority than it gives to a minority. As the noted minorities scholar Patrick Thornberry has argued, the UN Charter and the UDHR do not mention minority rights because "the principle of universal human rights on the basis of non-discrimination on racial, ethnic, religious and other grounds was deemed to be sufficient protection for minority groups."[59] However, Thornberry also argues that "the principle of non-discrimination is only a first step in the protection of minorities, but is not sufficient in itself to deal with the question."[60]

B. The International Covenant on Civil and Political Rights

The ICCPR, by contrast, provides more protection than the mere nondiscrimination principle of the UDHR. Article 27 of the ICCPR specifically provides for the protection of the rights of minorities as minorities:[61]

> In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.[62]

Article 27 clearly distinguishes between three kinds of minorities: A minority may be an ethnic (or cultural)[63] minority, a religious minority, or a linguistic minority, and "persons belonging to *such minorities*"[64] are given certain rights. The use here of the plural term "minorities" makes it clear that Article 27 contemplates three distinct kinds of minorities and that a minority need not have culture, religion, *and* language in common in order to receive protection. Article 27 further emphasizes the distinctness of each of these kinds of minorities by guaranteeing each minority the right to enjoy that quality which makes the minority distinct. Thus, a cultural minority has the right to enjoy its culture, a religious minority has the right to

58. UDHR, *supra* note 16, at art. 2.

59. Thornberry, *supra* note 57, at 14. Of course, if a country does not guarantee the rights and freedoms listed in the UDHR to the majority, the principle of non-discrimination will not protect the rights of minorities. The UDHR accounts for this weakness by stating first that the rights and freedoms of the UDHR apply to everyone in every country, be they part of the majority or minority. UDHR, *supra* note 16, at art. 2.

60. Thornberry, *supra* note 57, at 20.

61. ICCPR, *supra* note 17, at art. 27

62. *Id.*

63. Article 27 refers to an ethnic minority in the introductory phrase and then provides in the predicate of the sentence that the members of such a minority shall have the right "to enjoy their own culture. *Id.* Article 27 thus seems to equate ethnic minority with cultural minority.

64. *Id.* (emphasis added).

practice its religion, and a linguistic minority has the right to use its own language.[65]

1. Article 2 of the UDHR vs. Article 27 of the ICCPR

Article 27 of the ICCPR differs significantly from Article 2 of the UDHR in the kind of protection provided for (or the rights guaranteed to) minorities. Article 2 of the UDHR does not specifically mention the term "minority, nor does it provide any substantive rights but merely provides every person the right to assert every other right listed in the Declaration.[66] Article 27 of the ICCPR, on the other hand, affirmatively provides minorities with the substantive right to enjoy their culture, religion, or language.[67]

These two sections also differ with regards to who can assert protection under them. Article 2 of the UDHR prevents discrimination against any individual, regardless of whether that person is part of the majority or a minority. Article 27 of the ICCPR, on the other hand, protects *only* those belonging to one of the three stated minorities.[68] Furthermore, Article 27 of the ICCPR only applies "[i]n those States in which ethnic, religious or linguistic minorities exist,"[69] suggesting that these rights "may not be universal since the groups may not 'exist' in all states."[70] Thus, Article 2 of the UDHR appears to provide broader but less specific protection than Article 27 of the ICCPR. The fact that minority rights lack universality may help to explain why they were omitted from the Universal Declaration of Human Rights.

Despite the reference in Article 27 to a person's right to enjoy his or her culture, religion, or language "in community with the other members of their group,"[71] the rights guaranteed under Article 27 must be asserted individually Thornberry notes that "[t]he text refers to the rights of persons and not of groups, thus limiting the community or collective dimension of the rights."[72] Thus, like Article 2 of the UDHR, Article 27 of the ICCPR contemplates an individual-rights approach to minority rights.

2. Article 18 vs. Article 27 of the ICCPR

Article 18 of the ICCPR (providing for freedom of religion and belief) and Article 27 of the ICCPR have a significant amount of overlap with respect to religious minorities. Article 18 provides:

> Everyone shall have the right to freedom of thought, conscience and religion.

65. *Id.*
66. UDHR, *supra* note 16, at art. 2.
67. ICCPR, *supra* note 17, at art. 27
68. *Id.*
69. *Id.*
70. Thornberry, *supra* note 57, at 15.
71. ICCPR, *supra* note 17, at art. 27
72. Thornberry, *supra* note 57, at 15.

> This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.[73]

While Article 18 does not specifically mention religious minorities, General Comment 22 to Article 18 suggests that the Article contemplates protection of religious minorities:

> Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions. The Committee therefore views with concern any tendency to discriminate against any religion or belief for any reason, including the fact that they are newly established, *or represent religious minorities that may be the subject of hostility on the part of a predominant religious community.*[74]

Under Article 18, as under Article 27 members of religious minorities must assert their rights individually. Article 18 guarantees the right to freedom of thought, conscience and religion to *everyone*, not to every *group*.[75] However, both Article 18 and Article 27 provide the right to practice one's religion in community with others.[76]

Because both Article 18 and Article 27 apply to religious minorities, what is the difference between the two? Article 27 but not Article 18, is subject to derogation "[i]n time of public emergency which threatens the life of the nation."[77] This fact reveals "[t]he fundamental character of [freedom of thought, conscience and religion guaranteed under Article 18]"[78] and suggests that the rights of religious minorities guaranteed under Article 27 may not be fundamental. However, the right of a religious minority to *profess and practice* its religion under Article 27 is guaranteed without limitation,[79] while the right to *manifest* one's religion or belief (but not the right to believe or to adopt a religion or belief)[80] under Article 18 is subject to "such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others."[81]

These facts are significant, but they do not fully answer the question as to what protections each Article provides and to whom they are provided. General

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73. ICCPR, *supra* note 17, at art. 18(1).

74. General Comment No. 22, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, 48th Sess., para. 2, (1993), *available at* http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/26bd1328bee3bd13c1256a8b0038e0a2/$FILE/G0141468.pdf (last visited Feb. 24, 2004) (emphasis added) [hereinafter General Comment No. 22].

75. ICCPR, *supra* note 17, at art. 18(1).

76. *Id.* at arts. 18(1), 27.

77. *Id* at art. 4(1)-(2)

78. General Comment No. 22, *supra* note 74, at para. 1.

79. *See* ICCPR, *supra* note 17, at art. 27.

80. General Comment No. 22, *supra* note 74, at para. 3.

81. ICCPR, *supra* note 17, at art. 18(3).

Comment 23 affirms that the right guaranteed under Article 27 "is distinct from, and additional to, *all the other rights* which as individuals in common with everyone else, they are already entitled to enjoy under the Covenant."[82] So how is an Article 18 religious minority different from an Article 27 religious minority?[83]

Article 18 applies solely (but universally) to *individuals*, who may or may not be part of a religious minority Article 27 on the other hand, applies to individuals "who belong to a *group* and who share in common culture, a religion and/or a language."[84] "Although the rights protected under Article 27 are *individual rights*, they depend in turn on the ability of the *minority group* to maintain its culture, language or religion."[85] Article 27 thus incorporates a group rights element for the protection of minority rights much like the Minorities Treaties. Furthermore, the existence of an Article 27 minority group "does not depend upon a decision by that State party but requires [establishment] by *objective criteria*."[86] Although not specifically indicated, these objective criteria presumably are the minority's unique ethnic, religious or linguistic characteristics.[87]

Inherent in Article 27 therefore, is the existence of a group.[88] Group affiliation for purposes of Article 27 is more than just mutual association, however, for even the members of an Article 18 religious minority may manifest their religious belief in community with others.[89] Article 18, on the other hand, may be asserted by a person constituting a religion of one.[90]

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82. General Comment No. 23, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, 50th Sess., para. 1 (1994), *available at* http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/26bd1328bee3bd13c1256a8b0038e0a2/$FILE/G0141468.pdf (last visited Feb. 24, 2004) (emphasis added) [hereinafter General Comment No. 23].

83. I will refer to a religious minority who qualifies for Article 27 protection as an Article 27 minority; religious minority who does not qualify for Article 27 protection will be referred to as an Article 18 minority.

84. General Comment No. 23, *supra* note 82, at para. 5.1 (emphasis added).

85. *Id.* at para. 6.2 (emphasis added).

86. *Id.* at para. 5.2 (emphasis added).

87. *See id.*, ICCPR, *supra* note 17, at art. 27.

88. General Comment No. 23 provides that an Article 27 minority must include members "who share in common culture, religion *and/or* language. General Comment No. 23, *supra* note 82, at para. 5.1 (emphasis added). The use of the "and/or" here in General Comment 23 is significant, for it suggests that a purely cultural, religious, or linguistic minority may constitute an Article 27 minority, but it is certainly possible that such an Article 27 minority will have more than one characteristic in common.

89. ICCPR, *supra* note 17, at art. 18(1).

90. The explanation given in this paragraph hinges in large part on General Comments No. 22 and No. 23 to Articles 18 and 27 of the ICCPR, respectively. General Comment No. 22 was written in 1993, and General Comment No. 23 was written in 1994. General Comment No. 22, *supra* note 74; General Comment No. 23, *supra* note 82. Other international instruments adopted around this same time (the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992) and the Framework Convention for the Protection of National Minorities (opened for signature 1995)) use a similar hybrid individual rights-group rights approach to minority rights. While the interpretation given in General Comments No. 22 and No. 23 is consistent with the text of Articles 18 and 27, this interpretation is not necessarily inherent in these Articles. Thus, it is possible (although not certain) that General Comments Nos. 22 and 23 were influenced by the work on

Article 27 minorities are to receive "positive measures of protection"[91] against acts by the State and by others within the State that would infringe on their rights, and "[p]ositive measures by States may also be necessary to protect the *identity of a minority* and the rights of its members to enjoy and develop their culture and language and to practise their religion, in community with the other members of the group."[92] This Comment reveals that Article 27 is concerned not so much with protecting religious freedom as with protecting the *group identity* of cultural, linguistic, and religious minorities. While such positive measures must respect the principles of non-discrimination and equal protection found in Articles 2.1 and 26, respectively,[93] special treatment of an Article 27 minority "aimed at correcting conditions which prevent or impair the enjoyment of the rights guaranteed under [A]rticle 27"[94] is deemed permissible if based on reasonable and objective criteria.[95]

Article 27 differs from the Minorities Treaties approach by providing a uniform system for the protection of minority rights. Furthermore, the ICCPR is intended to be a declaration of fundamental rights,[96] so an argument could be made that the rights guaranteed under Article 27 are fundamental (despite the fact that they are severable), unlike the rights guaranteed under the Minorities Treaties.

C. The Convention for the Protection of Human Rights and Fundamental Freedoms

The European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") protects minority rights through the mechanism of non-discrimination: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."[97] The ECHR thus adopts a purely individual rights approach to minority rights, as did the UDHR.

The ECHR is significant, as it is the first international treaty to use the term "national minority Religion is mentioned in the ECHR as a separate ground of prohibited discrimination, possibly indicating that a national minority and a religious minority should be treated as separate and distinct concepts.

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these other international instruments and may be the result of an intellectual trend in the protection of minority rights that prevailed throughout the 1990s.

91. General Comment No. 23, *supra* note 82, at para. 6.1.

92. *Id.* at para. 6.2 (emphasis added).

93. *Id.*

94. *Id.*

95. *Id.*

96. The preamble to the ICCPR states that "[the] recognition of the *inherent dignity* and of the equal and *inalienable rights* of all members of the human family is the foundation of freedom, justice and peace in the world. ICCPR, *supra* note 17, at pmbl. (emphasis added). Consequently, it appears that the ICCPR, like the UDHR, is meant to enumerate fundamental, universal rights.

97. ECHR, *supra* note 22, at art. 14.

V MINORITY RIGHTS FOLLOWING THE COLD WAR: THE UN DECLARATION ON THE RIGHTS OF PERSONS BELONGING TO NATIONAL OR ETHNIC, RELIGIOUS AND LINGUISTIC MINORITIES

The end of the Cold War brought renewed interest in minority rights. James Mayall notes that "with the end of the Cold War and the collapse of communism the protection of minority rights has risen to the top of the political agenda for the first time since 1945."[98]

The earliest legal instrument in this flurry of activity regarding minority rights is the 1992 United Nations General Assembly Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities ("UN Declaration").[99] While this Declaration refers to the term "national minority, the term as used here seems to be equated with ethnic minority only[100] and is likely not equivalent to the term national minority as used in the Framework Convention.

The UN Declaration is significant because, like the Minorities Treaties and Article 27 of the ICCPR, it blends individual rights and group rights ideas in protecting minority rights. The rights enumerated in the Declaration must be asserted by individuals, not by groups,[101] but the Declaration requires States to "protect the existence and *identity*" of national or ethnic, cultural, religious and linguistic minorities. Again, as with Article 27 of the ICCPR, it is the minority's identity that is to be particularly protected.

The UN Declaration goes a step further than Article 27 however, by requiring that States both protect and encourage conditions *promoting* the identity of these minorities.[102] Promotion of a minority's identity would likely require positive measures by States to foster the development of such minorities. This special treatment "shall not prima facie be considered contrary to the principle of equality contained in the Universal Declaration of Human Rights."[103] Furthermore, States must allow members of these minorities the opportunity to contact other members of their minority either within the State or across international borders.[104]

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98. Mayall, *supra* note 54, at 7

99. *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, G.A. Res. 135, U.N. GAOR, 47th Sess., 92nd plen. mtg. (1992), *available at* http://www.un.org/documents/ga/res/47/a47r135.htm (last visited Feb. 24, 2004) [hereinafter UN Declaration].

100. The title of the Declaration refers to "National or Ethnic" minorities, thus appearing to equate the two terms. *Id.*

101. "*Persons* belonging to national or ethnic, religious and linguistic minorities have the right to enjoy their own culture, to profess and practise their own religion, and to use their own language *Id.* at art. 2(1) (emphasis added).

102. *Id.* at art. 1(1).

103. *Id.* at art. 8(3). Whether this special treatment is truly fair and non-discriminatory will be for the reader to decide.

104. *Id.* at art. 2(5).

VI. PROTECTION OF NATIONAL MINORITIES FOLLOWING THE COLD WAR

A. Early Attempts to Protect National Minorities

Although the end of the Cold War brought an increased interest in the rights of minorities generally, as will be shown, special concern was also given to so-called "national minorities. The term "national minority, however, appears to have grown out of the period immediately following World War II. As early as 1949, the Parliamentary Assembly of the Council of Europe recognized the importance of protecting the rights of national minorities.[105] In 1961, the Parliamentary Assembly recommended the inclusion of an article in a second additional protocol to the ECHR to guarantee the rights of national minorities.[106] A Committee of Experts was organized to consider the adoption of such a protocol, but "[i]n 1973 it concluded that, from a legal point of view, there was no special need to make the rights of minorities the subject of a further protocol to the ECHR."[107] European leaders then put aside the idea of special legal protection for national minorities for well over a decade.

B. Political Developments Leading Up to the Adoption of the Framework Convention for the Protection of National Minorities

1. Copenhagen Document of 29 June 1990

A series of political events in the early 1990s had a significant impact upon the development of the Framework Convention. In June 1990, the Conference for Security and Co-operation in Europe adopted an agreement for the advancement of human rights and fundamental freedoms,[108] which laid the groundwork for what would become significant developments in the protection of national minorities. This agreement, called the Copenhagen Document, provides that "[p]ersons belonging to *national minorities* have the right freely to express, preserve and develop their ethnic, cultural, linguistic *or* religious identity and develop their culture in all its aspects."[109] The Copenhagen Document thus clearly anticipates that a national minority need not have ethnic, cultural, linguistic, *and* religious characteristics in common.

The Copenhagen Document provides that a person belonging to a national

105. Explanatory Report to the Framework Convention for the Protection of National Minorities, para. 1, *available at* http://www.humanrights.coe.int/Minorities/Eng/FrameworkConvention/Explanatory%20report/explreport.htm (emphasis added) (last visited Feb. 22, 2004) [hereinafter Explanatory Report].

106. *Id.*

107. *Id.* at para. 2.

108. Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, June 29, 1990, *available at* http://www.osce.org/docs/english/1990-1999/hd/cope90e.htm (last visited Feb. 22, 2004) [hereinafter Copenhagen Document].

109. *Id.* at para. 32 (emphasis added).

minority may choose whether to be treated as such,[110] a new concept later adopted formally in the Framework Convention.[111] Also significant is the fact that the Copenhagen Document provides national minorities the right "to establish and maintain unimpeded contacts among themselves within their country *as well as contacts across frontiers* with citizens of other States with whom they share a common ethnic or national origin, cultural heritage or religious beliefs."[112] This concept later found its way into the UN Declaration[113] and the Framework Convention.[114]

2. Recommendation 1134 of the Parliamentary Assembly (1990)

The Parliamentary Assembly of the Council of Europe also began to consider the need for greater protection of minorities within Europe. In Recommendation 1134 (1990),[115] the Parliamentary Assembly noted that with the fall of the communist governments in Central and Eastern Europe, "grave minority problems [have] come to light [which] have been ignored and neglected for many years by authoritarian rule."[116] The Parliamentary Assembly noted the need to implement the Copenhagen Document of 29 June 1990[117] and recommended, as it had in 1961, that either the Committee of Ministers draw up a European Convention on Human Rights protocol on minorities' rights, or that a special Council of Europe convention be enacted to protect minorities' rights.[118] This recommendation is probably the earliest suggestion of the need for a Council of Europe convention for the protection of minorities.

In making this recommendation, the Parliamentary Assembly had in mind the protection of minorities generally. The Recommendation notes that "[t]here are *many* kinds of minorities in Europe. They have certain characteristics which may be ethnic, linguistic, religious or other which distinguish them from the majority in a given area or country,"[119] and the document recommends the protection "[of] the rights of [all] *minorities*,"[120] not just national minorities.

National minorities did, however, receive special recognition. Recommendation 1134 defines national minorities as "separate or distinct groups, well defined and established on the territory of a state, the members of which are nationals of that state and have certain religious, linguistic, cultural or other

110. *Id.*

111. Framework Convention, *supra* note 3, at art. 3(1).

112. Copenhagen Document, *supra* note 108, at para. 32.4 (emphasis added).

113. UN Declaration, *supra* note 99, at art. 2(5).

114. Framework Convention, *supra* note 3, at art. 17(1).

115. *On the Rights of Minorities*, Eur. Parl. Ass., 42nd Sess., pt. 2, para. 6, Recommendation 1134 (1990), *available at* http://assembly.coe.int/Main.asp?link=http%3A%2F%2Fassembly.coe.int%2FDocuments%2FAdoptedText%2Fta90%2FEREC1134.htm (last visited Feb. 22, 2004) [hereinafter Recommendation 1134].

116. *Id.*

117. *Id.* at para. 14.

118. *Id.* at para. 17

119. *Id.* at para. 1 (emphasis added).

120. *Id.* at para. 17 (emphasis added).

characteristics which distinguish them from the majority of the population,"[121] and recommends a number of special protections for national minorities.[122]

Recommendation 1134's definition of national minority does not put any special emphasis on the number or kind of characteristics that the members of a national minority have in common. Instead, a national minority may have either "religious, linguistic, cultural *or* other characteristics"[123] in common and distinct from the majority.

The key characteristics of a national minority under this definition are that the group is "separate or distinct"[124] (the "separateness element") and that it is "well defined and established"[125] (the "temporal element"). By focusing on "well defined and established" minorities, Recommendation 1134's proposed definition of national minority focuses on groups with an historical presence in Europe. Thus, "new" minorities (including new religions or religious groups) would likely not fall under this definition. Of course, "new" and "established" are relative terms, and the Recommendation gives no indication as to how long a group needs to have been in a particular country in order to fall under this definition.

In May 1992, the Committee of Ministers instructed the Steering Committee for Human Rights to consider "the possibility of formulating specific legal standards relating to the protection of *national minorities*."[126] Thus, despite the Parliamentary Assembly's concern for the rights of minorities in general, these early instructions from the Committee of Ministers focused specifically on the issue of national minorities.

3. Recommendation 1201 of the Parliamentary Assembly (1993)

In 1993, the Parliamentary Assembly issued another recommendation, Recommendation 1201, on national minorities.[127] While the Parliamentary Assembly had previously suggested in Recommendation 1134 the adoption of either an additional protocol to the ECHR or a special convention on national minorities, Recommendation 1201 expressed the Assembly's preference for the passage of an additional protocol[128] to the ECHR because it would allow minorities to "benefit from the remedies offered by the convention, particularly the right to submit applications to the European Commission and Court of Human Rights."[129]

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121. *Id.* at para. 11.

122. *See id.* at para. 11(i)-(v).

123. *Id.* at para. 11 (emphasis added).

124. *Id.*

125. *Id.*

126. Explanatory Report, *supra* note 105, at para. 4.

127. *Additional Protocol on the Rights of National Minorities to the European Convention on Human Rights*, Eur. Parl. Ass., 44th Sess., pt. 4, Recommendation 1201 (1993), *available at* http://assembly.coe.int/Main.asp?link=http%3A%2F%2Fassembly.coe.int%2FDocuments%2FAdoptedText%2Fta93%2FEREC1201.htm (last visited Feb. 22, 2004) [hereinafter Recommendation 1201].

128. *Id.* at para. 8.

129. *Id.* at para. 7.

Recommendation 1201 proposes the text for such an additional protocol, which includes a different definition of national minority:

> [T]he expression "national minority" refers to a group of persons in a state who:
>
> a. reside on the territory of that state and are citizens thereof;
>
> b. maintain longstanding, firm and lasting ties with that state;
>
> c. display distinctive ethnic, cultural, religious or linguistic characteristics;
>
> d. are sufficiently representative, although smaller in number than the rest of the population of that state or of a region of that state;
>
> e. are motivated by a concern to preserve together that which constitutes their common identity, including their culture, their traditions, their religion or their language.[130]

While differing on some fine points, the definitions in Recommendations 1134 and the proposed Additional Protocol of Recommendation 1201 have much in common; Recommendation 1134 talks about national minorities as being nationals of the state,[131] while the Additional Protocol of Recommendation 1201 talks about national minorities being residents and citizens of the state.[132] Recommendation 1134 speaks of national minorities as being "well defined and established,"[133] while the Additional Protocol talks about them "maintaining longstanding, firm and lasting ties with [a] state."[134] Thus, both include a temporal element. Furthermore, Recommendation 1134 speaks of national minorities as having "religious, linguistic, cultural or other characteristics"[135] in common, while the proposed Additional Protocol states that a national minority is a group that has "distinctive ethnic, cultural, religious or linguistic characteristics."[136] Notably, in both definitions the connector "or" is used in the list of characteristics that might define a national minority, thus leaving open the possibility that a national minority may be a group that has only one or a few of the mentioned

130. *Id.* at Text of the Proposal for an Additional Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Concerning Persons Belonging to National Minorities, § I, art. 1 (the "Additional Protocol").

131. Recommendation 1134, *supra* note 115, at para. 11.

132. Recommendation 1201, *supra* note 127, at Additional Protocol, § I, art. 1(a).

133. Recommendation 1134, *supra* note 115, at para. 11.

134. Recommendation 1201, *supra* note 127, at Additional Protocol, § I, art. 1(b). Admittedly, the historical requirement as proposed in the Additional Protocol seems clearly to set a higher standard than the definition in Recommendation 1134 by requiring not just an established relationship with the state but "*longstanding, firm, and lasting ties*. *Id.* (emphasis added). However, in both cases, relatively "new" minorities would be excluded from the definition.

135. Recommendation 1134, *supra* note 115, at para. 11.

136. Recommendation 1201, *supra* note 127, at Additional Protocol, § I, art. 1(c).

characteristics in common. Noticeably absent from Recommendation 1201, however, is the separateness element contained in Recommendation 1134.[137]

The definition in the Additional Protocol proposed by Recommendation 1201 does add a few nuances to the definition of national minority contained in Recommendation 1134. Under the definition in the proposed Additional Protocol, a national minority must be "sufficiently representative"[138] among the general population of the country That is, under this definition, national minorities, while still minorities, are not small, isolated groups but minorities of considerable size. Furthermore, while a national minority under this definition may have only one or a few distinctive characteristics in common, the group would have to be particularly motivated by a desire "to preserve together that which constitutes their *common identity*."[139] This fact is further underscored in Section 2, Article 2 of the proposed Protocol which states that "[m]embership of a national minority shall be a matter of free personal choice."[140] Thus, under this definition, a national minority is not only a group with characteristics distinct from the majority, but it is also one that is particularly motivated to maintain those distinguishing characteristics.[141]

Recommendation 1201 noted that the issue of the protection of national minorities was "extremely urgent and one of the most important activities currently under way at the Council of Europe."[142] Therefore, the Parliamentary Assembly recommended the adoption of a protocol at the then upcoming summit of heads of state and government to be held in Vienna on October 8 and 9 of 1993.[143]

4. The Final Declaration of the Heads of State and Government of the member States of the Council of Europe, Vienna, 9 October 1993

The Vienna summit did not, however, go so far as to adopt an additional protocol to the ECHR. Instead, the participants adopted a document entitled "The Final Declaration of the Heads of State and Government of the member States of the Council of Europe, Vienna, 9 October 1993" (the "Vienna Declaration"). Meeting less than two years after the dissolution of the Soviet Union, the

137. *See* text *supra* accompanying note 124. Recommendation 1134 defines national minorities in terms of "separate and distinct groups, which suggests that national minority may live as separate "community within a community. Recommendation 1134, *supra* note 115, at para. 11. In contrast, the Additional Protocol of Recommendation 1201 mentions only that national minorities have distinctive characteristics. Recommendation 1201, *supra* note 127, at Additional Protocol, § I, art. 1. The Additional Protocol thus omits the suggestion that national minorities may live as separate communities.

138. Recommendation 1201, *supra* note 127, at Additional Protocol, § I, art. 1(d).

139. *Id.* § I, art. 1(e) (emphasis added).

140. *Id.* § II, art. 2(1).

141. This aspect of the definition contained in the proposed Additional Protocol is similar to Article 3(1) of the Framework Convention for the Protection of National Minorities, which states that "[e]very person belonging to a national minority shall have the right freely to choose to be treated or not to be treated as such. Framework Convention, *supra* note 3, at art. 3(1).

142. Recommendation 1201, *supra* note 127, at para. 9.

143. *Id.*

participants at the summit acknowledged that "the end of the [Cold War] division of Europe offers an historic opportunity to consolidate *peace and stability* on the continent."[144] The participants expressed a desire to have the countries recently freed from communist oppression join the Council of Europe, provided they bring their political institutions and legal systems in line with European standards.[145] Among the factors specifically mentioned in this regard was the protection of national minorities.[146]

The Vienna Declaration was primarily concerned with maintaining security and stability in Europe.[147] The participants expressed a hope that "Europe can become a vast area of *democratic security*."[148] They lamented the fighting in Yugoslavia and issued a call to leaders to put an end to such conflicts.[149] The participants also expressed their desire to make the Council of Europe "capable of contributing to *democratic security*" and of cooperating with "other organizations involved in the construction of a *democratic and secure Europe*."[150] They expressed resolve to make full use of the organs of the Council of Europe "to promote the strengthening of *democratic security in Europe*"[151] as well as a hope that the political dialogue within the Council of Europe would "make a valuable contribution to the *stability* of [the] continent."[152] Finally, the Vienna Declaration expressed the participants' intent to cooperate with non-European States in order "to promote *peace and democracy*."[153] Democratic security, if it means nothing else in this context, is security and stability in a post-communist (and now democratic) Central and Eastern Europe. The protection of minority rights was given particular notice in light of the history of minority rights in Europe and the conflicts that have arisen over the question of minorities in the past.

Appendix II to the Vienna Summit was dedicated to national minorities.[154] It noted that national minorities have been created by "the upheavals of history" in Europe and that these minorities "should be protected and respected so that they can contribute to stability and peace."[155] The "upheavals of history"[156] referred to here are, undoubtedly, the two world wars that swept across Europe during the twentieth century New minorities were created when territory occupied by

144. Vienna Summit Final Declaration, Oct. 9, 1993, *available at* http://www.coe.int/T/E/human_rights/Ecri/5-Archives/2-Other_texts/2-Vienna_Summit/Declaration/Declaration_Vienna_Summit.asp (last visited Feb. 22, 2004) (emphasis added).

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* (emphasis added).

149. *Id.*

150. *Id.* (emphasis added).

151. *Id.* (emphasis added).

152. *Id.*

153. *Id.* (emphasis added).

154. *See* Vienna Declaration, Appendix II, Oct. 9, 1993, *available at* http://cm.coe.int/ta/decl/1993/Vienna%20Summit%20Declaration.htm (last visited Feb. 22, 2004).

155. *Id.*

156. *Id.*

members of one nationality was placed within the borders of a country dominated by a different nationality thus making the first nationality a minority within the newly-restructured country Good examples are the German[157] and Hungarian[158] minorities of Eastern Europe created following World War I. These facts suggest that whenever there is such a kin-state/kin-minority relationship (e.g., Germany and the German minorities or Hungary and the Hungarian minorities living outside of Germany and Hungary, respectively), the kin-minority will be a national minority. This definition is certainly consistent with the Framework Convention for the Protection of National Minorities, but it does not appear to encompass the entire definition of national minority for purposes of the Convention.[159]

C. The Text of the Framework Convention for the Protection of National Minorities

On November 4, 1993, less than a month after the Vienna Declaration, the Committee of Ministers established the Ad Hoc Committee for the Protection of National Minorities ("Ad Hoc Committee" or "CAHMIN").[160] This committee was the body responsible for drafting the Framework Convention for the Protection of National Minorities.[161] Its terms of reference instructed the committee to draft both a framework convention for the protection of national minorities *and* a protocol to the European Convention on Human Rights in the cultural field.[162] During the first meeting of the Ad Hoc Committee, it was decided (probably in response to the instruction given in the Final Declaration of the Vienna Summit to draft a framework convention "with minimum delay")[163] that a clear preference should be given to the completion of a framework Convention while hindering as little as possible the completion of a draft protocol to the European Convention on Human Rights.[164] The result of the efforts of the Ad Hoc Committee is the

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157. *See supra* discussion accompanying notes 26-30.

158. Lobjakas, *supra* note 1. This article includes the following explanation from Viktor Orban of the creation of the Hungarian minorities:

> There is Hungarian issue. The Hungarian issue is that after the World War I, two-thirds of Hungarian territory and millions of its people belonged to other, newly born neighboring countries. Now the territories are not an issue, but the people are still there, the people living there still feel themselves [to be] Hungarian, speak [the] Hungarian language, and have a Hungarian culture. So from a Hungarian point of view, the European Union is a possibility to unify the Hungarian nation, in a cultural sense, without the modification of state borders.

Id. (quoting Viktor Orban). Orban thus seems to suggest that the problems of national minorities may be somewhat alleviated through the structures of the European Union.

159. *See* discussion *infra* Part VI.C.3.

160. *Terms of Reference of the CAHMIN on the drawing up of framework convention and protocol complementing the European Convention on Human Rights (ECHR) as adopted by the Committee of Ministers on 4 Nov. 1993*, para. 1, Ad Hoc Comm. for the Prot. of Nat'l Minorities, CAHMIN (94) 1 (Dec. 10, 1993) (photocopy on file with author) [hereinafter CAHMIN (94) 1].

161. Explanatory Report, *supra* note 105, at para. 6.

162. *Id.* at para. 5.

163. Vienna Declaration, Appendix II, *supra* note 154. *See also* Explanatory Report, *supra* note 105, at para. 5.

164. *Meeting Report, 1st Mtg., 25 Jan.-28 Jan. 1994, Palais de l'Europe, Strasbourg*, para. 4, Ad

Framework Convention for the Protection of National Minorities.[165]

During the first meeting of the Ad Hoc Committee, the participants discussed whether or not they should define the term "national minority."[166] They decided to begin drafting the Framework Convention "without embarking on a prior discussion of the definition question."[167] As previously noted, the Convention ultimately included no definition of the term. Therefore, this article will look to the text of the Framework Convention as well as to the history of minority rights to try to discover the meaning of the term "national minority."

1. Article 1 and Article 3(2)

The protections provided by the Framework Convention include a mixture of individual and group rights principles of minority rights. Article 1 of the Convention refers to "the rights and freedoms of *persons* belonging to [national] minorities."[168] Article 3(2) states, "*Persons* belonging to national minorities may exercise the rights and enjoy the freedoms flowing from the principles enshrined in the present framework Convention individually as well as in community with others."[169] While each person is entitled under Article 3(2) to enjoy the rights guaranteed under this Convention collectively (that is, with others), this article does not guarantee collective (or group) rights: "[Article 3(2)] recognises the possibility of joint exercise of [the rights and freedoms guaranteed under the Convention], which is distinct from the notion of collective rights."[170]

However, the Convention applies only to members of specific groups

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Hoc Comm. for the Prot. of Nat'l Minorities, CAHMIN (94) 5 (Feb. 1, 1994) (photocopy on file with author) [hereinafter CAHMIN (94) 5].

165. While the committee was successful in completing its drafting of the Framework Convention for the Protection of National Minorities, a draft protocol to the ECHR in the cultural field was never finished, presumably due to a lack of time. *See Meeting Report, 7th Mtg., 10-14 Oct. 1994, Palais de l'Europe, Strasbourg*, Ad Hoc Comm. for the Prot. of Nat'l Minorities, para. 19, CAHMIN (94) 32 (Oct. 14, 1994) (photocopy on file with author). However, the Committee of Ministers in its January 1999 reply to the Parliamentary Assembly's Recommendations 1134 and 1201 stated that "an additional protocol as recommended by the Parliamentary Assembly has proved not to be feasible for several reasons, inter alia because it contains certain elements (*the definition of a national minority*.) which do not muster the general support of all member States. *Recommendations of the Assembly, Replies from the Committee of Ministers*, Eur. Parl. Ass., Doc. 8306, (1999), *available at* http://assembly.coe.int/Main.asp?link=http%3A%2F%2Fassembly.coe.int%2FDocuments%2FWorkingDocs%2FDOC99%2FEDOC8306.htm (last visited Feb. 22, 2004) (emphasis added). Whether differences of opinion regarding the definition of national minority or lack of time (or both) caused the Ad Hoc Committee not to complete draft protocol seems unclear. What is clear, however, is that no definition of national minority arose out of the drafting process.

166. CAHMIN 94(5), *supra* note 164, at para. 5.

167. *Id.*

168. Framework Convention, *supra* note 3, at art. 1 (emphasis added).

169. *Id.* at art. 3(2) (emphasis added).

170. Explanatory Report, *supra* note 105, at para. 37 The Explanatory Report also expresses confidence that an individual rights approach will achieve adequate protection of national minorities as whole: "The Parties recognise that protection of national minority can be achieved through protection of the rights of individuals belonging to such a minority. *Id.* at para. 31.

(national minorities), thus incorporating a group rights element into the exercise of the rights under the Framework Convention. While providing protection for individuals, the Framework Convention requires the additional step of determining which groups are national minorities eligible to assert the rights of the Framework Convention. This hybrid individual rights/group rights approach is similar to the Minorities Treaties system,[171] Article 27 of the ICCPR,[172] and the UN Declaration.[173]

2. Article 3(1)

As in the UN Declaration, the Framework Convention allows each member of a national minority the opportunity to choose whether he or she will be treated as such: "Every person belonging to a national minority shall have the *right freely to choose to be treated or not to be treated as such* and no disadvantage shall result from this choice or from the exercise of the rights which are connected to that choice."[174]

While the Framework Convention provides individuals with a choice of whether they will be treated as a national minority, it does not permit just any individual or group the unfettered right to choose status as a national minority Rather, Article 3 allows a person *who is already part of a national minority* the choice as to whether he or she will be treated as such:[175] "[Article 3(1)] does not imply a right for an individual to choose arbitrarily to belong to any national minority. The individual's subjective choice is inseparably linked to *objective criteria* relevant to the *person s identity*."[176] On the flip side, state parties to the Framework Convention "do not have an unconditional right to decide which groups within their territories qualify as national minorities in the sense of the [F]ramework [C]onvention."[177] Thus, neither the minorities themselves nor the states of which they are a part have the right to decide whether a minority is a national minority because the answer to this question must be based upon objective criteria. Article 3(1) does not, however, list these objective criteria. The Explanatory Report to Article 3(1) makes it clear, however, that the objective criteria are linked to a person's *self-identity*.[178]

171. *See* discussion *supra* Part III.B.

172. *See* discussion *supra* Part IV.B.2.

173. *See* discussion *supra* Part V

174. Framework Convention, *supra* note 3, art. 3(1) (emphasis added).

175. *See id.*

176. Explanatory Report, *supra* note 105, at para. 35 (emphasis added). Compare this reference to "objective criteria" as listed in General Comment 23, *supra* note 86, at para. 5.2.

177. *Rights of National Minorities*, Eur. Parl. Ass., 2003 Sess., 4th pt., para. 6, Recommendation 1623 (2003), *available at* http://assembly.coe.int/Main.asp?link=http%3A%2F%2Fassembly.coe.int%2Fdocuments%2FadoptedText%2Fta03%2FEREC1623.htm (last visited Feb. 22, 2004) [hereinafter Recommendation 1623].

178. Explanatory Report, *supra* note 105, at para. 35.

3. Article 5(1)

Article 5(1) is probably meant to provide the objective criteria used in determining what constitutes a national minority. It states: "The Parties undertake to promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage."[179] Article 5(1) thus outlines the characteristics *essential* to a national minority's *identity*: religion, language, traditions *and* cultural heritage.[180] Since the elements in this familiar list are now connected by an "and, it appears that, at least under the Framework Convention, a national minority must have all of these elements in common. The Explanatory Report further explains that "[Article 5(1)] does not imply that all ethnic, cultural, linguistic or religious differences necessarily lead to the creation of national minorities."[181] Thus, a purely cultural, religious or linguistic minority would *not necessarily* qualify as a national minority under the Framework Convention, although the possibility is not completely ruled out.

That the door may still be open for a purely cultural, religious, or linguistic minority to qualify as a national minority is suggested by the fact that the Ad Hoc Committee rejected a proposal to extend the protections of the Framework Convention "to persons belonging to ethnic, religious and linguistic minorities, because the Committee felt that this would prejudge the issue of the definition of a national minority."[182] In other words, to extend the protections of the Framework Convention for the Protection of National Minorities to ethnic, religious, and linguistic minorities could either equate these minorities with the term "national minority" or could define these minorities as categorically distinct from national minorities. The Ad Hoc Committee was careful *not* to make either distinction, thus leaving open the possibility that a purely ethnic, religious or linguistic minority could qualify as a national minority. However, the fact that Article 5(1) lists elements *essential* to a national minority's identity would seem to carry great weight in defining what minorities are national minorities.

On its face, Article 5(1) appears to incorporate neither the separateness element contained in Recommendation 1134 nor the temporal element mentioned in Recommendations 1134 and 1201. The concept of separateness, however, may come into the Framework Convention through the back door. A minority defined

179. Framework Convention, *supra* note 3, at art. 5(1). Since the Framework Convention uses the capitalized term "Parties" when referring to the Parties to the Framework Convention, this article will do the same.

180. *Id.* At least one expert who participated in the drafting expressed desire "to replace the words 'the essential elements' by 'other essential elements.'" *Meeting Report, 2nd Mtg., 14-18 Mar. 1994, Palais, De l'Europe, Strasbourg*, Ad Hoc Comm. for the Prot. of Nat'l Minorities, para. 11, CAHMIN (94) 9 (Mar. 23, 1994) (photocopy on file with author). This reading would have added culture as a fifth essential element of the identity of national minorities, but it was not adopted.

181. Explanatory Report, *supra* note 105, at para. 43.

182. *Meeting Report, 5th Mtg. 27 June – 1 July 1994, Palais de l'Europe, Strasbourg*, Ad Hoc Comm. for the Prot. of Nat'l Minorities, para. 32, CAHMIN (94) 19 (July 7, 1994) [hereinafter CAHMIN (94) 19] (photocopy on file with author).

by a unique religion, language, tradition and cultural heritage will likely be "separate and distinct"[183] from the majority However, Article 5(1) does *not* appear to "back door" the temporal element. While Article 5(1) does refer to a national minority's "traditions and cultural heritage,"[184] there is no suggestion that the minority must have existed on the territory for a significant period of time and thus be "established"[185] or have "longstanding, firm and lasting ties."[186] Consequently, for purposes of the Framework Convention, new minorities could fall under the rubric of national minority as long as they meet the other identity classification requirements of Article 5(1).

Article 5(1) arguably provides a positive right to national minorities: "The Parties [to the Convention] undertake *to promote* the conditions"[187] specified in Article 5(1). Promotion suggests affirmative action, including the use of Parties' resources for the benefit of their national minorities. The preamble to the Convention requires Parties to do more than just respect national minorities; they must also create conditions to allow them to flourish.[188] Article 12(1) requires Parties to the Convention to "foster knowledge of the culture, history, language and religion of their national minorities."[189] Thus, unlike Article 2 of the UDHR and Article 27 of the ICCPR,[190] the Framework Convention provides national minorities an avenue to assert their rights in a positive fashion.

However, the fact that the Convention is only a "framework convention" is not without legal significance. As Francesco Capotorti points out, "The term 'framework convention' indicates that the principles in the convention are not directly applicable in internal law. States must implement them either through bilateral or multilateral agreements with other states or through legislation or appropriate national policies."[191] The Framework Convention also reflects this idea in its preamble, which states that the Parties are "determined to implement the principles set out in [the] framework Convention through national legislation and appropriate governmental policies."[192] Thus, while the Convention legally binds all the signing Parties, it may only be implemented through the actions of individual governments.

4. Article 17(1)

The Framework Convention also provides national minorities the right "to establish and maintain free and peaceful contacts across frontiers with persons lawfully staying in other States, in particular those with whom they share an

183. Recommendation 1134, *supra* note 115, at para. 11.
184. Framework Convention, *supra* note 3, at para. 5(1).
185. Recommendation 1134, *supra* note 115, at para. 11.
186. Recommendation 1201, *supra* note 127, at Additional Protocol, § I, art. 1(b).
187 Framework Convention, *supra* note 3, at art. 5(1) (emphasis added).
188. *Id.* at pmbl.
189. *Id.* at art. 12(1).
190. *See* discussion *supra* Parts IV.A and B.
191. Capotorti, *supra* note 4.
192. Framework Convention, *supra* note 3, at pmbl.

ethnic, cultural, linguistic or religious identity, or a common cultural heritage."[193] A similar idea was adopted in the UN Declaration.[194] Undoubtedly, this provision particularly considers those kin-state/kin-minority relationships created where a group of individuals of one nationality (the "kin-minority") is separated from its nation state (the "kin-state") by the realignment of international borders and becomes a minority of another country.

A kin-minority of a corresponding kin-state would be the quintessential example of a national minority, an idea consistent with the Vienna Declaration.[195] The members of the kin-minority would share *all* of the essential elements of identity listed in Article 5(1) and would be particularly likely to want to maintain contacts with others of their nationality in the kin-state. Indeed, because the term "national minority" is unique to Europe and because it appears to have arisen out of the time period immediately following the two world wars and the subsequent realignment of international borders in Europe, the term probably was originally meant to apply to such kin-state/kin-minority situations. These facts help explain why Orban called the protection of national minorities a "European value."[196]

This analysis suggests that the definition of "national minority" is related to the concept of "nationality, and perhaps the best definition of "national minority" would be a minority that, if given the opportunity, could become a nation state. At the very least, it seems clear that for purposes of the Framework Convention, whenever there is a kin-state/kin-minority relationship, the kin-minority will be a national minority of its home country.[197] While such a kin-state/kin-minority relationship is probably sufficient to make the kin-minority a national minority, there is no indication that such a relationship is necessary for a group to constitute a national minority For example, while they do not have a corresponding kin-state, the Roma are probably a national minority.[198] Thus, under the Framework Convention, the true defining characteristic of a national minority is the sharing of a number of attributes between the members of a group (i.e., religion, language, culture and traditions) and not necessarily the relationships the minority maintains with other groups or countries.

The dangers posed to international security by the existence of such kin-state/kin-minority relationships appear to be real and ongoing. As mentioned previously Germany used the excuse of protecting German-speaking minorities in the countries of Eastern Europe as a pretext for starting World War II.[199] More recently, the Hungarian minorities living outside Hungary have been an issue. Hungary recently passed a Status Law giving special privileges to the Hungarian

193. *Id.* at art. 17(1).

194. *See* UN Declaration, *supra* note 99, at art. 2(5).

195. *See* discussion *supra* Part VI.B.4.

196. Lobjakas, *supra* note 1.

197. *See* discussion *supra* Part VI.B.4.

198. *See* Recommendation 1623, *supra* note 177, at para. 6 (encouraging "states parties to pay particular attention to the possibility for the most vulnerable Roma minorities to fully benefit from the protection envisaged in the Framework Convention [for the Protection of National Minorities]").

199. *See supra* text accompanying note 54.

minorities living in Croatia, Serbia and Montenegro, Romania, Slovenia, Slovakia and Ukraine.[200] The law created serious concerns in both Romania and Slovakia,[201] which undoubtedly were worried about the possibility of Hungary meddling in their domestic affairs. The Parliamentary Assembly of the Council of Europe responded to the Hungarian law by stating that it generally "welcomes assistance give[n] by kin-states to their kin-minorities"[202] but also cautioned that such assistance must be acceptable to the states of which the kin-minorities are citizens.[203] The Parliamentary Assembly further noted "that responsibility for minority protection lies primarily with the home states."[204] Nevertheless, this incident shows that the issue of national minorities remains a real international concern.

VII. CONCLUSION

Although this review of the Framework Convention does not provide a final definition of the term "national minority," we can draw some firm conclusions about what is a national minority, at least for purposes of the Convention. The members of a national minority share essential characteristics (religion, language, traditions and cultural heritage) that define the self-identity of the individuals that make up the minority The members of a national minority most likely have all of these essential characteristics in common, and they may live separate and apart from the majorities among whom they live. Thus, the meaning of the term national minority under the Framework Convention seems to incorporate, through the back door, the concept of separateness suggested in Parliamentary Assembly Recommendation 1134. However, because the Framework Convention contains no temporal element in describing a national minority, newly created minorities could potentially qualify if they meet the other elements described in the Convention.

A kin-state/kin-minority relationship is sufficient but not necessary to make a minority a national minority. Furthermore, a national minority is one that is likely to have a particular interest in maintaining contacts with others across international borders, often because of the existence of a kin-state, the members of whose majority population are of the same nationality as the national minority These facts, together with the fact that national minorities probably have a number of characteristics in common, suggest that the concept of a national minority is related to the concept of nationality and that a national minority could best be defined as a minority that, if given the opportunity, could become a nation state.

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200. *See Preferential Treatment of National Minorities by the Kin-State: The Case of the Hungarian Law on Hungarians Living in Neighbouring Countries ("Magyars") of 19 June 2001*, Eur. Parl. Ass., 2003 Sess., 3rd pt., paras. 3-4, Res. 1335 (2003), *available at* http://assembly.coe.int/Main.asp?link=http%3A%2F%2Fassembly.coe.int%2FDocuments%2FAdoptedText%2Fta03%2FERES1335.htm (last visited Feb. 22, 2004) [hereinafter Resolution 1335]. *See also* Lobjakas, *supra* note 1.

201. *See* Lobjakas, *supra* note 1.

202. Resolution 1335, *supra* note 200, at para. 1.

203. *Id.*

204. *Id.* at para. 2.

The recent Hungarian law shows that continued concern over national minorities is well-founded. Hopefully, the particular attention the Framework Convention provides to national minorities and the additional rights it guarantees to them will help to diffuse future tensions over the question of national minorities.

NAFTA CHAPTER 11 DISPUTE RESOLUTION AND MEXICO: A HEALTHY MIX OF INTERNATIONAL LAW, ECONOMICS AND POLITICS

*Scott R. Jablonski**

I. INTRODUCTION

Trade and investment agreements provide the political, economic and legal framework for economic integration in the modern international political economy, and underscore the importance of international law in the integration process. The proliferation of such agreements among nation-states since the mid-twentieth century has been a major factor contributing to the increasing volume of business transactions across borders.[1] The Americas are certainly not an exception to these trends. There are roughly fifty regional, sub-regional and bilateral trade and

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1. Since the inception of the General Agreement on Tariffs and Trade ("GATT") in 1948, now the World Trade Organization ("WTO"), there has been continued increase in the number of trade agreements in the world. "At present, about 97% of total global trade involves countries that are members of at least one PTA, compared with 72% in 1990. Asian Development Bank, *Trends in Trade and the Expansion of PTAs, at* http://www.adb.org/Documents/Books/ADO/2002/pta0200.asp (last visited Feb. 23, 2003) [hereinafter "*Trends in Trade*"]. Notably, there was 22-fold increase in world trade in merchandise from 1948 to 2000. World Bank, *Doha WTO Ministerial 2001 at* http://www.wto.org/english/thewto_e/minist_e/min01_e/brief_e/brief21_e.htm (last visited Feb. 23, 2003) [hereinafter "*Doha WTO*"]. Aggregate world trade in goods in services in 1948 was $58 billion, compared to $7.6 trillion in 2000. *Id.* In 2000, total world foreign direct investment flows reached $1261 billion, which was 53-fold increase from 1973 when such investment totaled $24 billion. *Id.* Between 1990 and 2000, the number of bilateral investment treaties ("BITs") between countries increased from 470 to nearly 2000, and some regional trade groupings such as NAFTA and the EU have incorporated investment agreements into their broader trade agreements. Mary Hallward-Driemeier, *Do Bilateral Investment Treaties Attract FDI? Only bit. .and they could bite*, (June 2003), *at* http://econ.worldbank.org/files/29143_wps3121.pdf (last visited Mar. 15, 2004).

integration agreements in the Americas,[2] with negotiations underway for other agreements, including a Free Trade Area of the Americas ("FTAA").[3] In 2000, total trade among FTAA negotiating countries had reached roughly $784 billion, growing at 11% annually.[4]

Within the context of multilateral governance of trade and investment and increasing transnational business transactions lies the following reality: more transnational transactions mean an increasing need to seek effective, uniform principles of dispute resolution for disputes between private parties and governments arising out of a government's obligations under a trade agreement.[5] This is particularly true in the context of trade-related investment agreements, through which private parties play a direct role in economic integration.[6] The role of law in the modern international political economy is therefore paramount.

Several obstacles, however, often hinder or severely detract from efforts to achieve uniformity of dispute resolution among foreign legal systems. The greatest obstacle is the phenomenon of differing legal traditions. Alternative Dispute Resolution ("ADR"), namely arbitration, has emerged as the preferred method of dispute resolution among nation-states belonging to trade agreements, as well as among private parties engaged in international transactions.[8] Indeed, in the context of international investment, private parties have long preferred international arbitration for resolving investment disputes with foreign governments.[9]

Chapter 11 of the North American Free Trade Agreement ("NAFTA")[10] is unique among trade agreements in that it contains an entire chapter dealing with foreign investment and the protection of such investment.[11] Chapter 11 broadly defines who an investor is and what an investment is in North America, and gives

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2. *See* SICE, *Inventory of Dispute Settlement Mechanisms, Procedures and Legal Texts Established in Existing Trade and Integration Agreements, Treaties and Arrangements in the Hemisphere and the WTO, at* http://www.sice.oas.org/cp_disp/English/dsm_toc.asp (last visited Feb. 23, 2003) [hereinafter "SICE, *Inventory*"].

3. *See infra* note 43.

4. Council of the Americas, *Free Trade Area of the Americas, at* http://www.americas-society.org/coa/publications/testimony.AmbFrechette-9-9-02.html (last visited Feb. 23, 2003) [hereinafter "*Free Trade Area*"].

5. *See* Hope H. Camp, Jr., *Dispute Resolution and United States-Mexico Business Transactions*, 5 U.S.-MEX. L.J. 85 (1997); *see* Noemi Gal-Or, *Private Party Direct Access: A Comparison of the NAFTA and the EU Disciplines*, 21 B.C. INT'L & COMP L. REV 1, 3, 11-12 (1998).

6. *See* Camp, *supra* note 5; *see* Gal-Or, *supra* note 5.

7. *Id.*

8. *Id.*

9. *See infra* Part II.C.2.b (discussing various aspects of international alternative dispute resolution).

10. North American Free Trade Agreement, Dec. 17, 1992, part 5, chapter 11, U.S.-Can.-Mex. (effective Jan. 1, 1994), *reprinted in* 32 I.L.M. 289, 296 (1993) [hereinafter "NAFTA"]. The Contracting Parties to NAFTA are Canada, the United Mexican States ("Mexico") and the United States of America ("United States").

11. Donald S. Macdonald, *Chapter 11 of NAFTA: What are the Implications for Sovereignty*, 24 CAN.-U.S. L.J. 281 (1998) (pointing out that NAFTA is "the first comprehensive international trade treaty to provide to private Parties direct access to dispute settlement as of right.").

private investors in NAFTA Parties[12] direct access to binding international arbitration for claims against NAFTA Parties arising out of investment disputes. NAFTA thus seeks to bridge the gap between private individuals and governments in the resolution of cross border commercial disputes. And, it does so by creating an opportunity for a private investor to resolve an investment dispute without litigating in foreign courts or pressuring the investor's home government to resolve the dispute through diplomatic bargaining.[13] The arbitration alternative is also a pragmatic approach to the pressing need for effective international investment dispute resolution without engaging in the monumentally difficult task of harmonizing three different legal systems.[14] Chapter 11 dispute resolution is indeed representative of the evolving link between international law, economics and politics in the modern global political economy

Despite its pragmatism and progressive nature, however, Chapter 11 dispute resolution has not escaped criticism. In recent years it has come under attack by various groups and commentators in NAFTA Parties whose arguments are generally based upon two main assertions: Chapter 11 dispute resolution is a threat to national sovereignty and an abrogation of democracy [15] These critics base their assertions on what they believe are fundamental flaws in the Chapter 11 dispute resolution framework. The most often-cited arguments are that Chapter 11 promotes frivolous litigation and permits disproportionate compensation, lacks an adequate award review process, uses "secret" tribunals to reduce transparency prevents legitimate governmental regulation, and derogates from notions of equality and sustainable development.[16] In recent years, the literature on Chapter 11 has increased as the general debate on its dispute resolution framework has intensified.

The debate has centered primarily on whether Chapter 11 is detrimental to all NAFTA Parties. A focus on Mexico, however, is particularly intriguing given Mexico's history toward foreign investment and its economic status relative to Canada and the United States.[17] Interestingly Chapter 11, for all intents and purposes, runs counter to the traditional Mexican approach to international law and foreign investment. That traditional approach emanates from conceptions of international law and economic integration that are quite opposite from the

12. The text of NAFTA refers to Canada, Mexico and the United States as "Parties, therefore for purposes of consistency I refer to NAFTA countries as NAFTA Parties and a NAFTA country individually as NAFTA Party.

13. *See* Charles H. Brower II, *Investor-State Disputes Under NAFTA: The Empire Strikes Back*, 40 COLUM. J. TRANSNAT'L L. 43, 44 (2001) [hereinafter "Brower II"].

14. *Id.*

15. *See infra* Part IV· Brower II, *supra* note 13, at 44 (noting that Chapter 11 "has become a lightning rod for opponents of globalization and the intrusion of international law into domestic affairs.").

16. *See infra* Part IV This is not an exhaustive list of the criticisms of Chapter 11; however, it does include the most often-cited arguments and thus the arguments that deserve most attention for purposes of this article.

17 This is not to de-emphasize the implications of Chapter 11 on the United States and Canada. That discussion is simply outside the scope of this article.

philosophy behind NAFTA.[18] Indeed, the traditional Mexican approach to investment dispute resolution has customarily characterized a major line of demarcation between developed and developing countries in an age of globalization.

The inclusion of Chapter 11 in NAFTA, therefore, represents a major reversal in policy for Mexico, and thus begs the question: is Chapter 11 direct access dispute resolution beneficial to Mexico? After all, of the NAFTA Parties it is Mexico which has made the most dramatic changes in accepting Chapter 11 and which is economically disadvantaged compared to its North American counterparts.[19] Any detrimental aspects of Chapter 11 arguably would affect Mexico the most. The purpose of this article, therefore, is to provide an informed discussion of the criticisms of Chapter 11 dispute resolution and to evaluate the implications of Chapter 11 for Mexico, focusing on the NAFTA text and the Chapter 11 arbitrations against Mexico so far. First, however, this paper presents important historical and policy foundations behind NAFTA in order to pave the way for a discussion of Chapter 11 and Mexico.

Part II first provides a brief background on the history of economic integration in the Americas. This part highlights the interrelationship of historical political and economic policy interests pursued by the United States and Latin America. Part II also includes an overview of the traditional Mexican approach to foreign investment and international law Indeed, history tells why things are the way they are now, and thus serves as an important backdrop for discussing the purposes of NAFTA Chapter 11 and its implications for Mexico. Part II ends with a detailed discussion of the background of NAFTA and its dispute resolution framework, commenting briefly on the differing legal traditions of NAFTA Parties and ADR in general. This discussion completes the task of providing the necessary background information for proceeding to a more narrow discussion of Chapter 11 and Mexico.

Part III discusses in detail Chapter 11. It first highlights the major substantive provisions of Chapter 11, and then details its dispute resolution framework. This is followed by summaries of the first four final arbitral awards involving Mexico.[20] This discussion sheds light on how the process has been handled in real-life situations in Mexico and serves as a critical reference point for purposes of this article.

Part IV moves to an informed discussion of the implications of Chapter 11 for Mexico. It does so by taking into account the major criticisms of Chapter 11, and then by responding to them using the Chapter 11 text and the first four final arbitral awards against Mexico as the bases for testing those criticisms. The criticisms discussed herein are by no means exhaustive. Rather, this article

18. *See infra* Part II.B.1.

19. *See infra* Part II.B.1.

20. At the time of this writing, private investors have invoked the Chapter 11 dispute resolution mechanism against Mexico on nine occasions, and on roughly twenty occasions overall. This comment is confined to discussion of the first four final arbitral awards issued involving Mexico.

summarizes the most often-cited concerns with Chapter 11. This discussion attempts to accomplish several things. It provides further clarity as to how and why NAFTA Parties structured Chapter 11 as they did. It demonstrates why the broader concerns with Chapter 11 are unfounded—why Chapter 11 is not a threat to Mexico's sovereignty or democratic governance.

Further, and perhaps most importantly Part IV also sheds light on how Chapter 11 is a unique example of how international law is a necessary and positive force for Mexico in the governance of economic integration in North America. As an extension of well-established principles of international law to business activities between private individuals and governments, and as a novelty in the ongoing trend of economic integration in the Americas, Chapter 11 direct access dispute resolution is exemplary of what is necessary for Mexico's successful participation in the international political economy

II. A NOTE ON THE HISTORY OF ECONOMIC INTEGRATION IN THE AMERICAS

Globalization is the buzz word for describing the modern international political economy Although specifically defining the phenomena of globalization and when it precisely began tends to generate debate, it certainly implies "a stretching of social, political and economic activities across frontiers."[21] In this sense, economic integration—predominantly accomplished through trade and investment agreements—is a key ingredient, a critical tool, of globalization.[22] The proliferation of trade agreements in the Americas over the last half century demonstrates an unprecedented push by nation-states of varying wealth and size to integrate their economies.[23] This is perhaps nowhere more apparent than in NAFTA, where two countries with highly advanced economies, the United States and Canada, entered into a free trade agreement with Mexico, a developing country.[24] The history behind NAFTA goes back much further than the early 1990s, however. Historical, political, and economic policy interests of both the United States and Latin America as a whole set the background for understanding

21. DAVID HELD ET AL., GLOBAL TRANSFORMATIONS: POLITICS, ECONOMICS AND CULTURE 15 (1999).

22. There are four basic levels of economic integration, which include (1) free trade area, (2) customs union, (3) a common market, and (4) an economic union. *See generally* MICHAEL R. CZINKOTA ET AL., INTERNATIONAL BUSINESS 256-57 (5th ed. 1999). A free trade area is the least integrative model, with focus on eliminating taxes, quotas, tariffs and other trade barriers among member countries without forming collective policy for relations with nonmembers. *See id.* In a customs union, on the other hand, members not only agree to eliminate trade barriers, they also agree to common trade policy regarding nonmembers. *Id.* A common market goes step further, as it incorporates the tenets of a customs union but seeks to integrate further the factors of production—labor, capital and technology—thus eliminating restrictions mainly in the areas of immigration and investment. *Id.* Lastly, "the creation of true economic union requires integration of economic policies in addition to the free movement of goods, services, and factors of production across borders. *Id.* A common monetary and tax policy as well as a common currency among members further characterize an economic union. *Id.*

23. *See supra* notes 1-3.

24. Gwynne & Kay, *supra* note 18.

NAFTA and the intended purposes and implications of its provisions.

A. U.S. Policy and the Economics of Latin America

As Latin America and the Caribbean gained their independence from European colonial powers in the first part of the nineteenth century, the United States faced a critical foreign policy decision: what would be U.S. foreign policy in a Western Hemisphere of independent countries?[25] The answer to this question, along with economic trends in Latin America over the last two centuries, helps explain the policy behind modern economic integration. In 1822, the United States was the first country officially to recognize Argentina (then La Plata), Chile, Peru, Colombia and Mexico as new countries.[26] In 1823, President Monroe and Secretary of State John Quincy Adams fashioned the historic Monroe Doctrine, which has served as the crux of United States foreign policy in the region ever since.[27]

In 1901, President Theodore Roosevelt referred to the Monroe Doctrine as "a guarantee of the commercial independence of the Americas."[28] At the time, there was brewing tension between European countries and Latin American countries, particularly Venezuela and the Dominican Republic, arising out of the failure to repay public debts to European lenders.[29] In 1904, President Roosevelt, anticipating possible military action by European countries, officially reaffirmed U.S. commitment to intervene against any foreign power that attacked any Latin American nation, regardless of any general reluctance of the United States to become engaged in such a military entanglement.[30] This became known as the Roosevelt Corollary.[31] Subsequent U.S. presidents acted to strengthen the precepts of the Monroe Doctrine and the Roosevelt Corollary. For example, President Taft championed Dollar Diplomacy in Latin America,[32] and President Wilson used

25. *See* SAMUEL F BEMIS, JOHN QUINCY ADAMS AND THE FOUNDATIONS OF AMERICAN FOREIGN POLICY (1940); *see* ARTHUR P WHITAKER, THE UNITED STATES AND THE INDEPENDENCE OF LATIN AMERICA, 1800-1830 (1941).

26. ALAN BRINKLEY, AMERICAN HISTORY: A SURVEY 282 (10th ed. 1999).

27. *Id.* The Monroe Doctrine "established the idea of American hegemony in the Western Hemisphere that later U.S. governments would invoke at will to justify policies in Latin America. *Id.* The Monroe Doctrine had two major themes: (1) the United States would not tolerate any future European colonization in the Western Hemisphere, and (2) the United States would regard any attack on an American nation as an attack upon the United States, and would respond with force against any country or countries initiating such an attack. The Monroe Doctrine was primarily political doctrine; however, it also furthered United States economic interests in Latin America by stopping European colonization and the imperial, protectionist economic policies that accompanied such colonization. *Id.*

28. THOMAS G. PATERSON ET AL., 1 AMERICAN FOREIGN RELATIONS: A HISTORY TO 1920 243 (5th ed. 2000).

29. *Id.* at 244.

30. *Id.*

31. *Id.*

32. *Id.* at 243. Dollar Diplomacy included "using private financiers and business leaders to promote foreign policy, and using diplomacy to promote American commerce and investment abroad. *Id.* at 240. Indeed, "[e]xports to Latin America increased markedly from $132 million at the turn of the century to $309 million in 1914. *Id.* at 240.

military force to quiet internal conflicts in the region and safeguard U.S. commercial interests.[33]

World Wars and the Great Depression in the first part of the twentieth century curtailed U.S. involvement in Latin American affairs.[34] In fact, the economic effects of these events shocked Latin American economies and set the stage for major economic policy changes in the region.[35] Prior to the mid-twentieth century, Latin American countries had followed an export-oriented economic model based mostly on primary product exports.[36] This served U.S. needs and commercial interests, but left Latin American economies at the mercy of international demand fluctuations.[37] As industrialized countries erected trade barriers to recover from the Depression, Latin American countries experienced serious decreases in export income which caused severe economic setbacks.[38]

During World War II, Latin American countries experienced increased export income from the increased demand for food stuffs, but wartime industrial production and consumption limited the availability of much needed industrial imports to Latin American countries.[39] These events stirred nationalistic rhetoric in many large Latin American countries, and led to the emergence of political populism, which called for protectionist economic policies geared toward boosting internal development.[40] By the 1940s, policymakers in Latin America, deriving theoretical support from the tenets of dependency theory and economic structuralism, implemented inward-looking, protectionist polices that lasted through the 1970s, known mainly as import substitution industrialization ("ISI").[41]

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33. *Id.* at 245.

34. FREDERICK S. WEAVER, LATIN AMERICA IN THE WORLD ECONOMY 121 (2000).

35. *Id.* at 117-121.

36. *Id.*

37. *Id.*, PATRICE FRANKO, THE PUZZLE OF LATIN AMERICAN ECONOMIC DEVELOPMENT 46-47 (1999); Gwynne & Kay, *supra* note 18 at 129-30.

38. FRANKO, *supra* note 38, at 46-47.

39. WEAVER, *supra* note 35, at 121.

40. *Id.* at 121-25, 137.

41. FRANKO, *supra* note 38, at 52-55. With regard to dependency theory, Franko comments:

> Proponents of dependency theory postulated that a country did not thrive or falter simply because of its own national endowments. Rather, progress could be attributed to the power it had to set the rules of the international economic game. Center countries, or the industrialized countries, defined the rules; the periphery, or developing countries, were pawns in the international pursuit of profit.

Id. at 53.

This led to the emergence of the structuralist school of economic development, headed by Raúl Prebisch, an Argentinean economist who became chair of the United Nations Economic Commission for Latin America ("ECLA") in 1949. *Id.* 53-54. Franko notes:

> Under the leadership of Raúl Prebisch, ECLA analysts looked at the disappointing economic performance of Latin America in the first half of the century, focusing on the volatility of primary product exports, and the progressive difficulty of paying for more technologically sophisticated (and expensive) products with the limited agricultural returns. Technological progress was controlled by the powerful center-industrialized countries and spread slowly into the periphery. ECLA researchers in the 1950s were also fascinated by seeming correlation between the interruption of normal trade patterns with the industrialized countries during war periods and accompanying robust

Cold War politics prompted the United States to promote some economic cooperation with Latin American countries, despite the latters' protectionist policies.[42] For example, in 1961, President Kennedy initiated the Alliance for

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internal growth in the Latin America regions. Isolation from the international system apparently helped growth at home.

In part the disadvantaged position of the periphery countries in the international system derived from the kind of goods they offered. Developing countries principally traded primary products, such as raw materials and agricultural goods, for more technologically advanced products in the international arena. Within this unequal framework, they faced what was seen as declining terms of trade for their products. There are only so many bananas that people want to eat or so much coffee that they can drink. Given the low income elasticity for agricultural products, as the global economy grows, the relative demand for primary products declines. Instead, rewards tend to accrue to those engaged in technological entrepreneurship. Technological sophistication adds value to good, increasing its market price well beyond the cost of basic inputs. Declining terms of trade for primary products reflected the argument that as the prices of sophisticated goods rose, developing countries would need to export more and more oranges or wheat to pay for the more expensive technological machinery. Without mastering technology, countries had little hope of advancement.

Id. at 53-55.

The prescription, therefore, according to the structuralists, was for Latin American governments to play a prominent role in regulating trade and focusing on acquiring technology and improving industrial capacity. Protectionism and high tariff rates thus swept across Latin America, where "[a]verage nominal protection over consumer and manufactured goods was 131 percent in Argentina, 168 percent in Brazil, 138 percent in Chile, 112 percent in Colombia, 61 percent in Mexico, and 21 percent in Uruguay in 1960. *Id.* at 59. Governments also overvalued exchange rates to promote cheaper imports and promulgated monetary and fiscal policies that included subsidizing domestic enterprises through nationalized lending institutions, while also providing such enterprises with tax credits and special interest rates. *Id.* at 60-62. These protectionist policies, ironically, had the effect of stimulating foreign investment in manufacturing in many Latin American countries because multinational corporations found it profitable to establish a presence in those countries rather than deal with protectionist trade policies. *Id.* at 62-64. "In or about 1970, 24 percent of manufacturing in Argentina, 50 percent in Brazil, 30 percent in Chile, 43 percent in Colombia, 35 percent in Mexico, 44 percent in Peru and 14 percent in Venezuela was under foreign control. *Id.* at 62; *see also* MICHAEL C. MEYER ET AL., THE COURSE OF MEXICAN HISTORY 611-614 (6th ed. 1999) (discussing the trends and implications of industrialization policies in Mexico in the mid-twentieth century). During ISI, Latin American countries experienced high growth rates and significant industrialization, but the negative effects of ISI became apparent in the 1970s and 80s. *See* FRANKO, *supra* note 38, at 64-8. (discussing numerous negative effects of ISI on Latin American economies, including high deficits and inflation, balance-of-payment crises, debt accumulation,the rise of politically oppressive military regimes and government corruption, to name a few); *see also* WEAVER, *supra* note 35, at 169-79 (discussing the demise of ISI and subsequent debt crises in Latin America). Nonetheless, the gradual abandonment of ISI policies in Latin America set the stage for a new discussion of economic integration efforts between Latin America and the United States.

42. In July of 1947, George Kennan, then director of the Policy Planning Staff of the U.S. Department of State and formerly a U.S. Ambassador to Russia and Yugoslavia, issued his famous "Memorandum X" which advocated for U.S. policy of containment of the spread of Soviet communism. *See* PATERSON, *supra* note 29, at 244-45. Coinciding with that policy, U.S. politicians began speculating that if one country in region fell to communism, the entire region would fall, and then eventually the rest of the world, which became known as the "domino theory. *Id.* at 254-57. Kennan's policy recommendation dominated the U.S. foreign policy mindset throughout the Cold War. *Id.* Consequently, any hint of communism in Latin America encouraged U.S. policymakers to take

Progress through the Organization of American States ("OAS").[43] Kennedy "envisioned spending $20 billion in funds from the U.S. and international organizations" to promote economic development in Latin America.[44] The Alliance for Progress was rather unsuccessful in achieving its goals for economic development, but it did symbolize U.S. commitment to preserving its interests in Latin America—a further extension of the Monroe Doctrine, over one hundred years later.[45]

In the 1980s, the U.S. began to focus on the vital connection between democracy and economic integration in Latin America. One commentator notes that, "despite selective unevenness and all the other caveats, there still was a significant sea change in U.S. policy in the 1980s: U.S. governments actively encouraged transitions from military to electoral regimes in South and Central America and pressured Mexico to clean up its electoral act."[46] Specifically, in response to communist revolutions in Central America, President Reagan instituted the Caribbean Basin Initiative ("CBI").[47] As one commentator describes,

> [T]he CBI stressed the need for economic development and the development of free enterprise in the region as a means of combatting communist expansionism. Twenty Caribbean basin countries were designated as the beneficiaries of a program that included a combination of foreign aid, investment incentives, and reduction of barriers to United States markets. This included twelve years of duty-free access to United States markets for most exports from designated countries and industries.[48]

With the end of the Cold War, the Bush Administration faced the task of developing a new U.S. foreign policy model for Latin America. One author summarizes that "[t]he Bush administration joined most Latin American states in adopting a primarily economic foundation for inter-American relationships, with agreement on the essentiality of continued democratic development."[49] In 1990, President Bush announced his Enterprise for the Americas Initiative ("EAI"),

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action to dispel such political change. *Id.*

43. *See id.* at 331.

44. *Id.*

45. *See id.* at 332. The Alliance for Progress did not prove to be an economic success for variety of reasons, some of which included lack of U.S. investor initiative, corruption in Latin American politics, and the rise of military regimes in Latin America. *Id.* Nonetheless, it did achieve some political success in rallying pro-American, as opposed to Soviet, support in Latin America. See, for example, ANTONIO H. OBAID & NINO MARITANO, AN ALLIANCE FOR PROGRESS: THE CHALLENGE AND THE PROBLEM 11 (1963), writing in the first few years after its inception that "it deserves full credit for the noticeable improvement which is taking place in the political atmosphere The anti-American feelings prevalent in the 1950's have subsided considerably There is much admiration, respect, and affection for this country.

46. WEAVER, *supra* note 35, at 186. This set the groundwork for future negotiations regarding economic integration under the George H.W Bush Administration. *See supra* notes 39-41.

47 Caribbean Basin Economic Recovery Act 19 U.S.C. § 2701 (2004).

48. Paul A. O'Hop, Jr., *Hemispheric Integration and the Elimination of Legal Obstacles under NAFTA-Based System*, 36 HAR. INT'L L.J. 127, 149 (1995) (internal footnotes omitted).

49. G. POPE ATKINS, LATIN AMERICA IN THE INTERNATIONAL POLITICAL SYSTEM 130 (3d ed., Westview Press 1995).

which served to spearhead U.S. negotiations for free trade, increased investment and debt relief in the Western Hemisphere as well as to ignite the modern process of economic integration.[50] Indeed, negotiations for NAFTA arose in the context of the EAI.[51]

The Clinton Administration continued the push for free trade in the Americas. In fact, "[t]he Clinton Administration's economic policy toward Latin America [was] largely a continuation of President Bush's EAI."[52] Not only was President Clinton successful in getting NAFTA in place, but his efforts also led several countries in the Western Hemisphere to meet and officially declare their mutual goal of achieving hemispheric free trade through an FTAA.[53] The current administration has reaffirmed U.S. commitment to free trade and increased economic integration in the Americas. A free trade agreement with Chile entered into force at the beginning of this year.[54] Most recently, the United States and

50. George Bush, *Remarks Announcing the Enterprise for the Americas Initiative*, 26 WEEKLY COMP. PRES. DOC. 1009 (June 27, 1990). O'Hop, *supra* note 49, at 149 (commenting that "[t]he three pillars of this initiative were: (1) reduction of trade barriers, (2) increase of investment into the region, and (3) debt relief," which led the U.S. to actively pursue bilateral and multilateral negotiations aimed at liberalizing trade with countries in the Americas.). *Id.* at 150 ("The EAI encouraged rapid development of subregional associations.").

51. O'Hop, *supra* note 49 at 149.

52. *Id.* at 151.

53. *See id.* In December of 1994, thirty four democratic countries in the Americas met in Miami, Florida at the Summit of the Americas, with the goal of fashioning the FTAA. *Antecedents of the FTAA Process, at* http://www.ftaa-alca.org/View_e.asp (last visited Feb. 23, 2003) [hereinafter "FTAA Website"] and *Summit of the Americas Information Network, at* http://www.summit-americas.org (last visited Feb. 23, 2003) [hereinafter "Summit of Americas Website"]. "The idea behind the FTAA is the consolidation of the nearly twenty-five free trade pacts already operating in region of nearly 800 million inhabitants. FRANKO, *supra* note 38, at 241 Since the Miami Summit, summits have taken place in San Jose (1996), Santiago (1998) and Quebec City (2001). Summit of Americas Website, *supra*. The FTAA would serve as an enormous regional trade agreement, creating "a market of [over] 719 million people and could expand trade within the hemisphere to unprecedented levels. Richard L. Bernal, *Free Trade Areas: The Challenge and Promise of Fair vs. Free Trade*, 27 LAW & POL'Y INT'L BUS. 945, 946 (1996). The Second Draft of the Consolidated Text of the FTAA is available at the official website for the United States Trade Representative ("USTR"), http://www.ustr.gov/regions/whemisphere/ftaa.shtml (last visited Mar 2, 2004) [hereinafter "Draft FTAA"].

Through the Declaration of Principles and Plan of Action, negotiating states have agreed to make decisions on a consensus basis, to ensure that the decision-making process is transparent, to follow WTO-based guidelines, to take into account the needs of less-developed countries, and to complete negotiations for the FTAA by 2005. *Declaration of Principles and Plan of Action*, 34 I.L.M. 808 (1995) [hereinafter "FTAA Declaration"]; FTAA Website, *supra*. The Declaration also expresses the negotiating states' commitment to "build on existing subregional and bilateral agreements in order to broaden and deepen hemispheric economic integration and to bring the agreements together. FTAA Declaration, *supra*, at 811. For detailed discussions on the FTAA, dispute resolution and economic integration, see Frank J. Garcia, *Americas Agreements"—An Interim Stage in Building the Free Trade Area of the Americas*, 35 COLUM. J. TRANSNAT'L L. 63 (1997), Frank J. Garcia, *New Frontiers in International Trade: Decisionmaking and Dispute Resolution in the Free Trade Area of the Americas: An Essay in Trade Governance*, 18 MICH. J. INT'L L. 357 (1997), and David Lopez, *Dispute Resolution under Free Trade Area of the Americas*, 28 U. MIAMI INTER-AM. L. REV. 597 (1997).

The implications of NAFTA Chapter 11 direct access dispute resolution on the FTAA is also an important and interesting topic, however, such a discussion is beyond the scope of this article.

several Central American countries signed the Central American Free Trade Agreement ("CFTA").[55] In addition, the United States has continued to sign and negotiate bilateral investment treaties with Latin American countries.[56]

B. Latin America and the Emergence of Trade and Investment Agreements

In 1948, as ISI policies began to emerge in Latin America,[57] another economic trend took hold. Despite encouraging protectionist economic policies as a means to achieve internal growth, the United Nations Economic Commission for Latin America ("ECLA") actually encouraged trade cooperation between Latin American countries in the form of regional trading blocs.[58] The result was the formation of the Latin American Free Trade Association ("LAFTA") in 1960,[59] which evolved into the Latin American Integration Association ("LAIA") in 1980.[60] The second half of the twentieth century also witnessed the emergence of various subregional trade agreements in Latin America, including the Central American Common Market ("CACM") in 1960,[61] the Andean Community in 1969,[62] the Caribbean Community ("CARICOM") in 1973,[63] and the Mercado del

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54. For discussion of the negotiations, the signing and the text of the Chile-U.S. Free Trade Agreement, see the official website for the United States Trade Representative ("USTR"), *at* http://www.ustr.gov/new/fta/chile.htm (last visited Mar. 9, 2004). *See also* Scott R. Jablonski, *¡Sí Po!, Foreign Investment Dispute Resolution Does Have a Place in Trade Agreements in the Americas: Chapter 10 of the United States-Chile Free Trade Agreement*, ___ U. MIAMI INTER. AM. L. REV. ___ (forthcoming 2004).

55. USTR, "U.S. & Central American Countries Conclude Historic Free Trade Agreement, *at* http://www.ustr.gov/releases/2003/12/03-82.pdf (last visited Feb. 23, 2003). The Central American countries are Honduras, Nicaragua, El Salvador, Guatemala and Costa Rica. *Id.*

56. Jame R. Holbein & Gary Carpentier, 25 CASE W. RES. J. INT'L L. 531, 567-569 (1993). The authors note that "pursuant to EAI, the U.S. has signed seventeen framework agreements on trade and investment. *Id.* at 567 These framework agreements provide the foundation for negotiations of bilateral investment treaties ("BITs") between the United States and Latin American countries. *See id.* at 568-69.

57. *See supra* note 29.

58. O'Hop, *supra* note 49, at 133.

59. Treaty Establishing a Latin American Free Trade Area and Instituting the Latin American Free Trade Association, Feb. 18, 1960, 1484 U.N.T.S. 223 (1960); O'Hop, *supra* note 49, at 131.

60. Treaty of Montevideo Establishing the Latin American Integration Association, Aug. 12, 1980, *reprinted in* 20 I.L.M. 672 (1980). "The long range objective of this process shall be the gradual and progressive formation of a Latin American common market. *Id.* at 673. The eleven original signatory countries to LAIA include Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Mexico, Paraguay, Peru, Uruguay and Venezuela. Cuba became the twelfth member in 1999. ORGANIZATION OF AMERICAN STATES, TOWARD FREE TRADE IN THE AMERICAS 118-21 (Jose M. Salazar-Xirinachs & Maryse Robert eds., 2001) [hereinafter "OAS FREE TRADE"] (discussing LAIA in detail) and Atkins, *supra* note 50, at 189-90 (commenting that LAIA provides Latin American countries with political forum for trade negotiations on many levels, including the promotion of developing strong market-based economies, special treatment for less-developed countries and participation by nonmember countries and private parties in some instances).

61. General Treaty on Central American Economic Integration, Dec. 13, 1960, 455 U.N.T.S. 3, *available at* http://mba.tuck.dartmouth.edu/cib/tradeagreements/CACM.pdf (last visited May 1, 2004).

62. Agreement on Andean Subregional Integration, May 26, 1969, *reprinted in* 8 I.L.M. 910 (1969).

63. Treaty Establishing the Caribbean Community, July 4, 1973, 946 U.N.T.S. 17, *reprinted in* 12

Cono Sur ("MERCOSUR")[64] in 1991. Through the OAS, Latin American countries have discussed and continue to discuss all aspects of integration, including the harmonization of private international law and other cooperation conducive to economic integration.[65] Moreover, Latin American countries have been responsive to ongoing negotiations for the FTAA.[66]

In addition, with regard to foreign investment, "[c]ountries in Latin America and the Caribbean have signed approximately three hundred BITs, virtually all of which were negotiated in the 1980s and 1990s."[67] As discussed below, the Mexican approach to economic integration traditionally had been more limited compared to other Latin American countries. Mexico's policy on the interplay between international law and foreign investment did, however, influence foreign investment policies throughout Latin America prior to the 1980s.[68] Those policies stood in stark contrast to U.S. policy initiatives. Until the negotiation of NAFTA became a reality Mexico stood firm in its opposition to international standards for foreign investment dispute resolution.

1. The Traditional Mexican Approach to Foreign Investment

The international-based, investor-friendly provisions found in Chapter 11 and discussed in detail later run counter to traditional Mexican law regarding foreign investment.[69] It has been noted that "[s]ince the nineteenth century, Mexico has contested vehemently the traditional principles of international law governing the protection of foreigners and foreign property."[70] This policy originated from Mexican dissatisfaction with foreign investors at the end of the nineteenth

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I.L.M. 1033 (1973).

64. Treaty Establishing a Common Market, Apr. 19, 1991, *reprinted in* 30 I.L.M. 1041 (1991).

65. O'Hop, *supra* note 49, at 135-37. The OAS sponsors talks for hemispheric legal harmonization through its Inter-American Specialized Conferences on Private International Law (known as "CIDIPs"). *Organization of American States, at* http://www.oas.org/dil/privateintlaw_interamericanconferences.htm (last visited Mar. 2, 2004) [hereinafter "OAS Website"]. There have been six CIDIPs to date, covering topics such as jurisdiction, enforcement of judgments and secured financial transactions, to name a few. *Id.*

66. *See supra* note 54.

67. *House of Representatives Committee on Ways and Means Subcommittee on Trade Hearing on the Outcome of the Summit of the Americas and Prospects for Free Trade in the Hemisphere*, 27 CAN. U.S. L.J. 313, 18 (2001) (testimony of Daniel M. Price on behalf of the U.S. Council for International Business).

68. Gloria L. Sandrino, *The NAFTA Investment Chapter and Foreign Direct Investment in Mexico: A Third World Perspective*, 27 VAND. J. TRANSNAT'L L. 259, 323 (1994); Daniel R. Loritz, *Corporate Predators Attack Environmental Regulations: It's Time to Arbitrate Claims Filed Under NAFTA's Chapter 11*, 22 LOY. L.A. INT'L & COMP. L. REV. 533, 537-38 (2000).

69. Indeed, NAFTA "represents the first time Mexico has entered into an international agreement providing for investor-state arbitration. Daniel M. Price, *An Overview of the NAFTA Investment Chapter: Substantive Rules and Investor-State Dispute Settlement*, 27 INT'L LAW 727 (1993) (no pagination electronic version) [hereinafter "Price, *Overview*"].

70. *See* NAFTA: A PROBLEM-ORIENTED COURSEBOOK 24-8 (Ralph H. Folsom, Michael Wallace Gordon, & David Lopez eds., 2000) [hereinafter "NAFTA COURSEBOOK"]. *See also* Loritz, *supra* note 69, at 536 (noting Mexico's history of expropriation of foreign investment without compensation).

century [71] For example, the open investment policy of President Porfirio Diaz in the late-nineteenth and early-twentieth centuries was a major contributor to economic and social problems in Mexico, and consequently a significant cause of the Revolution.[72] The view in Mexico that foreign investment was a threat to state sovereignty and Mexico's economic well-being remained pervasive throughout most of the twentieth century [73]

Developed countries, on the other hand, traditionally have argued it is a basic principle of international law that a country must provide an investor with just compensation in the event that a country expropriated an investment.[74] Indeed, the view advocated by the United States and other developed countries[75] was in stark contrast to that which developing countries, like Mexico, espoused:

> At the end of the 1970s, the world remained sharply divided in its view of international investment policy, particularly the issue of compensation for expropriation. The developed states asserted that expropriation required payment of prompt, adequate and effective compensation. The socialist states contended that no compensation was required, although they frequently did agree to pay compensation in settlement of claims by expropriated foreign investors. The developing states also rejected the prompt, adequate and effective standard, generally taking the position that the calculation of compensation should depend upon a variety of factors, such as the return that the investor already had received

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71. *See* NAFTA COURSEBOOK, *supra* note 71, at 26.

72. Sandrino, *supra* note 69, at 279-81. The author explains:

> Although actual figures are not available, recent studies suggest that by the end of Porfiriato, foreigners owned over half of the total wealth of Mexico and foreign capital dominated most areas of productive enterprise.
>
> The presence of foreign investors during the Porfiriato was largely to blame for many of Mexico's economic ills at the beginning of this century and fueled the Mexican Revolution of 1910. The Revolution established the ideological and political foundation for a fundamentally different state role in the Mexican economy. The new boundaries for the role of the Mexican state were established in the Mexican Constitution of 1917, which placed restraints on foreign economic activities and foreign land ownership. By incorporating the anti-foreign sentiments of the Mexican revolutionaries, the Mexican Constitution emphasized Mexican sovereignty and independence from foreign economic control.

Id. at 280-81; *see also* Loritz, *supra* note 69, at 535-36.

73. Sandrino, *supra* note 69, at 279-81.

74. *See generally* John A. Westberg, *International Transactions and Claims Involving Government Parties: Case Law of the Iran-United States Claims Tribunal* 219 (1991) (discussing the Restatement (Third) of Foreign Relations Law of the United States 15 (1987), explaining that "compensation in the case of expropriation or nationalization [must] be 'appropriate' and 'just' which means it must be in 'an amount equivalent to the value of the property taken' which means 'fair market value' where that can be determined."); Kenneth J. Vandevelde, *Sustainable Liberalism and the International Investment Regime*, 19 MICH. J. INT'L L. 373 (1998) (discussing the differing views on international law and investment among developed and developing countries.).

75. Sandrino, *supra* note 69, at 265 ("Since the end of the nineteenth century, the developed states have been preoccupied with securing international standards for the protection of investments of their nationals and firms abroad, fashioned on the traditional rules of the protection of property.").

> prior to the expropriation and the content of local law on the subject.[76]

The principle that local law should govern foreign investment disputes thus traditionally has been the centerpiece of Mexican policy on the issue.

The Mexican Constitution accomplishes this policy in what is known as the "Calvo Clause."[77] In the mid-nineteenth century, the Argentinean diplomat and publicist Carlos Calvo set forth a series of "assertions" that formed the basis of what became known as the Calvo Doctrine.[78] Calvo argued that international law and principles of state sovereignty prohibited diplomatic and military intervention by foreign countries to resolve commercial disputes on behalf of their investors.[79] Such intervention exacerbated the inequality between developed and developing countries by obliging developing countries to give foreigners more protection in commercial dealings than was given to their own citizens.[80] The Calvo Doctrine, therefore, is based on two key principles: absolute "nonintervention" by foreign states and "absolute equality of foreigners with nationals" with regard to foreigners' commercial dealings in another country [81]

The Calvo Doctrine became immediately popular throughout Latin America.[82] Latin American countries for years tried to implement the Calvo Doctrine through international treaties, in national constitutions and in municipal legislation, but the most popular and successful approach has been to implement Calvo's principles through contractual stipulation.[83] Calvo's principles are still pervasive in many Latin American countries today and stand as a point of contention between developed and developing countries.[84] In Mexico, the Constitution provides:

> Only Mexicans by birth or naturalization and Mexican corporations have the right to acquire ownership of lands, waters, and the appurtenances, or to obtain

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76. Vandevelde, *supra* note 75, at 385-86. During the 1970s this divide was evidenced in the United Nations system, wherein a number of developing and less-developed countries formed the New International Economic Order ("NIEO") in an attempt to assert more control over an international system which those countries viewed as exploitative to their interests and oppressive to their aspirations for development. Sandrino, *supra* note 69, at 269-76. In fact, one of the main aspects of the NIEO was to "challenge[] traditional principles of customary international law that govern foreign direct investment, such as determining compensation for expropriation or nationalization and settling foreign investment disputes. *Id.* at 274.

Interestingly, as result of the NIEO movement in the United Nations, a series of resolutions were passed by the United Nations General Assembly in the 1970s that outright rejected principles of customary international law regarding foreign investment disputes. *See* RONALD A. BRAND, FUNDAMENTALS OF INTERNATIONAL BUSINESS TRANSACTIONS 983-93 (Kluwer Law International 2000) [hereinafter "BRAND IBT"].

77. Constitución Política de los Estados Unidos Mexicanos, art. 27 (1976), http://www.ilstu.edu/class/hist263/docs/1917const.html (last visited Mar. 18, 2004).

78. DONALD R. SHEA, THE CALVO CLAUSE 17 (1955).

79. *Id.* at 18.

80. *Id.* at 18-19.

81. *Id.* at 19-20.

82. *Id.* at 21.

83. *Id.* at 21-32.

84. Christopher K. Dalrymple, *Politics and Foreign Direct Investment: The Multilateral Investment Guarantee Agency and the Calvo Clause*, 29 CORNELL INT'L L.J. 161, 168-69 (1996).

> concessions for working mines or for the utilization of waters or mineral fuel in the Republic of Mexico. The nation may grant the same rights to aliens, provided they agree before the Ministry of Foreign Relations to consider themselves Mexicans in respect to such property, and bind themselves not to invoke the protection of their governments in matters relating thereto, under penalty, in the case of noncompliance, of forfeiture of the property so acquired.[85]

Thus, for most of the twentieth century, the Mexican approach to foreign investment disputes was to handle such disputes according to national law, disregarding any "international" standards for foreign investment dispute resolution. Since the NAFTA negotiating process began, however, Mexican policy has undergone significant changes—namely, the Calvo Clause no longer applies to investors from NAFTA Parties.[86] Moreover, the Mexican legal system has undergone much reform over the last two decades, paving the way for the application of international law in Mexican courts, comporting with Mexico's goals for economic openness and development.[87]

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85. *See* Constitución Política de los Estados Unidos Mexicanos (1976), http://www.ilstu.edu/class/hist263/docs/1917const.html (last visited Mar. 18, 2004). *See also* NAFTA COURSEBOOK, *supra* note 71, at 324 (noting that the Calvo Clause "stipulate[d] that foreign persons operating in Mexico should be considered in all respects as Mexicans, thus limiting the resolution of disputes to local courts adjudicating under domestic law provisions and prohibiting any intervention by the home government."); Charles N. Brower & Lee A. Steven, *Who Then Should Judge?: Developing the International Rule of Law under NAFTA Chapter 11*, 2 CHI. J. INT'L L. 193-95 (2001) (discussing the history of Mexico's unfriendly foreign investor provisions and explaining that "the United States lobbied hard to include Chapter 11's investment protections precisely because it wanted 'to liberalize Mexican restrictions on investment' ") (internal footnotes omitted). See Sandrino, *supra* note 69, at 283-87, for a good discussion of how the traditional anti-foreign investment sentiment in Mexico is embedded in the Mexican Constitution and in Mexican law.

86. Isidro Morales, *NAFTA: The Governance of Economic Openness*, 565 ANNALS 35, 50 (1999) (internal citations omitted), explaining that the traditional Mexican approach:

> was completely opposed to the international minimum standard that the U.S. government has traditionally required all states to comply with when dealing with foreign investments. According to the U.S. view, even if state does not provide its own nationals with minimum international rights, it may not escape international responsibility to guarantee minimum standards to nationals of other countries. Though Latin American countries, including Mexico, have moved progressively from the national-centered paradigm to that of the "minimum international standard" approach, chapter 11 of NAFTA is a turning point in this regard.

87. *See generally* Jorge A. Vargas, *Enforcement of Judgments and Arbitral Awards in Mexico*, 5 U.S.-MEX. L.J. 137, 140 (1997) (discussing the significant changes in Mexican laws in recent years, noting that "[f]or over half century, Mexico's absolute territorialism led to the virtual exclusion of foreign law from that country's court system" and that "[f]rom 1932 to 1988, over fifty years, Mexico was so territorialistic that no foreign judgments were enforced in Mexico."); Jorge Cicero, *International Law in Mexican Courts*, 30 VAND. J. TRANSNAT'L L. 1035 (1997) (discussing the progressive evolution of international law in the Mexican legal system); Miguel Jauregui Rojas, *A New Era: The Regulation of Investment in Mexico*, 1 U.S.-MEX. L.J. 41 (1993) (discussing the changes in law in Mexico in the 1980s regarding foreign investment, such as reducing restrictions on foreign ownership of domestic enterprises, in order to comply more with international practices and enhance foreign investment in Mexico); Sandrino, *supra* note 69, at 301-07 (discussing in detail the changing regulatory scheme of foreign investment in Mexico in the latter part of the twentieth century).

C. NAFTA

The idea that modern trade and investment agreements provide the framework for economic integration in the Western Hemisphere, as discussed, has foundations in U.S. political and economic interests beginning in the nineteenth century as well as in efforts at economic integration by Latin American countries since the mid-twentieth century. The current reality is, nevertheless, clear: globalization has finally linked historical political agendas and economic trends in the Americas and countries are seeking structured, legal frameworks within which to control trends in economic integration. It is within this historical context that NAFTA emerged as the first official milestone in economic integration in the Americas—the first official trade agreement between developed countries and a developing country [88]

1. Background

Canada, Mexico and the United States began negotiations for a free trade area in North America in 1991, largely on account of President Bush's EAI.[89] The United States and Canada were already parties to a free trade agreement, the U.S. Canada Free Trade Agreement ("CFTA"),[90] and the United States led the charge toward creating a new free trade agreement for all of North America.[91] In fact, in the early 1990s, the United States began to experience increasing economic competition from a more unified European Community, and it was feared that if the United States did not act to stimulate more economic cooperation in the Western Hemisphere, a strong Europe may gain an advantage in Latin American markets.[92] Thus, for President Bush, NAFTA served as a critical maneuver to counter economic competition in Latin America from an integrating Europe, as well as a first step toward hemispheric integration. For President Carlos Salinas de Gortari of Mexico, NAFTA represented a great opportunity to stimulate the Mexican economy and effectively assure that Mexico could not return to its protectionist policies of the past.[93]

Indeed, President Salinas had engineered tremendous fiscal and economic policy reform in Mexico since his term began in 1988, making negotiations for NAFTA with the United States and Canada possible in the first place.[94] Both President Salinas and his successor, President Ernesto Zedillo, were responsible for opening Mexico's economy in preparation for NAFTA by privatizing state

88. FRANKO, *supra* note 38, at 228; Gwynne & Kay, *supra* note 18, at 130 ("NAFTA is the only example so far of scheme of economic integration involving two advanced economies and one emerging or developing economy."); Sandrino, *supra* note 69, at 261-62 (noting that NAFTA "is the first regional trade pact between Third World state and two industrialized states.").

89. *See supra* notes 39-42.

90. Dec. 22, 1987, U.S.-Can. (effective Jan. 2, 1988), *reprinted in* 27 I.L.M. 281 (1988).

91. RALPH FOLSOM & W DAVIS FOLSOM, UNDERSTANDING NAFTA AND ITS INTERNATIONAL BUSINESS IMPLICATIONS 119 (1996) [hereinafter "FOLSOM & FOLSOM"].

92. *See* Gwynne & Kay, *supra* note 18, at 93.

93. *See* MEYER, *supra* note 42, at 670-73.

94. *See id.*

enterprises, reducing government spending and transforming the Mexican economy into a free market economy.[95] The three countries signed NAFTA in 1993, and after President Clinton spearheaded negotiations for side agreements on labor and the environment, the U.S. Congress passed NAFTA marking the beginning of a truly historic cooperative.[96] Under the direction of President Zedillo, Mexico continued to liberalize its economy throughout the 1990s in implementing NAFTA.[97] Interestingly, because of Chile's stable political and economic climate, NAFTA countries met with Chile on five occasions to discuss Chile's accession to NAFTA.[98] However, Chile suspended talks regarding its accession, waiting for the U.S. Congress to approve fast-track negotiating authority for President Clinton, which never happened.[99]

Although some commentators opine that "the jury is still out on the effects of NAFTA,"[100] trade has increased dramatically among NAFTA Parties since the agreement took effect, and Parties continue to hold meetings to accelerate the elimination of all tariffs and non-tariff barriers to trade in North America.[101] In terms of stimulating trade and foreign investment, NAFTA has been a positive tool for Mexican economic policy.[102] Ten years after NAFTA went into effect North American trade has doubled.[103] Mexican exports to the United States have increased by 234% and by 203% to Canada.[104] Increased exports have generated new jobs for Mexican workers (one out of five jobs are export-oriented), which pay on average 37% more than manufacturing jobs in Mexico.[105] Mexico also continues to receive large amounts of foreign investment from its NAFTA partners in a variety of sectors, ranging from manufacturing to mining to services.[106]

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95. NAFTA COURSEBOOK, *supra* note 71, at 28.

96. See FOLSOM & FOLSOM, supra note 92, at 120-21 (1999); Dr. Elvia Acelia Quintana Adriano, *The North American Free Trade Agreement and Its Impact on the Micro- Small- and Medium-Sized Mexican Industries*, 39 ST. LOUIS U. L.J. 967 (1995) (explaining that NAFTA created "the largest free trade area in the world.").

97. *See* NAFTA COURSEBOOK, *supra* note 71, at 28.

98. *Id.* at 746.

99. *Id.* at 746-47 Thereafter, Chile has entered into free trade agreements with Canada and Mexico. OAS FREE TRADE, *supra* note 61, at 103-104. And, in June 2003, the United States and Chile signed free trade agreement. USTR, *Chile Free Trade Agreement*, http://www.ustr.gov/new/fta/chile.htm (last visited Feb. 27, 2004).

100. FRANKO, *supra* note 38, at 232.

101. *See* OAS FREE TRADE, *supra* note 61, at 89.

102. Patricia Kowsmann, *World Bank says NAFTA Has Had Positive Impact On Mexico*, U.N. Wire, Dec. 18, 2003, *at* http://www.unwire.org/UNWire/20031218/449_11452.asp (last visited May 1, 2004).

103. *See* United States Trade Representative, "NAFTA at Ten: A Success Story, *at* http://www.ustr.gov/regions/whemisphere/2003-12-08-nafta10-factsheet.pdf (last visited April 7, 2004).

104. *See* United States Trade Representative, "NAFTA. A Decade of Strengthening a Dynamic Relationship, *at* http://www.ustr.gov/regions/whemisphere/nafta2003/brochure-english.pdf (last visited April 7, 2004).

105. *See* United States Trade Representative, "Myth: NAFTA was a Failure for Mexico, *at* http://www.ustr.gov/regions/whemisphere/ftaa2003/factsheet-myth-nafta_mexico.pdf (last visited April 7, 2004).

106. *See* U.S. Embassy in Mexico, "North American Free Trade Agreement: Tenth Anniversary, *at* http://www.usembassy-mexico.gov/eNAFTA_figures.htm (last visited April 7, 2004) (graphing FDI

Mexico is now receiving three times the amount of capital inflow it received in the five-year period immediately prior to NAFTA.[107] Moreover, Mexico has "become the third highest recipient of foreign direct investment ("FDI") among developing countries."[108] FDI-related jobs in Mexico have grown twice as fast as other jobs in Mexico and pay on average some 50% more than national average wages.[109] Notably, Mexico has signed free trade agreements with several Central American countries, has joined the Group of Three with Colombia and Venezuela establishing a free trade area with those countries, and also has free trade agreements with Bolivia and Chile.[110]

NAFTA itself is a highly technical trade document. It lacks, however, the institutional framework that characterizes the more progressive European Union, for example.[111] NAFTA is, at base, a free trade agreement between the Parties, with no provisions for additional party accession and no schedules for achieving higher forms of economic integration such as a customs union, common market or economic union.[112] It does, however, cover a wide range of trade-related topics,

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in Mexico by sector).

107. *See* OECD Global Forum on International Investment, "New Horizons and Policy Changes for Foreign Direct Investment in the 21st Century, *at* http://www.oecd.org/dataoecd/23/52/2424050.pdf (last visited April 7, 2004) [hereinafter "OECD Global Forum"].

108. *See id*; see *also* Secretaria de Economia de México, Comisión Nacional de Inversiones Extranjers, "Informe Estadistico Sobre el Comportamiento de la Inversión Extranjera Directa en México (Enero – diciembre de 2003), *at* http://www.economia.gob.mx/pics/p/p1175/03-dic.doc (last visited April 7, 2004). That report, which covers foreign investment statistics in Mexico from January 2003 to December 2003, points out a 24.7% estimation of new investment in Mexico. *Id.* (translation mine) ("la estimación de la IED realizada en el lapso enero diciembre de 2003 asciende 10,731.4 md, y se integra en un 24.7% (2651.0 md) de nuevas inversiones "). It also notes that during that time period 54.1% of total foreign investment came from the United States. *Id.* (graphing foreign investment inflows by country). Statistics regarding foreign investment from U.S. businesses are particularly staggering. In fact, "[in] September of 2002 there were 15,356 businesses with U.S. capital, which is 55.0% of all businesses with foreign direct investment (FDI) registered in Mexico (27,936). Secretaria de Economia, Subsecretaria de Normatividad, Inversión Extranjera y Practicas Comerciales Internacionales, "Dirección General de Inversión Extranjera: Inversión de Estados Unidos en México, *at* http://www.economia.gob.mx/pics/p/p1240/EUASEP03.doc (last visited April 7, 2004) (translation mine) ("Al mes de septiembre de 2003 se cuenta con un registro 15,356 sociedades con participación estadounidense en su capital social, esto es, el 55.0% del total de sociedades con inversion extranjera directa (IED) registradas en México (27,936)."). Further, "[b]etween January 1999 and September 2003, businesses with U.S. capital realized $51,903.7 million, which represents 68.0% of all FDI invested in the country during that time ($76,286.5 million) "). *Id.* (translation mine) ("Entre enero de 1999 y septiembre de 2003, las empresas con capital estadounidense realizaron inversiones por 51,903.7 millones de dólares (md), cantidad que representa el 68.0% de la IED total que ingresó al pais en ese lapso (76,286.5 md) "). Moreover, since the inception of NAFTA, U.S. FDI in Mexico continues to climb: "U.S. investment since 1994 has reached $80,325.4 million, equivalent to 65.1% of all FDI destined to the country between January 1994 and September 2003. *Id.* (translation mine) ("La inversión estadounidense acumulada a partir de 1994 asciende a 80,325.4 md y equivale al 65.1% de la IED total destinada al pais entre enero de 1994 y septiembre de 2003.").

109. *See* OECD Global Forum, *supra* note 108.

110. *Id.* at 95-104.

111. *See* Gal-Or, *supra* note 5, at 5-11.

112. *See* NAFTA, *supra* note 10, at Ch. 1; *see also* Gustavo Vega Canovas, *Convergence: Future Integration between Mexico and the United States*, 10 U.S.-MEX. L.J. 17 (2002) (discussing the characteristics and limitations of NAFTA as an integrative agreement).

some of which include trade in goods and services, foreign investment, intellectual property rights, government procurement, strict rules of origin for products, anti-dumping provisions, labor issues, environmental issues, and dispute resolution.[113] The NAFTA Central Trade Commission ("Commission") is the central governing body charged with overseeing implementation and dispute resolution among Parties.[114] The Commission has established several Working Groups dedicated to promoting cooperation in specific areas of NAFTA and to conducting day-to-day business.[115] The dispute resolution framework of NAFTA is, of course, of particular interest for purposes of this article. A discussion of that framework in general underscores the preference for international arbitration in modern economic integration and, further, the unique and important character of Chapter 11 dispute resolution.

2. Dispute Resolution

The NAFTA dispute resolution framework serves to facilitate the purposes of NAFTA—to provide a concrete regulatory structure for the reality of economic integration in North America in an era of expansive trade and investment. In this respect, the NAFTA framework underscores how international law is inextricably intertwined with economic policy. As is the case in most international trade and investment agreements, the NAFTA framework depends on alternative means of dispute resolution through which the link between law and economics is maintained and developed.[116] All three NAFTA Parties have unique legal traditions, and the differences between Mexico's legal system and the legal systems of the United States and Canada are tremendous. Thus, it is important to be aware of these differences in order to understand why NAFTA Parties chose the ADR framework and why ADR is the best method for resolving NAFTA-type disputes, especially those involving a private investor and a NAFTA Party.

a. Differing Legal Traditions

A brief note on the differences between legal systems in NAFTA countries is appropriate at this point. Some scholars have stated that:

> NAFTA at its heart is about changing market forces, but law is the instrument and to a degree the guarantor of change. It is through legal enactments and proceedings that the new rules of the business game in North America are to be realized. Each legal system brings with it traditions that can be expected to influence how the NAFTA accords are interpreted, implemented, and applied.[117]

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113. *See* Canovas, *supra* note 113.

114. NAFTA, *supra* note 10, at art. 2001.

115. USTR, "NAFTA Organizations, *at* http://www.ustr.gov/regions/whemisphere/organizations.shtml#committees (last visited Feb. 23, 2003) [hereinafter "NAFTA Organizations"].

116. NAFTA Secretariat, *Overview of the Dispute Settlement Provisions of the North American Free Trade Agreement (NAFTA), at* http://www.nafta-sec-alena.org [last visited Feb. 28, 2004].

117. FOLSOM & FOLSOM, *supra* note 92, at 32.

The Canadian and U.S. legal systems are based on the common law tradition, which derives its roots primarily from English jurisprudence.[118] That is, law has primarily developed and continues to be modified through judicial decisions.[119] This does not mean that Canadian and U.S. law do not rely on other primary sources of law. On the contrary, the Canadian and U.S. legal systems today are indeed vast networks of case law, legislation, and administrative rules and regulations.[120] This, however, does not obscure the tremendous differences between those countries' legal systems and Mexico's legal system. In contrast, Mexico's legal system is based on the civil law tradition, deriving its roots mainly from Spain, France and other Continental European legal traditions.[121] The principle characteristic of the civil law tradition is that law is developed and modified through enacted law, or legislative proscriptions.[122]

While an elaborate discussion of the differences among the legal systems of NAFTA Parties is beyond the scope of this comment, it is worth mentioning that the differences highlight conflicting ideas regarding the role of lawyers and judges in the dispute resolution process, rules of procedure and jurisdictional principles.[123] Additionally, there are differences in the legacy of the rule of law among NAFTA Parties. The United States and Canada can generally boast of individual histories committed to the rule of law. In Mexico, however, where a written constitution and general commitment to democracy "has successfully avoided military coups of the kind that have been common throughout much of Latin America, one-party rule and elitism have tainted the degree to which the rule of law has been able to flourish."[124] This difference is especially pertinent in the context of foreign investment and dispute resolution involved therein.

These differences serve as major obstacles to achieving uniformity of dispute resolution procedures for suits involving private parties and NAFTA Parties in order to deal with increased flows of commerce and investment across borders. One author summarizes the effects of this non-uniformity on private individuals

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118. *See generally id.* at 32-42, 49-56 (providing general overview of some major facets of the Canadian and U.S. legal systems). Canada is common law country like the United States, and thus similarly stands in contrast to Mexico's civil law system, but it can hardly be said that the Canadian and U.S. legal systems are the same for purposes of achieving harmonization of dispute resolution procedures. *Id.* Additionally, the Province of Québec maintains its own civil code, which has roots in the French Civil Code and is thus something of an amalgamation between the common law and civil law, baring some similarity to Mexico's legal system. *Id.* This adds further complexity to the task of achieving uniform dispute resolution procedures among NAFTA Parties. *Id.* at 39-42. *See also generally* MARY ANN GLENDON ET AL., COMPARATIVE LEGAL TRADITIONS 438-764 (1994) (discussing the foundations and characteristics of the common law tradition).

119. FOLSOM & FOLSOM, *supra* note 92, at 33.

120. *See* FOLSOM & FOLSOM, *supra* note 92, at 35-38, 53-56.

121. *Id.* at 43-44. *See generally* GLENDON, *supra* note 119, at 44-276 (discussing the foundations and characteristics of the civil law tradition) *and* JOHN H. MERRYMAN, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA (1999) (discussing the same).

122. *See* GLENDON, *supra* note 119, at 192-94.

123. *See generally id.* at 130-251.

124. *See* PATERSON, *supra* note 29, at 48.

engaged in transnational business in the United States and Mexico:

> [Mexican law] limits damages that may be recovered in a civil action, whereas United States law creates opportunities for unlimited damages, including punitive damages. In Mexico, an injunction is not available as a remedy in commercial disputes where damages are irreparable or cannot be measured in monetary terms. In the United States, an injunction is often the preferred remedy for resolving a commercial dispute. The jury is not a part of adjudication of civil disputes in Mexico, whereas it is an integral part of the system in the United States. In Mexico, trial evidence is mainly presented by documentation in front of judges who question the witnesses, and pre-trial discovery is not allowed on the same scale as in the United States. These differences and others reinforce a party's doubts that the legal system of his or her counterpart will lead to a definitive resolution of a commercial dispute that will be fair.[125]

The NAFTA dispute resolution framework establishes ADR procedures for dispute settlement as a means of bypassing the complexities involved in transnational litigation and legal harmonization. Understanding the basics of ADR is thus essential to understanding the NAFTA dispute resolution framework.

b. ADR[126]

ADR includes methods of resolving disputes without involving litigation in a particular court system.[127] These methods include consultation, mediation and arbitration.[128] Mediation, also known as conciliation, is simply "a process in which parties to a dispute appoint a neutral third party to assist them in resolving their disputes, and the goal is "a voluntary negotiated settlement."[129] Arbitration also involves resolution of disputes by a neutral third party, but it is a more formal step for parties to take.[130] Decisions of arbitration panels can be either binding or non-binding, depending upon the rules to which the disputing parties have agreed.[131] There are several organizations that offer international arbitration guidelines, such as the United Nations Commission on International Trade Law ("UNCITRAL"),[132]

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125. Robert K. Paterson, *A New Pandora's Box? Private Remedies for Foreign Investors under the North American Free Trade Agreement*, 8 WILLAMETTE J. INT'L L. & DISP RESOL. 77, 89 (2000) [hereinafter "Robert Paterson"].

126. For an introductory discussion on ADR, see International Trade Administration, *Primer on International Alternative Dispute Resolution*, *at* http://www.osec.doc.gov/ogc/occic/adr.html (last updated Nov. 6, 1998) [hereinafter "*International ADR*"].

127. *Id.*

128. *Id.*

129. *Id.*

130. American Arbitration Association, *AAA Glossary of Dispute Resolution Terms*, *available at* http://www.adr.org/index2.1.jsp?JSPssid=15784 (last visited Mar. 1, 2004).

131. *International ADR*, *supra* note 127.

132. United Nations Commission on International Trade Law (UNCITRAL), *general information*, *at* http://www.uncitral.org/english/commiss/geninfo.htm (last visited Feb. 23, 2003) [hereinafter "UNCITRAL Website"]. UNCITRAL is the main legal body of the United Nations for international trade law. *Id.* It has set forth several rules and guidelines regarding international commercial arbitration and conciliation, and, in particular, the UNCITRAL Arbitration Rules adopted in 1976 are

and others that offer guidelines and services such as the American Arbitration Association ("AAA")[133] and the International Centre for the Settlement of Investment Disputes ("ICSID").[134]

Given the availability and characteristics of arbitration procedures for the settlement of disputes involving parties from different countries, international arbitration is increasingly favored by those involved in international business. One scholar has summarized the advantages and disadvantages to arbitration in the context of international commercial transactions:

> [T]he common arguments favoring arbitration include the following:
>
> Arbitration can be simpler and less subject to rules of procedure and rules of evidence.
>
> Arbitration can be set in a neutral location, thus avoiding either party giving up the "home court" advantage.
>
> Parties to arbitration can select both the procedural and substantive law applicable to the dispute.
>
> Arbitration can more often take place without termination of contract

often selected by parties to disputes in international arbitration. *Id.* NAFTA Chapter 11 gives private investors the option to select UNCITRAL rules as the applicable arbitration rules in an investor-state dispute. *See infra* Part III.B.

133. American Arbitration Association, *available at* http://www.adr.org/index2.1.jsp (last visited Feb. 23, 2003).

134. *See* International Centre for Settlement of Investment Disputes, *About ICSID*, *at* http://www.worldbank.org/icsid/about/main.htm (last visited Feb. 23, 2003) [hereinafter "ICSID Website"]. The ICSID was created by the World Bank in 1966, believing "that an institution specially designed to facilitate the settlement of investment disputes between governments and foreign investors could help could help promote increased flows of international investment. *Id.* The ICSID is particularly important in the context of NAFTA Chapter 11 dispute resolution, as discussed in Part III.B., *infra*. Notably,

> ICSID provides facilities for the conciliation and arbitration of disputes between member countries and investors who qualify as nationals of other member countries. Recourse to ICSID conciliation and arbitration is entirely voluntary. However, once the parties have consented to arbitration under the ICSID Convention, neither can unilaterally withdraw its consent. Moreover, all ICSID Contracting States, whether or not parties to the dispute, are required by the Convention to recognize and enforce ICSID arbitral awards.
>
> Besides providing facilities for conciliation and arbitration under the ICSID Convention, the Centre has a set of Additional Facility Rules authorizing the ICSID Secretariat to administer certain types of proceedings between States and foreign nationals which fall outside the scope of the Convention.
>
> Provisions on ICSID arbitration are commonly found in investment contracts between governments of member countries and investors from other member countries. Advance consents by governments to submit investment disputes to ICSID arbitration can also be found in about twenty investment laws and in over 900 bilateral investment treaties.

performance, allowing dispute resolution to fill gaps in performance issues in long-term contracts without otherwise disrupting performance.

Arbitral awards are more likely to be enforceable in the courts of multiple countries because of the New York Arbitration Convention and the lack of any similar multilateral convention dealing with the enforcement of court judgments.

Arbitral awards generally are not subject to appeal, thus bringing more certain finality to the process.

In addition, the following factors may lead to a decision that litigation is more desirable:

Court decisions are more often a matter of public record, making the interpretation of the law in a given jurisdiction more predictable than in arbitration where the arbitrators may have no published record and the institution under which arbitration is conducted may not make public prior arbitral awards on similar issues.

If the other party will agree to jurisdiction in a local court, the "home court" advantage of litigation may be available.

Preliminary relief, such as prejudgment attachment, has traditionally been more often available in litigation than in arbitration.

Litigation is most often subject to appeal, allowing for correction or erroneous application of the substantive law by the tribunal. [135]

The preference for and importance of international arbitration in modern trade agreements, and in particular investment agreements, has been summarized as follows:

Arbitration has become a fixture in international trade and investment because it compares favorably to the alternatives. It provides a neutral mechanism characterized by private proceedings, flexible procedures, expert decision-makers, relative finality, and enforceability of the result. For a host state, private adjudication before a learned tribunal within a relaxed procedural framework will often be preferable to defending against litigation in an investor's home state. [136]

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135. BRAND IBT, *supra* note 77, at 584-85.

136. Clyde C. Pearce & Jack Coe, Jr., *Arbitration Under NAFTA Chapter Eleven: Some Pragmatic Reflections upon the First Case Filed Against Mexico*, 23 HASTINGS INT'L & COMP L. REV. 311, 318 (2000); *see also* Gal-Or, *supra* note 5, at 19 (discussing the obvious advantages of such international arbitration).

The NAFTA dispute resolution framework is thus not unique to this preference in that it establishes five different mechanisms for arbitration involving NAFTA Parties.

c. NAFTA Framework in General

As mentioned, NAFTA lacks a concrete institutional framework. Dispute resolution mechanisms are thus dispersed throughout the document in five main areas.[137] Notably, "[t]he NAFTA dispute settlement system is a decentralized system [It] operates by channeling certain types of trade conflicts into the appropriate specialized dispute settlement mechanism of limited jurisdiction and limited powers."[138] Mechanisms are found in Chapter 20, Chapter 19, Chapter 11,[139] and in provisions under the North American Agreement on Environmental Cooperation ("NAAEC")[140] and the North American Agreement on Labor Cooperation ("NAALC").[141]

The Chapter 20 mechanism is the general trade dispute mechanism for NAFTA countries. Parties may seek to resolve disputes on virtually any matter related to the terms of NAFTA.[142] Dispute settlement under Chapter 20 proceeds as follows: (1) Parties first undergo consultations; (2) if they cannot agree on resolution of the dispute, the aggrieved Party may submit the dispute to the Commission for resolution and recommendation; (3) if the Commission does not facilitate a resolution, a Party may request that an arbitral panel hear the dispute, administered by the NAFTA Secretariat; (4) the arbitration panel will then issue a non-binding decision.[143] A decision by an arbitration panel does not directly affect national law.[144] Further, if a Party does not comply with the arbitration ruling, the prevailing Party has the right to withhold temporarily NAFTA benefits from the non-compliant Party until the situation is remedied.[145]

The Chapter 19 mechanism allows Parties to request arbitral panel review in the first instance regarding dumping and countervailing duties.[146] In a Chapter 19 dispute, the arbitral panel will issue a binding decision, as "[p]anels and committees in Chapter 19 proceedings replace judicial review in the courts of

137 Cherie O'Neal Taylor, *Dispute Resolution as a Catalyst for Economic Integration and an Agent for Deepening Integration: NAFTA and MERCOSUR?* 17 N.W. J. INT'L L. & BUS. 850, 854 (1996).

138. *Id. at 854-55.* For more discussion on the NAFTA dispute resolution framework, *see id.* at 854-58, and Lopez, *supra* note 54, at 606-09.

139. Taylor, *supra* note 138, at 854-55.

140. North American Agreement on Environmental Cooperation, Sept.14, 1993, U.S.-Can.-Mex., arts. 22-36, 32 ILM 1480, 1482 (text) (entered into force Jan. 1, 1994) [hereinafter NAAEC].

141. North American Agreement on Labor Cooperation, Sept. 14, 1993, U.S.-Can.-Mex., arts. 27-41, 32 I.L.M. 1499, 1502 (text) (entered into force Jan. 1, 1994) [hereinafter NAALC].

142. NAFTA, *supra* note 10, at art. 2004.

143. *Id.* at arts. 2006-2017

144. Taylor, *supra* note 138, at 856.

145. NAFTA, *supra* note 10, at art. 2019; Lopez, *supra* note 54, at 606.

146. NAFTA, *supra* note 10, at art. 1904; NAFTA COURSEBOOK, *supra* note 71, at 434.

competent jurisdiction in the NAFTA countries."[147]

The NAALC mechanism creates "a four-step dispute settlement process that progresses sequentially from initial consultations to ministerial consultations, to expert evaluations to further consultations which may lead to non-binding arbitration,"[148] pertaining to labor matters. However, only "controversies involving occupation safety child labor, or minimum wage concerns may" reach an arbitration panel.[149] Only Parties have access to this mechanism, and decisions are non-binding.[150]

In the case of disputes regarding the environment, the NAAEC mechanism authorizes the Environmental Secretariat "to conduct an investigation and to prepare a report, potentially for distribution to the public."[151] Parties may request such an investigation when another Party allegedly fails to enforce effectively its own environmental laws or when another Party's environmental laws are arguably inadequate.[152] Decisions regarding such disputes, if they reach an arbitral panel, are non-binding, and compliance is left to the threat of monetary damages or suspension of NAFTA benefits to the Party in error.[153]

The common characteristic of the four NAFTA dispute settlement mechanisms discussed above is that only NAFTA Parties have access to the ADR proceedings. Moreover, apart from the binding nature of arbitration decisions under Chapter 19 the other three mechanisms only allow for non-binding decisions and depend on political and economic pressure for enforcement.[154] The Chapter 11 mechanism, on the other hand, stands in contrast to the general NAFTA dispute resolution framework in its procedures, results and implications. Chapter 11 bridges the gap between private parties and governments by establishing a binding, international law-based dispute resolution regime for disputes between NAFTA investors and NAFTA Parties.[155] In this sense, it is a progressive and pragmatic approach to incorporating private actors and international law into the process of governing economic integration.

Chapter 11 is thus a distinctive feature of NAFTA, and warrants careful analysis. More importantly for the purposes of this article, given the Chapter 11 framework and Mexico's traditional outlook on the applicability of international law to foreign investment, this analysis prompts discussion of whether Chapter 11 dispute resolution is beneficial to Mexico. With the background information now in place, a more narrow discussion of Chapter 11 and Mexico is in order. A look at the Chapter 11 text in detail and the first four final arbitration awards involving Mexico provides the proper focus for that analysis.

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147 NAFTA COURSEBOOK, *supra* note 71, at 437· NAFTA, *supra* note 10, at art. 1904.

148. Lopez, *supra* note 54, at 607-08. *See* NAALC, *supra* note 142, at arts. 27-41.

149. Lopez, *supra* note 54, at 607-08. *See* NAALC, *supra* note 142, at art. 29.

150. *See* NAALC, *supra* note 142, arts. 27-49; *see also* Lopez, *supra* note 54, at 608.

151. Lopez, *supra* note 54, at 607. *See* NAAEC, *supra* note 141, at arts. 22-36.

152. NAAEC, *supra* note 141, at arts. 22-34; Lopez, *supra* note 54, at 606-07.

153. NAEEC, *supra* note 141, at art. 36; Lopez, *supra* note 54, at 607.

154. Lopez, *supra* note 54, at 605-08.

155. *See infra* Part III.B.

III. NAFTA CHAPTER 11

A. Substantive Provisions

As mentioned, NAFTA Chapter 11 deals specifically with foreign investment in North America. It creates broad protections for foreign investors in an effort to stimulate integration beyond trade.[156] Indeed, there is a strong correlation between foreign investment and trade. As one author notes, "[t]he subject of international investment arises from one basic idea: the mobility of capital. If there is a competitive advantage to be gained, capital can and will get there."[157] Moreover, "[t]he flow of capital takes four forms: foreign direct investment, bond purchases, portfolio equity flows, and lending directly to support trade."[158] Foreign direct investment ("FDI") represents the deepest form of investment commitment, as it is "investment by foreigners through ownership of equity shares or setting up production facilities within a country."[159]

Section A of Chapter 11 is devoted to reducing barriers to foreign investment. In doing so, it broadly defines what constitutes investors and investment. Investment includes any economic interest in an enterprise, including equity securities, debt securities, loans, and real estate or other property acquisitions.[160]

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156. Indeed, one of the objectives of NAFTA is to "increase substantially investment opportunities in the territories of the Parties. NAFTA, *supra* note 10, at art. 102(c); *see also* Office of NAFTA and Inter-American Affairs, "Investment, *at* http://www.mac.doc.gov/nafta/investment.htm (last visited Feb. 23, 2003) [hereinafter "NAFTA Investment"]:

> Chapter 11 of NAFTA addresses investment issues among Canada, Mexico and the United States. U.S. objectives for the protection of investors and investments in the NAFTA Chapter 11 were to eliminate barriers to investment within the context of U.S. policy and law, to encourage adoption of market-oriented domestic policies that treat investment fairly and in a non-discriminatory manner, and to protect investment through appropriate dispute settlement mechanisms. The NAFTA Chapter 11 succeeds in obtaining these goals, thereby allowing companies to invest throughout the NAFTA region on a level playing field.

For a detailed review of the provisions in and objectives of Chapter 11, *see* Rodolpho Sandoval, *Chapter Eleven: Investments under the North American Free Trade Agreement*, 25 ST. MARY'S L.J. 1195 (1994); *see also* Price, *Overview*, *supra* note 70.

157. CZINKOTA, *supra* note 23, at 175.

158. FRANKO, *supra* note 38, at 177

159. *Id.* at 467· *see generally* CZINKOTA, *supra* note 23, at 175-79 (discussing in detail foreign direct investment and the rationale behind engaging in such investment); *see generally* JOAN E. SPERO & JEFFREY A. HART, THE POLITICS OF ECONOMIC RELATIONS, Ch. 8 (5th ed. 1997) (discussing foreign direct investment in detail and the arguments for and against such investment in developing countries).

160. NAFTA, *supra* note 10, at art. 1139(a)-(f). *See also* NAFTA COURSEBOOK, *supra* note 71, at 302 (discussing the breadth of the definition of investment under NAFTA Chapter 11, pointing out specifically that "[i]nvestment covers interests that entitle an owner to share income or profits of an enterprise, assets of the enterprise on dissolution, real estate, and tangible or intangible property, including intellectual property."). However, investment does not include:

> (i) claims to money that arise solely from
> (i) commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of another Party, or
> (ii) the extension of credit in connection with a commercial transaction, such as trade

An investor of a NAFTA Party is "a Party or state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, is making or has made an investment."[161] In line with the hallmarks of modern trade agreements, Chapter 11 sets forth national treatment[162] and most-favored nation treatment[163] standards for investors in NAFTA Parties, and mandates a minimum standard of treatment in accordance with principles of international law.[164] Article 1106 attempts to facilitate the free flow of investment across borders by limiting NAFTA Parties' abilities to establish performance requirements on investments, such as export or domestic content minimums, or restrictions on sales volume and technology transfer.[165] Other key provisions in Section A of Chapter 11 geared toward stimulating investment include a prohibition on excluding foreign nationals from being officers of an investor enterprise[166] and a restriction on placing limitations on monetary transfers.[167]

Perhaps most importantly, Chapter 11 establishes firm guidelines for government expropriation of investments covered by NAFTA. It "covers direct, indirect, and so-called 'creeping' expropriation."[168] Article 1110 provides:

> 1. No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except:

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financing, other than a loan covered by subparagraph (d); or

(j) any other claims to money, that do not involve the kinds of interests set out in subparagraphs (a) through (h).

NAFTA, *supra* note 10, at art. 1139(h)-(j).

161. NAFTA, *supra* note 10, at art. 1139.

162. *Id.* at art. 1102. "Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors *Id.*

163. *Id.* at art. 1103. "Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of non-Party *Id.*, *see also* NAFTA COURSEBOOK, *supra* note 71, at 302 (explaining "that treaty-protected investments will be treated at least as favorably by the NAFTA state as nationals and firms from any third state.").

164. *See* NAFTA, *supra* note 10, at arts. 1104-1105. For example, under Article 1105(1), NAFTA Parties must "accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security. *Id.* This is of particular interest given Mexico's traditional policy on the applicability of international law to foreign investment. *See supra* Part II.B.1.

165. NAFTA, *supra* note 10, at art. 1106(1)-(3); *see also* NAFTA COURSEBOOK, *supra* note 71, at 303 (explaining that "NAFTA prohibits the imposition of performance requirements includ[ing] export performance, domestic content, domestic sourcing, trade balancing, product mandating, and technology transfer requirements.").

166. NAFTA, *supra* note 10, at art. 1107. However, "[a] Party may require that majority of the board of directors, or any committee thereof, of an enterprise of that Party that is an investment of an investor of another Party, be of a particular nationality, or resident in the territory of the Party *Id.* at art. 1107(2).

167. *Id.* at art. 1109; *see also* NAFTA COURSEBOOK, *supra* note 71, at 304 (explaining that "[t]his includes transfers to the investor, such as remittance of profits and dividends, the payment of interest and capital gains, management fees, and proceeds from the sale of liquidation of an investment.").

168. Price, *Overview*, *supra* note 70, at 730.

(a) for a public purpose;

(b) on a non-discriminatory basis;

(c) in accordance with due process of law and Article 1105(1); and

(d) on payment of compensation in accordance with paragraphs 2 through 6.

2. Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ("date of expropriation"), and shall not reflect any change in value occurring because the intended expropriation had become known earlier. Valuation criteria shall include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value.

3. Compensation shall be paid without delay and be fully realizable.[169]

It should be noted that Chapter 11 also takes steps to protect legitimate government regulations regarding the environment and public health. Article 1114 provides:

1. Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.

2. The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures.[170]

The substantive provisions in Chapter 11 thus embody established principles of international law, and carry out a significant policy change for Mexico regarding the applicability of international law to foreign investment. The direct access dispute resolution framework set out in Section B of Chapter 11 further serves to facilitate cross border investment by providing a predictable legal structure based on principles of international law within which to resolve investment disputes.[171]

B. Direct Access Dispute Resolution

The Chapter 11 investor-state dispute resolution framework derives its structure from Bilateral Investment Treaties ("BITs") promoted by the United

169. NAFTA, *supra* note 10, at art. 1110(1)-(3).
170. *Id.* at art. 1114.
171. *Id.* at arts. 1115-1138.

States.[172] Notably, such investment treaties "commonly dealt with the key issue[s] of mechanisms for settling disputes between foreign investors and host governments, which included provisions for binding international arbitration.[173] The purpose of the Chapter 11 dispute settlement provisions is clear: "this Section establishes a mechanism for the settlement of investment disputes that assures both equal treatment among investors of the Parties in accordance with the principal of international reciprocity and due process before an impartial tribunal."[174] A principle goal of Chapter 11 is therefore to establish a friendly investment climate via predictable legal rules and principles as derived from international law.

Articles 1116 and 1117 grant private investors from NAFTA Parties the right to seek arbitration, on behalf of themselves or on behalf of an enterprise from a NAFTA Party, against NAFTA Parties for injury or loss due to alleged violations of the provisions in Section A of Chapter 11, and also in other limited circumstances arising from Parties' obligations pursuant to other Chapters of NAFTA.[175] There is a three-year time limit for filing a claim, running "from the date on which the investor first acquired, or should have first acquired, knowledge

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172. Currently, there is no multilateral framework for the regulation of foreign investment. *See* R. Todd Shenkin, *Trade-Related Investment Measures in Bilateral Investment Treaties and the GATT. Moving Toward Multilateral Investment Treaty*, 55 U. PITT. L. REV 541, 544, 567 (1994); *see also* BRAND IBT, *supra* note 78, at 1061. Conversely, the WTO provides a framework for international trade. *See* WTO, "Trade and Investment, *at* http://www.wto.org/english/tratop_e/invest_e/invest_e.htm (last visited Feb. 23, 2003) [hereinafter "WTO Investment"] ("Despite several efforts since the end of WWII, to date there does not exist set of coherent, substantive, and binding multilateral rules governing foreign investment."). Absent such a framework to regulate foreign investment, the United States has signed BITs with several countries, and these agreements contain standard provisions for dispute resolution in accordance with established principles of international law. *See* BRAND IBT, *supra* note 78, at 1053, 1058-59; *see generally* Shenkin, *supra* at 541-82 BITs have thus become a key component of economic integration in addition to free trade agreements:

> "The U.S. Model BIT covers five main subjects:
> general principles for treatment of foreign investors;
> conditions of expropriation and the measure of compensation payable;
> the right to free transfer without delay of profits and other funds associated with investments;
> the prohibition of inefficient and trade distorting practices; and
> access to international arbitration for settlement of investment disputes.

FUNDAMENTALS OF INTERNATIONAL BUSINESS TRANSACTIONS: DOCUMENTS 124 (Ronald Brand ed., 2000) [hereinafter "Brand, FUNDAMENTALS"]. Notably, the Model BIT provides for binding international arbitration against signatory states. *Id.* at 125. To view a version of the U.S. Model BIT, *see* Brand, FUNDAMENTALS at 126-32; *available at* http://www.osec.doc.gov/ogc/occic/modelbit.html (last visited May 1, 2004).

173. NAFTA COURSEBOOK, *supra* note 71, at 325-26.

174. NAFTA, *supra* note 10, at art. 1115.

175. *Id.* at arts. 1116-1117. An investor has standing to submit a claim to arbitration when:

> (1) [T]he government of another NAFTA party has breached an obligation under Section A of Chapter 11; (2) [a] NAFTA party has acted in manner inconsistent with the party's obligations under Chapter 11 (investment) or Chapter 14 (financial services) in the exercise of its regulatory, administrative or other governmental authority; or (3) a state monopoly has acted in a manner inconsistent with a party's obligations under Chapter 11 where the entity 'exercises any regulatory, administrative, or other governmental authority that the Party has delegated to it '"

of the alleged breach and knowledge that the investor has incurred loss or damage" in the case of individual claims,[176] and "from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the enterprise has incurred loss or damage" in the case of claims filed on behalf of an enterprise.[177] Thus, the hallmark of NAFTA Chapter 11 investment dispute resolution, which sets it apart from other NAFTA dispute settlement mechanisms, is that private investors have direct access to arbitration against Parties.

The procedure for Chapter 11 dispute settlement is set out in Articles 1118 through 1137 Disputing parties are directed to engage in consultation and negotiation to resolve the dispute before arbitration is commenced.[178] An investor that decides to submit a claim for arbitration against a NAFTA Party must notify that Party at least ninety days prior to submitting the claim.[179] However, an aggrieved investor may not submit a claim for arbitration unless a minimum of six months have passed since the alleged breach and injury [180] If an investor submits a claim to arbitration pursuant to either Article 1116 or 1117 the claimant must consent in writing to the arbitration procedures set forth in Chapter 11, and must waive in writing any right to litigate before the courts of any NAFTA Party on the issues submitted for settlement in arbitration.[181] With respect to Mexico specifically, the Chapter 11 text prohibits an investor from simultaneously submitting a claim in arbitration against Mexico and bringing a similar action in a Mexican court.[182]

Section B of Chapter 11 also sets forth guidelines for appointing arbitrators,[183]

NAFTA COURSEBOOK, *supra* note 71, at 327. *See also* Gal-Or, *supra* note 5, at 27-28 (listing scenarios where investors may have standing under Chapter 11).

176. NAFTA, *supra* note 10, at art. 1116(2).

177. *Id.* at art. 1117(2).

178. NAFTA, *supra* note 10, at art. 1118-1137

179. *Id.* at art. 1119.

180. *Id.* at art. 1120(1).

181. NAFTA, *supra* note 10, at art. 1121(1)-(3) (Under article 1121(1)(b) and (2)(b), a private investor utilizing Chapter 11 arbitration is not barred from obtaining declaratory or injunctive relief from the courts of NAFTA Parties. Article 1122 assures that NAFTA Parties consent to private investor arbitration as set out in Chapter 11), *available at* http://tech.mit.edu/Bulletins/Nafta/11.invest (last visited May 1, 2004).

182. *Id.* at annex 1120.1(a).

183. *See* NAFTA, *supra* note 10, at arts. 1123-1125 (Arbitral tribunals consist of three arbitrators, unless the disputing parties agree otherwise under article 1123); *see also* Ray C. Jones, *NAFTA Chapter 11 Investor-to-State Dispute Resolution: A Shield to Be Embraced or a Sword to Be Feared?* 2002 B.Y.U.L. REV. 527, 534-35 (2002) (In practice, "each party to the dispute selects one arbitrator, and the two selected arbitrators in turn choose third arbitrator who will preside over the proceeding."). Thus the very composition of the arbitral tribunal is neutral. Jones summary of the general procedures that follow after the arbitration panel is selected:

> Once the arbitration panel is selected, it is not uncommon for all interested parties to meet and allow the panel to hear an outline of each respective case "on the merits. Before the formal oral hearing, the claimant in the case will submit a "memorial, the "chief moving document" of the arbitration, containing "a statement of relevant facts; statement of law; and the submissions. The respondent will then issue his "counter-memorial. This interaction may take place second time if the parties agree. Also,

selecting the place of arbitration,[184] consolidating of claims,[185] and for the applicable law.[186] Section B also provides for participation by non-disputing NAFTA Parties.[187] Other provisions in Section B deal with damages awards and the finality and enforcement of an arbitral decision.[188] The arbitration tribunal may award an injured private investor monetary damages, interest, restitution of property and costs for arbitration, but it "may not order a Party to pay punitive damages."[189]

The arbitration panel may grant interim relief to a disputing party to protect rights in property, but it "may not order attachment or enjoin the application of the measure alleged to constitute a breach "[190] Moreover, an arbitral decision is binding only between the disputing parties,[191] and "[e]ach Party shall provide for

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before the oral hearing, post-brief/pre-hearing conferences may take place to accomplish the "marshaling of evidence" that the parties plan to present at the hearing. According to modern international arbitration rules, the parties have the option to forgo the oral hearing and to rest on their written submissions. However, very few claimants rest on their written submissions, as the overwhelming majority considers the oral hearing to be invaluable to their case.

Id. at 535-56.

In addition, disputing parties often submit post-hearing briefs to the arbitration panel in order to clarify their positions on certain issues. *Id. See also* Pearce & Coe, *supra* note 137, at 319-22.

184. NAFTA, *supra* note 10, at art. 1129 (Arbitration must take place within the territory of a Party "which is a party to the New York Convention, unless otherwise agreed); Jones, *supra* note 184, at 535 (acknowledging that normally "disputing parties will elect to hold the arbitration in the third country not involved in the dispute to add a measure of neutrality to the proceedings.").

185. *See* NAFTA, *supra* note 10, at art. 1125; Price, *Overview*, *supra* note 70, at 727 (no pagination electronic version).

186. *See* NAFTA, *supra* note 10, at arts. 1120, 1130, 1131. (Under Article 1120, an investor may submit a claim to arbitration under the ICSID Convention, the Additional Facility Rules of ICSID or under the UNCITRAL rules for arbitration, and the relative procedural rules apply to the arbitration. Article 1130 is the general governing law provision, stating that an arbitration panel "shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law. Article 1131(1) is the general governing law provision, stating that an arbitration panel "shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law "); *see also supra* notes 133 and 135 (discussing those organizations). Currently, of the NAFTA Parties only the United States is a signatory to the ICSID. ICSID Website, *supra* note 135. As Jones notes, "[t]herefore, and arbitration claim brought by an American investor against either Canada or Mexico would need to be governed by either ICSID's Additional Faculty Rules or the UNCITRAL Rules. Jones, *supra* note 184, at 534. Jones also mentions that the number of Chapter 11 arbitrations governed by UNCITRAL or the ICSID thus far have been about equal. *Id.*

187 NAFTA, *supra* note 10, at arts. 1128, 1129, 1133. ("On written notice to the disputing parties, a Party may make submissions to a Tribunal on question of interpretation" of NAFTA. Additionally, there are provisions for submissions by expert witnesses); Jones, *supra* note 184, at 536, (commenting that the arbitration panel has "a great deal of discretion in determining the timing and manner of third party submissions that will be allowed").

188. NAFTA, *supra* note 10, at arts 1134-1135; Jones, *supra* note 184, at 536 (decisions are made on a majority vote basis).

189. NAFTA, *supra* note 10, at art. 1134.

190. NAFTA, *supra* note 10, at art. 1133 (a NAFTA Chapter 11 tribunal has no authority to require a NAFTA Party to change its laws).

191. *Id.* at art. 1135(1) (thus Chapter 11 arbitral have no precedential value. However, tribunals often look to previous awards for some guidance); *see* Price, *Overview*, *supra* note 70, at 727 (no

the enforcement of an award in its territory."[192] In order to effect enforcement of an award, an investor "may seek enforcement of an arbitration award under the ICSID Convention, the New York Convention or the Inter-American Convention ..."[193] Additionally, if a NAFTA Party does not comply with an arbitral award, the Party of the investor may temporarily suspend extension of NAFTA benefits to the non-compliant Party under Chapter 20.[194] It is important to note also that a losing NAFTA Party may bring an action in the country where the arbitration decision was rendered to have that decision modified or vacated.[195] However, there is no official process for appellate review of Chapter 11 arbitrations.[196]

C. Arbitrations against Mexico

At the time of this writing, there have been nine instances when private investors have invoked the NAFTA Chapter 11 dispute resolution mechanism against Mexico.[197] Arbitral tribunals have made four final awards in arbitrations involving Mexico so far, one of which is again pending after the claimants resubmitted their claim.[198] This discussion focuses on the first four final arbitral awards involving Mexico. All of the claims filed against the United States and Canada have been brought by private investors in those countries—none have been brought by an investor or enterprise based in Mexico against the United States or Canada.[199]

1. *Azinian v. United Mexican States*[200]

In late 1993, Naucalpan, a suburb of Mexico City, entered into a multi-year

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pagination electronic version).

192. NAFTA, *supra* note 10, at art. 1135(4).

193. NAFTA, *supra* note 10, at art. 1135(6); ICSID Website, *supra* note 137 (the United States is the only NAFTA Party that is signatory to the ICSID Convention); SICE, *Inventory*, *supra* note 2 (both the United States and Mexico are signatories to the Inter-American Convention on International Commercial Arbitration); UNCITRAL Website, *supra* note 133 (all three NAFTA Parties, however, are signatories to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). Thus, for example, a NAFTA investor who is successful in Chapter 11 arbitration against Mexico may seek to have the award enforced in Mexico pursuant to the New York Convention or the Inter-American Convention).

194. Price, *Overview*, *supra* note 70, at 735.

195. Jones, *supra* note 184, at 536.

196. *See generally* NAFTA, *supra* note 10; *see infra* Part IV.B.

197 U.S. Department of State, *at* http://www.state.gov/s/l/ (last visited June 12, 2003) [hereinafter "State Department Website"] (for an official listing of the pending arbitrations and accessible documents related thereto); Todd Weiler, *NAFTALAW.ORG*, *at* http://www.naftaclaims.com/ (last visited Feb. 23, 2003) [hereinafter "Weiler Website"].

198. Weiler Website, *supra* note 198 (look at "Mexico" under the Dispute link).

199. State Department Website, *supra* note 198; Weiler Website, *supra* note 198 (for a list, background discussion, and links to documents for such arbitrations).

200. *Azinian & Davitian & Baca v. Mex.*, Case No. ARB(AF)/97/2 (Nov. 1, 1999), *available at* Weiler Website, *supra* note 198 [hereinafter Azinian Award"]; *see generally* Robert Paterson, *supra* note 126, at 110 (discussing the Azinian Award in detail).

waste-management contract with Desechos Solidos de Naucalpan S.A. de C.V ("DESONA"), a Mexican corporation that had some U.S. citizen shareholders.[201] From the beginning of its operations, DESONA did not perform according to its contract obligations.[202] The Ayuntamiento of Naucalpan, dissatisfied with DESONA's performance, annulled the contract four months after DESONA began operations, and the State Administrative Tribunal upheld the annulment.[203] On appeal, the Superior Chamber of the Administrative Tribunal affirmed, finding nine "irregularities" by DESONA relating to the contract.[204] DESONA then filed an action in *amparo* in the Federal Circuit Court, and that court upheld the Administrative Tribunal's rulings.[205]

In 1997 two years after the Circuit Court's ruling, Azinian and other U.S. shareholders filed a claim in arbitration against Mexico under Chapter 11, arguing that the Ayuntamiento's cancellation of the waste-management contract was a breach of the provisions on expropriation and minimum standard of treatment.[206] The claimants requested damages in an average amount of $16 million plus various costs and interest.[207] The arbitral tribunal noted that, as a threshold issue, it first had to determine whether it had competence to review the dispute.[208] Indeed, the tribunal candidly asserted that "[i]t is a fact of life everywhere that individuals may be disappointed in their dealings with public authorities, and disappointed yet again when national courts reject their complaints. NAFTA was not intended to provide foreign investors with blanket protection from this kind of disappointment "[209] Thus, an investor cannot use Chapter 11 arbitration simply as a forum within which to argue disapproval of government actions or domestic court decisions with respect to the investor's business dealings in a NAFTA Party [210]

The tribunal found that the claimants had satisfied the notice and waiver

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201. Azinian Award, *supra* note 201, ¶¶ 1-9.

202. *Id.* ¶ 10. Specifically, DESONA did not operate with proper or sufficient equipment necessary to conduct the waste-management services as called for by the contract. *Id.*

203. *Id.* ¶¶ 17-20 ("Ayuntamiento" translates to city or local government).

204. *Id.* ¶ 21.

205. *Id.* ¶ 22 (the Mexican *amparo* is a legal action whereby an alleged injured party may challenge judicial decisions and administrative acts, seek protection of constitutional rights, and challenge the constitutionality of law); *see generally* Fix Zamudio, *A Brief Introduction to the Mexican Writ of Amparo*, 9 CAL. W INT'L L.J. 306 (1979) and KENNETH KARST & KEITH S. ROSENN, LAW AND DEVELOPMENT IN LATIN AMERICA. A CASEBOOK 127-60 (1975) (for more discussion on the Mexican *amparo).*

206. Azinian Award, *supra* note 201, ¶¶ 24, 75.

207. *Id.* ¶ 75.

208. *Id.* ¶ 35. The panel explained:

> Arbitral jurisdiction under Section B is limited not only as to the persons who may invoke it (they must be nationals of a State signatory to NAFTA), but also as to subject matter: claims may not be submitted to investor-state arbitration under Chapter Eleven unless they are founded upon the violation of an obligation established in Section A.

Id. ¶ 82.

209. *Id.* ¶ 83.

210. *Id.* ¶ 84.

requirements under Chapter 11 arbitration,[211] but ultimately ruled that the claimants did not have a valid claim under Chapter 11.[212] The panel had particular difficulty with the way in which the claimants argued their case. Specifically the complaint averred, at base, that the Ayuntamiento's actions were a breach of contract.[213] The tribunal explained that "NAFTA cannot possibly be read to create a regime, which would have elevated a multitude of ordinary transactions with public authorities into potential international disputes."[214] The critical issue was therefore whether the Ayuntamiento's annulment of the contract violated the Article 1110 provisions regarding expropriation;[215] or in other words, whether the alleged breach of contract was an expropriation.

The tribunal summarized the problem in *Azinian* as follows:

> The Ayuntamiento believed it had grounds for holding the Concession Contract to be invalid under Mexican law governing public service concessions. At DESONA's initiative, these grounds were tested by three levels of Mexican courts, and in each case were found to be extant. How can it be said that Mexico breached NAFTA when the Ayunatmiento of Naucalpan purported to declare the invalidity of a Concession Contract which by its terms was subject to Mexican law, and to the jurisdiction of the Mexican courts, and the courts of Mexico then agreed with the Ayuntamiento's determination?[216]

Thus, claimants had to prove that the decisions of the Mexican courts breached Chapter 11, which, although theoretically possible according to the tribunal, was not even argued by claimants.[217]

The tribunal also discussed at length the circumstances surrounding the status of the investors themselves. It found that the claimants mislead the Ayuntamiento with regard to their background in the waste-management business, the availability of capital to effect contract performance and the viability of the long-term aims of the waste-management services.[218] Indeed, the tribunal found that claimants were

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211. *Id.* ¶ 36.

212. *Id.* ¶¶ 35, 128.

213. *Id.* ¶ 87

214. *Id.*

215. *Id.* ¶ 91.

216. *Id.* ¶ 96.

217. *Id.* ¶¶ 97, 100. The panel explained that international arbitral panels can be called upon to assess the validity of judicial decisions with regard to international law and treaty obligations. *Id.* ¶¶ 98-99. Given that the claimants in *Azinian* did not allege misconduct by the Mexican courts, the panel concluded "[f]or if there is no complaint against a determination by a competent court that a contract governed by Mexican law was invalid under Mexican law, there is by definition no contract to be expropriated. *Id.* ¶ 100. Further, finding no violation of Article 1110, the panel dismissed *fortiori* claimants' Article 1105 claim. *Id.* ¶ 92.

Paterson notes that "[t]he ruling of the tribunal in the Azinian case is characterized by complete absence of any discussion of the meaning of Article 1110. Robert Paterson, *supra* note 126, at 116. He notes that the panel's analysis indicates that it did not consider whether the annulment itself violated Article 1110, but rather focused on the decisions of the Mexican courts. *Id.* Nonetheless, Paterson admits that *Azinian* stands for "effective use of Chapter 11 to resolve claim that was clearly found unpersuasive on its merits. *Id.* at 118.

218. Azinian Award, *supra* note 201, ¶¶ 29-33, 105. The panel also noted various facts regarding

not "an inherently plausible group of investors."[219] *Azinian*, therefore, is important for Mexico, and all NAFTA Parties, in that it demonstrates that (1) investors may not use Chapter 11 as a means of resolving normal business disputes; (2) such investors may not use Chapter 11 to eviscerate domestic court rulings regarding such disputes, and; (3) a Chapter 11 tribunal will scrutinize the plausibility of an investor and the soundness of an investment when deciding whether the investor should prevail in a Chapter 11 claim.[220]

2. *Waste Management, Inc. v. United Mexican States*[221]

In 1998, Waste Management, Inc. (formerly USA Waste Services, Inc.), a U.S. corporation, filed a Chapter 11 arbitration claim against Mexico on behalf of itself and its Mexican subsidiary, Acaverde, S.A. de C.V [222] The claimants alleged that Mexico, through the actions of the municipality of Acapulco, the State of Guerrero and Banco Nacional de Obras y Servicios Públicos, S.N.C. ("BANOBRAS"), violated Articles 1105 and 1110 of NAFTA.[223] In its Notice of Arbitration, Waste Management averred that Acapulco did not treat Acaverde according to international standards as required by Article 1105 by failing to make full payment to Acaverde for services performed under a long-term waste-management contract and then transferring Acaverde's contract rights to a third party [224] Claimants then argued that Acapulco's default on payment was unlawful expropriation as per Article 1110, as such nonperformance "rendered worthless Claimants' rights acquired and investments made under the concession" and "effectively extinguished Acaverde's viability as an enterprise."[225] Waste Management claimed $60 million in damages plus interest.[226]

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one of the claimant-investor's business record which clearly indicated a pattern of questionable conduct. *Id.* ¶ 121.

219. *Id.* ¶ 29.

220. Despite its final ruling, the tribunal did not award costs to Mexico, which it could have done under Chapter 11. *Id.* ¶¶ 125-26; NAFTA, *supra* note 10, at art. 1135(1). Several factors dissuaded the tribunal from awarding costs, one of which was the fact that the Chapter 11 mechanism was "a new and novel mechanism for the resolution of international investment disputes. Azinian Award, *supra* note 201, ¶ 126. Indeed, *Azinian* was the first investor-state arbitration decided under NAFTA. *Id.* ¶ 79.

221. Waste Management, Inc. v. United Mexican States (U.S. v. Mex.), 2000 Case No. ARB (AF)/98/2 (Jun. 2), *available at* http://www.worldbank.org/icsid/cases/waste_award.pdf [hereinafter "Waste Management I Award"]. *See also* William S. Dodge, *International Decision: Waste Management, Inc. v. Mexico*, 95 A.J.I.L. 186 (2001) [hereinafter "Dodge, *Waste Management*"], *and* Jacob S. Lee, *No "Double-Dipping Allowed: An Analysis of Waste Management, Inc. v. United Mexican States and the Article 1121 Waiver Requirement for Arbitration under Chapter 11 of NAFTA*, 69 FORDHAM L. REV. 2655 (2001) (both discussing the first *Waste Management* arbitration award in detail).

222. Waste Management I Award, *supra* note 222, ¶ 1.

223. *Id.*

224. ICSID Arbitration (Additional Facility), *Notice of Institution of Arbitration Proceedings*, Sep. 29, 1998, USA Waste Services, Inc. and Acaverde, S.A. de C.V v. United Mexican States, *available at* http://state.gov/documents/organization/3999.pdf (last visited May 1, 2004).

225. *Id.*

226. *Id.*

The arbitral award centered on whether the arbitral tribunal had jurisdiction to resolve the dispute, or more specifically, whether claimants followed the proper waiver requirements set out in Article 1121.[227] Under that article, claimant was required to waive its right to litigate in Mexican courts the claims it brought before the tribunal.[228] The claimants submitted a waiver with an exception that such waiver did not bar them from seeking relief against the government entities and BANOBRAS for alleged violations of Mexican law other than the alleged violations of NAFTA.[229] Mexico contested this waiver and thus the jurisdiction of the arbitral tribunal.[230]

In fact, subsequent to filing the Chapter 11 arbitration, Acaverde pursued two pending claims against BANOBRAS in Mexican courts for breach of a letter of credit until Acaverde lost both claims at the appellate level in March and October of 1999.[231] Acaverde also filed a claim in arbitration against Acapulco in October of 1998, one month after the Chapter 11 arbitration was filed, from which it did not withdraw until July 1999.[232] The arbitration tribunal ultimately found that claimants did not comply with Article 1121, and dismissed the claim for want of jurisdiction.[233]

In holding that compliance with the waiver requirements of Article 1121 was a "condition precedent" to the arbitration, the tribunal stated that it had to determine whether claimants submitted "the waiver in accordance with the formalities envisaged under NAFTA and whether it has respected the terms of same through the material act of either dropping or desisting from initiating parallel proceedings before other courts or tribunals."[234] Although claimants satisfied the formal requirements of Article 1121, they failed to comply materially with that article.[235] Acaverde pursued other legal action with respect to the conduct of Acapulco and BANOBRAS for more than a year after it filed for Chapter 11 arbitration.[236] Notably, the tribunal summarized:

> In effect, it is possible to consider that proceedings instituted in a national forum may exist which do not relate to those measures alleged to be in violation of the NAFTA by a member state of the NAFTA, in which case it would be feasible that such proceedings could coexist simultaneously with an arbitration proceeding under the NAFTA. However, when both legal actions have a legal basis derived from the same measures, they can no longer continue simultaneously in light of

227. Waste Management I Award, *supra* note 222, ¶¶ 7, 17

228. *Id*; NAFTA, *supra* note 10, at art. 1120-1122.

229. Waste Management I Award, *supra* note 222, ¶ 5.

230. *Id.* ¶ 6.

231. *Id.* ¶ 25.

232. *Id.*

233. *Id.* ¶ 31. Interestingly, the tribunal rejected Mexico's argument that the arbitral tribunal must, as one of its duties emanating from Article 1121, notify domestic tribunals of disputing investor's waiver. *Id.* ¶ 15. It held that such a task is that of the Mexican government, as the tribunal does not have the authority to preclude a disputing investor from litigating in other fora. *Id.*

234. *Id.* ¶ 20.

235. *Id.* ¶¶ 23-24.

236. *Id.* ¶ 31.

> the imminent risk that the Claimant may obtain the double benefit in its claim for damages. This is precisely what NAFTA Article 1121 seeks to avoid.[237]

Thus, Article 1121 is clear in that it prohibits a tribunal from entertaining jurisdiction over the dispute given that Acaverde maintained what were essentially duplicate proceedings in Mexican courts.[238]

In September of 2000, Waste Management re-filed for Chapter 11 arbitration.[239] Mexico again contested the jurisdiction of the arbitral tribunal, arguing that claimants' first unsuccessful attempt at Chapter 11 arbitration barred them from resubmitting their case to another Chapter 11 panel.[240] The first tribunal did not indicate whether its decision was *res judicata* as to claimants' re-filing of its Chapter 11 claims.[241] The second tribunal posited that the issue of its jurisdiction over the resubmitted claim depended on "what amounts to a submission of a claim within the meaning of Article 1121."[242]

It found that Article 1121 contemplates a submission of a claim for adjudication on the merits,"[243] and therefore even if Chapter 11 envisaged that investors have one opportunity to submit a claim for arbitration, a claim that is dismissed for lack of jurisdiction for failure to comply with Article 1121 waiver

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237. *Id.* ¶ 27.

238. In the dissenting opinion, Mr. Highet argued that claimants did not violate the waiver requirements, and that the panel had jurisdiction. Waste Management, Inc. v. Mexico, (U.S. v. Mex.), Dissenting Opinion, 2000 Case No. ARB(AF)/00/3 (Jun. 2) ¶ 39, *available at* http://www.worldbank.org/icsid/cases/waste_diss.pdf (last visited May 1, 2004). He argued that the Article 1121 waiver requirements should not be read strictly, and also should not be read to include "that litigations subject to the waiver be affirmatively withdrawn, that no further litigation be instituted, and that no appeals be conducted. *Id.* ¶ 32. Mr. Highet posited that Chapter 11 is not explicit to the termination of such litigation in light of pending Chapter 11 arbitration, as Annex 1120.1 already bars investors from simultaneously pursuing remedy for expropriation and violation of international law under Chapter 11 arbitration and through litigation in Mexican courts. *Id.* ¶¶ 34, 38. Here, claimants' actions in Mexican tribunals were based on different causes of action than their claims under Chapter 11, and therefore their continued litigation in Mexican courts should not have prevented the panel from asserting jurisdiction over the claim. *Id.* ¶ 39. Even more, for Mr. Highet, the question of whether claimants' waiver is valid should go to the admissibility of particular claim rather than to the jurisdiction of the panel, because the majority's interpretation presents "drastically preclusive effect. *Id.* ¶¶. 56, 9. *See also* Dodge, *Waste Management*, *supra* note 224, at 188. Dodge notes that Mr. Highet believed "the purpose of Article 1121 was not to bar local remedies for related commercial claims, but to protect the NAFTA parties from 'parallel actions in their own judicial systems that would raise NAFTA claims.'" *Id.* Dodge, nonetheless, agrees with the majority's opinion in that claimants did not comply with the waiver requirements. *Id.* at 189. He also adds that an investor has three years to seek remedy from domestic courts before filing for Chapter 11 arbitration. *Id.* at 190.

239. Waste Management, Inc. v. United Mexican States, (U.S. v. Mex.), Award on Jurisdiction, 2002 Case No. ARB(AF)/00/3 (Jun. 26) ¶ 1, *available at* http://www.state.gov/documents/organization/12244.pdf (last visited May 1, 2004) [hereinafter "Waste Management II Jurisdiction Decision"].

240. *Id.* ¶ 3. Indeed, Mexico interpreted NAFTA Article 1121 to mean that "an election under that provision is irrevocable and allows Claimant a single opportunity to vindicate its NAFTA claim before a Chapter 11 tribunal. *Id.* ¶ 17

241. *Id.* ¶¶ 20, 22.

242. *Id.* ¶ 32.

243. *Id.* ¶ 34.

requirements would still not bar a claimant's resubmission.[244] Also, none of the Mexican tribunals in which Acaverde brought actions entertained claimants' NAFTA claims,[245] and further, under international law "if the jurisdictional flaw can be corrected, there is in principle no objection" to allowing a disputing party the opportunity to resubmit its claim."[246] The arbitral tribunal therefore held that neither NAFTA nor international law precluded claimants from resubmitting their case before a Chapter 11 panel.[247] Moreover, the tribunal did not find that claimants abused process in submitting their claims for arbitration under NAFTA, and therefore could proceed.[248] The tribunal has not yet made a final ruling on the merits.

3. *Metalclad Corp. v. United Mexican States*[249]

In 1996, Metalclad (a U.S. corporation) filed for arbitration under Chapter 11 on behalf of Confinamiento Técnico de Residuos Insdustriales ("COTERIN"), a Mexican waste disposal company wholly-owned by Metalclad's wholly-owned U.S. subsidiary, Eco-Metalclad Corporation ("ECO").[250] In 1993, Metalclad had acquired COTERIN via a purchase-option agreement on the basis that COTERIN had obtained all necessary permits from Mexican authorities to operate a hazardous waste landfill in Guadalcazar, State of San Luis Potosi.[251] Pursuant to federal and state construction permits and under the assumption that the State of San Luis Potosi approved of the project, Metalclad began construction of a landfill in May of 1994 and continued work until October of 1994, when Guadalcazar ordered Metalclad to stop construction because Metalclad did not have a construction permit from that city.[252] Metalclad resumed construction in November of 1994 after federal officials informed it that its city permit application would be granted "as a matter of course."[253]

Both a study conducted by the Autonomous University of San Luis Potosi as

244. *Id.* ¶ 33.

245. *Id.* ¶ 35.

246. *Id.* ¶ 36.

247. *Id.* ¶ 37. The tribunal stated that "there is no doubt that, in general, the dismissal of a claim by an international tribunal on grounds of lack of jurisdiction does not constitute decision on the merits and does not preclude a later claim before a tribunal which has jurisdiction. *Id.* ¶ 43. Thus Mexico's argument that the first tribunal's decision was *res judicata* as to the merits of claimants' action failed. *Id.*

248. *Id.* ¶¶ 48-50. The claimants were "open" in the prior proceedings and did not act in "bad faith" so to give the tribunal reason to reject the resubmission. *Id.*

249. Metalclad Corp. United Mexican States (U.S. v. Mex.) Case No. ARB(AF)/97/1 (Aug. 30, 2000), *available at* State Department Website, *supra* note 203 [hereinafter "Metalclad Award"]. *See* Pearce & Coe, *supra* note 137, at 35 (discussing the arbitral tribunal phase of *Metalclad* in detail); William S. Dodge, *International Decision: Metalclad Corp. v. Mexico*, 95 A.J.I.L. 910 (2001) [hereinafter "Dodge, *Metalclad*"] (discussing all phases of *Metalclad*); Brower II, *supra* note 13, at 51-69 (same).

250. Metalclad Award, *supra* note 250, ¶¶ 1-2.

251. *Id.* ¶¶ 35-36.

252. *Id.* ¶¶ 38-40, 78.

253. *Id.* ¶¶ 41-42.

well as an audit by the Mexican Federal Attorney's Office for the Protection of the Environment confirmed the suitability of Metalclad's project, and Metalclad completed construction in March of 1995.[254] Protestors in Guadalcazar, however, prevented the landfill operation from commencing.[255] Metalclad thereafter entered into extensive negotiations with independent federal agencies, the result of which was a detailed agreement ("Convenio") permitting operation of the landfill in exchange for several concessions on the part of Metalclad.[256] The State of San Luis Potosi denounced the Convenio, and Guadalcazar officially denied Metalclad's construction permit.[257]

In 1996, Guadalcazar obtained an order from a Mexican court enjoining Metalclad's operation of the landfill.[258] Negotiations to resolve the matter failed, prompting Metalclad to file a claim against Mexico under Chapter 11 in January of 1997.[259] Metalclad alleged breaches of Articles 1105 and 1110[260] and requested more than $43 million in damages.[261] In September of 1997 just before leaving office, the Governor of San Luis Potosí issued an ecological decree declaring the area encompassing the landfill an environmentally protected zone "for the protection of rare cactus" found in the area.[262]

The arbitral tribunal first ruled that Mexico violated NAFTA Article 1105 in its treatment of Metalclad.[263] It stated that "[p]rominent in the statement of principles and rules that introduces [NAFTA] is the reference to 'transparency' inferring that the principle of transparency thus extends to a NAFTA Party's obligations under Chapter 11-type investment.[264] The tribunal noted that at all times Metalclad operated construction of the landfill with reassurance from federal authorities that it did not need approval from Guadalcazar for the project.[265] Consequently, the tribunal held:

> The absence of a clear rule as to the requirement or not of a municipal construction permit, as well as the absence of any established practice or procedure as to the manner of handling applications for a municipal construction permit, amounts to a failure on the part of Mexico to ensure the transparency

254. *Id.* ¶¶ 44-45.

255. *Id.* ¶ 46.

256. *Id.* ¶ 47-48. Metalclad agreed to correct certain "deficiencies" existing at the landfill site, to set aside a significant portion of its land for animal conservation purposes, to provide free medical advice to citizens of Guadalcazar, to give employment and training preferences to citizens of Guadalcazar, to give the city a discount for disposal of the city's hazardous waste and to consult with citizens and government authorities regarding issues arising from the operation of the landfill. *Id.* ¶ 48.

257. *Id.* ¶ 56.

258. *Id.* Guadalcavar's case was dismissed and the injunction was lifted, but not until May of 1999. *Id.*

259. *Id.* ¶ 58.

260. *Id.* ¶ 72.

261. *Id.* ¶¶ 114-16.

262. *Id.* ¶ 59.

263. *Id.* ¶ 74.

264. *Id.* ¶ 76.

265. *Id.* ¶¶ 85-87.

required by NAFTA.[266]

The tribunal pointed out that Guadalcazar denied Metalclad's permit after negotiation of the Convenio when construction was basically completed, and did not notify Metalclad of the denial proceedings or afford Metalclad an opportunity to be heard at those proceedings.[267] Metalclad was thus not given fair and equitable treatment in accordance with international law standards imposed on Mexico under in Chapter 11.[268]

According to the tribunal, it followed that Mexico violated Article 1110 through "indirect expropriation" of Metalclad's investment by allowing Guadalcazar to prevent operation of the landfill.[269] In other words, Mexico's actions were "tantamount to expropriation," in violation of Chapter 11.[270] Further, the tribunal found that, although such a ruling was not necessary, the Governor's ecological decree covering Metalclad's land was itself "an act tantamount to expropriation."[271] The tribunal then took into account a number of factors in assessing damages. It noted that Metalclad had been deprived of its entire investment, and assessed damages in the amount of the claimant's actual investment in the landfill operation.[272]

This assessment did not include future projected earnings, which Metalcad demanded.[273] The tribunal based its determination of "fair market value" on its analysis of prior international arbitration investment disputes.[274] In the end, Metalclad was awarded almost $16.7 million in damages plus legal interest at a monthly rate of six percent.[275]

Thereafter, Mexico filed a petition with the Supreme Court of British Columbia asking the court to set aside the award.[276] Chapter 11 prohibits final

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266. *Id.* ¶ 88. The tribunal found that under Mexican law, the federal government has authority over projects for managing hazardous waste regardless of whether Metalclad needed approval from Guadalcazar. *Id.* ¶¶ 82-86.

267. *Id.* ¶¶ 90-91. The tribunal further found that the permit denial "was denied without any consideration of, or specific reference to, construction aspects or flaws of the physical facility. *Id.* ¶ 93. Moreover, the tribunal gave weight to the Convenio in holding that the project was not violative of environmental concerns. *Id.* ¶ 98.

268. *Id.* ¶¶ 99-101.

269. *Id.* ¶¶ 104-07. The tribunal explained what "expropriation" means under Chapter 11:

> [E]xpropriation under NAFTA includes not only open, deliberate and acknowledged takings of property but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.

Id. ¶ 103.

270. *Id.* ¶ 104.

271. *Id.* ¶ 111.

272. *Id.* ¶¶ 113-22.

273. *Id.* ¶ 122.

274. *Id.*

275. *Id.* ¶ 131.

276. United Mexican States v. Metalclad Corp., 2001 B.C.S.C. 644, [2001] 89 B.C.L.R.3d 359, *available at*: www.naftaclaims.com (last visited May 1, 2004) [hereinafter "Metalclad"].

enforcement of an arbitral tribunal's award until "a court has dismissed or allowed an application to revise, set aside or annul the award."[277] There is, of course, no provision in NAFTA for appealing Chapter 11 arbitrations, but nothing in NAFTA prevents Mexico from proceeding as it did. In determining what law it should apply, the court reasoned that the International Commercial Arbitration Act was applicable, given the international commercial nature of the investment dispute in the *Metalclad* arbitration.[278] The British Columbia court then noted that that Act permitted the court to set aside the arbitration award only if the arbitral tribunal decided issues outside the scope of the arbitration or if the award was against the public policy of British Columbia.[279]

Under that standard of review, the court first dealt with the Article 1105 claim. It held that the minimum standard of treatment principle set forth in that article is based on "customary international law," "developed by common practices of countries, and is not based on "conventional international law which is comprised of treaties "[280] The court thus rejected the arbitral tribunal's finding that Mexico violated Article 1105 based on lack of transparency, as "[n]o authority was cited or evidence introduced to establish that transparency has become a part of customary international law."[281] The court then held that the tribunal's Article 1105 ruling "infected its analysis of Article 1110."[282] Because the tribunal held that Mexico's actions were "tantamount to expropriation" due in part to the tribunal's flawed analysis regarding transparency, the court ruled that the tribunal acted outside the scope of its mandate in ruling that Mexico violated Article 1110.[283]

At the end of the day, however, Metalclad prevailed. The court upheld the tribunal's finding that the Governor's ecological decree was itself tantamount to expropriation.[284] It noted that the tribunal's broad definition of expropriation was a question of law that the court could not review, and that the tribunal's finding of expropriation based on the ecological decree was separate from its other flawed findings and within its scope of review.[285] The court then dismissed Mexico's arguments that Metalclad had acted improperly and against the public policy of British Columbia by allegedly engaging in corruption, bribery and fraud in

277. NAFTA, *supra* note 10, at art. 1136(b)(3)(ii). The British Columbia Court noted that neither party contested the jurisdiction of the court given that the arbitration to place in Vancouver. *Metalclad*, *supra* note 277, ¶ 39; *see also* Dodge, *Metalclad*, *supra* note 250, at 914-15 (discussing the Canadian court's decision, noting that Mexico filed its suit in British Columbia because that is where the arbitration took place).

278. *Metalclad*, *supra* note 277, ¶¶ 39-49.

279. *Id.* ¶ 50.

280. *Id.* ¶ 62.

281. *Id.* ¶ 68. The court found that the arbitral tribunal wrongly stated the applicable law in inferring the requirement of transparency in NAFTA, and thus decided a matter outside the scope of its mandate. *Id.* ¶¶ 70-74.

282. *Id.* ¶ 78.

283. *Id.* ¶ 79.

284. *Id.* ¶ 92.

285. *Id.* ¶¶ 94-99.

pursuing its Chapter 11 claim.[286]

Mexico also argued that the award should be set aside on grounds that the arbitral tribunal did not address all of Mexico's arguments.[287] This argument was also rejected, as the court found that the tribunal "adequately dealt with the principle issues before it" and thus did not impair Mexico's case to warrant setting aside the award.[288] Lastly, the court modified Metalclad's damages according to its holding, reducing the amount of interest Mexico owed on the award by fixing the date of interest due on the award from the date of the ecological decree in 1997 rather than in 1995.[289]

4. *Feldman v. United Mexican States*[290]

Feldman differs significantly from the other Chapter 11 arbitrations discussed thus far. It raised a variety of complex jurisdictional questions before the tribunal could rule on the merits. Its complexity and in some instances incomplete factual

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286. *Id.* ¶¶ 106-118. The court found no evidence indicating such corruption or impropriety and confirmed the findings of the arbitral tribunal with respect to those issues. *Id.*

287. *Id.* ¶ 119.

288. *Id.* ¶ 130.

289. *Id.* ¶ 137 The court also ordered Metalclad to pay seventy-five percent of Mexico's court costs because Mexico prevailed in having the court set aside two of the tribunal's findings. *Id.* Interestingly, Dodge makes the following observation regarding *Metalclad*:

> One often thinks of courts as being concerned with setting precedents to guide future conduct, and of arbitrators as being both less concerned with the content of the law and more willing to fashion compromises to satisfy the parties. In *Metalclad*, however, those roles were reversed. The arbitral tribunal tried hard to advance international law concerning foreign investment by finding that "fair and equitable treatment" required transparency and by adopting an expansive definition of expropriation. It was Justice Tyson who gave each party what it wanted most—setting aside for Mexico the transparency aspects of the award, while giving Metalclad most of its money More broadly, the case may lead one to wonder whether it is appropriate to allow national courts to review Chapter 11 awards.

Dodge, *Metalclad*, *supra* note 250, at 915-16.

Dodge goes on to argue that the *Metalclad* proceedings demonstrate the need for NAFTA Parties to create an appellate body for Chapter 11 arbitrations. *Id.* at 918-19.

Interestingly, the court did not rule explicitly on whether Mexico had breached Articles 1105 and 1110, and held that Metalclad had the option of resubmitting its claims to the arbitral tribunal regarding those issues, excluding any arguments regarding Mexico's alleged lack of transparency. *Id.* ¶ 136. In a supplemental decision, the Supreme Court of British Columbia confirmed its ruling to permit Metalclad to resubmit certain claims to arbitration, and the court postponed its own adjournment until the arbitral tribunal could rule on those claims in resubmission. United Mexican States v. Metalclad, 2001 BCSC 1529, 95 B.C.L.R. (3d) 169, 41 C.E.L.R. (N.S.) 298, ¶¶ 18-19 (Sup. Ct. Brit. Col. 2001) (additional reasons to (2001) 89 B.C.L.R. (3d) 359 (B.C.S.C.)). Mexico appealed the court's decision not to set aside the award in whole. *Id.* ¶ 9. However, soon thereafter it abandoned its appeal. Mexico v. Metalclad Corp., Notice of Abandonment of Appeal, Oct. 30, 2001, Case No. CA028568, Doc. No. L002904, *available at* http://www.naftaclaims.com (last visited May 1, 2004).

290. Marvin Feldman v. United Mexican States, ICSID Case No. ARB(AF)/99/1, Final Award (Dec. 16, 2002), *available at* http://www.state.gov/s/l/c3751.htm (last visited May 1, 2004) [hereinafter "Feldman Award"]

history[291] also provide for a rather lengthy opinion. In April of 1999 Mr. Feldman (a U.S. investor) filed a claim in arbitration against Mexico on behalf of his Mexican corporation, Corporación de Exportaciones Mexicanas, S.A. de C.V ("CEMSA"), which was a reseller/exporter of cigarettes produced in Mexico.[292] Mr. Feldman based his claim on Articles 1102, 1105 and 1110,[293] requesting 475 million pesos ($50 million) in damages.[294]

The dispute involved CEMSA's tremulous relations with the Ministry of Finance and Public Credit ("SHCP"). Mexico's tax laws imposed a zero percent tax rate on the resale of cigarettes produced in Mexico sold as exports as well as granted rebates on the initial taxes the resellers/exporters paid to Mexican producers or retailers, as long as the resellers met certain invoice requirements.[295] In essence, Mr. Feldman's claim arose from SHCP's refusal to rebate excise taxes paid by CEMSA on its exported cigarettes, and SHCP's later denial of CEMSA's export registration license.[296]

In fact, legal action between CEMSA and SHCP began before NAFTA even took effect.[297] CEMSA received rebates from 1990-91, but in 1991 the Mexican Congress amended the tax laws to deny the rebates and the zero percent tax rate for resellers of cigarettes.[298] CEMSA then filed an *Amparo* petition in a Mexican court challenging the validity of the legislation,[299] later winning on appeal in 1993.[300] In that same year, however, SHCP "shut down" CEMSA's exports on grounds that CEMSA could not provide separate, itemized invoices of domestic taxes paid on cigarettes as required by Mexican law, even though it was impossible for it to comply with the invoice requirement.[301] SHCP soon after agreed to allow CEMSA to export cigarettes at the zero percent tax rate, but refused to give it the rebates.[302] In 1996 and 1997 however, SHCP paid rebates to CEMSA despite the fact that CEMSA could not produce the required invoices.[303]

At the end of 1997 SHCP stopped rebate payments to CEMSA, and in 1998 Congress amended the tax laws, establishing that only "first-sale" retailers could receive the rebates and that resellers had to register with the SHCP in order to get the zero percent tax rate on cigarette exports.[304] SHCP then denied CEMSA's registration request and demanded CEMSA to pay some $25 million in rebates that

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291. *Id.* ¶ 6.
292. *Id.* ¶ 1.
293. *Id.*
294. *Id.* ¶ 24.
295. *Id.* ¶. 7.
296. *Id.* ¶¶ 7-21.
297. *Id.* ¶¶ 11-26.
298. *Id.* ¶¶ 9-10.
299. *Id.* ¶ 11. CEMSA also filed a criminal complaint against certain SHCP officials alleging abuse of authority and conspiracy in refusing rebates. *Id.*
300. *Id.* ¶ 16.
301. *Id.* ¶ 14. CEMSA could not comply with the invoice requirements because it did not have access to the itemized invoices as a reseller—only producers had access to those invoices. *Id.* ¶ 15.
302. *Id.* ¶ 17
303. *Id.* ¶¶ 19-20.
304. *Id.* ¶ 21.

it had received.[305] CEMSA then filed an action in a Mexican court to stop SHCP from assessing criminal sanctions on it.[306] That case was still pending at the time of the arbitration.[307]

The arbitral tribunal first ruled on several preliminary jurisdictional issues. It ruled that Mr. Feldman did have standing to bring the claim under Chapter 11 as a U.S. citizen, even though he was a permanent resident of Mexico.[308] It also held that the three-year time limit on Chapter 11 claims began to run in 1996 when CEMSA experienced obstacles from the SHCP and therefore claimants' arguments for relief from Mexico's action prior to 1996 were barred from consideration.[309] Perhaps most interestingly, the tribunal held that it only had jurisdiction to resolve the disputed matters insofar as they related to measures or actions taken by Mexico after NAFTA became effective in 1994.[310]

The tribunal had jurisdiction despite CEMSA's pending action in a Mexican court (regarding SHCP's claim for reimbursement of rebates).[311] This was because (1) Mexican law required CEMSA to respond in litigation to SHCP's demand, and (2) CEMSA had since requested a termination of that litigation, leaving Chapter 11 arbitration as its only real opportunity for remedy[312] The tribunal also held that Mexico was estopped from arguing that CEMSA was not entitled to rebates from 1996-97 for not complying with the invoice requirements, precisely because SHCP had paid CEMSA despite the noncompliance and because CEMSA could not possibly have complied.[313] The arbitral tribunal conceded that under Chapter 11's broad investment protection framework, it is difficult to determine whether certain government actions are "tantamount to expropriation."[314] The tribunal concluded, in taking a variety of facts together as a

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305. *Id.* ¶ 21-22.

306. *Id.* ¶ 22. Before that decision, however, Congress amended the challenged law to allow resellers like CEMSA the rebates and favorable export tax rates. *Id.* ¶¶ 12-13.

307. *Id.*

308. *Id.* ¶ 48.

309. *Id.* ¶ 49. The tribunal rejected CEMSA's claim that the three-year time period should be tolled so to include rebates that CEMSA did not get in the early 1990s. *Id.* ¶ 58.

310. *Id.* ¶ 51.

311. *Id.* ¶¶ 67-68.

312. *Id.* ¶ 68.

313. *Id.* ¶ 59. The tribunal found reasoning for this in both Mexican law and international law, and further proffered that "[t]he doctrine of estoppel, based on the fundamental legal interest in predictability, reliance and consistency, is particularly important in the context of NAFTA, regime designed to protect and promote trade and investment among the parties *Id.* ¶ 60.

314. *Id.* ¶¶ 100-101. The tribunal noted that "tax measures, even if they are designed to and have the effect of an expropriation, will be indirect, with an effect that may be tantamount to expropriation. *Id.* ¶ 101. Further, the issue of whether such regulatory measures are expropriation is a fact-specific inquiry. *Id.* ¶ 102. The tribunal summarized the thin line between domestic tax policy and Chapter 11 obligations:

> The Tribunal notes that the ways in which governmental authorities may force company out of business, or significantly reduce the economic benefits of its business, are many. In the past, confiscatory taxation, denial of access to infrastructure or necessary raw materials, imposition of unreasonable regulatory regimes, among others, have been considered to be expropriatory actions. At the same time, governments must

whole, that SHCP's denial of excise tax rebates to CEMSA was not "creeping expropriation" in violation of Article 1110.[315] The tribunal explained that, although the claimant experienced "great difficulties" as a result of the government's conduct, that conduct did not amount to a violation of Chapter 11.[316] Also, the changes in tax laws adversely affecting claimant were found not to be prohibited by Chapter 11, as NAFTA Parties have broad discretion over their respective tax policies.[317]

Further, NAFTA does not require Mexico to create a market for resellers like CEMSA to export cigarettes, and in fact Mexico may have a legitimate public policy reason for limiting such activity.[318] The tribunal held that Mexico did not destroy claimant's investment by refusing to pay CEMSA the excise tax rebates, as CEMSA continued to generate profit through the benefit of the zero percent tax rate on exports of its cigarettes.[319] CEMSA still has control of its business.[320] As to claimant's Article 1105 claim, the tribunal noted that such a claim was not directly available because the dispute involved a tax measure, and further, an Article 1105 violation could not be inferred here because there was no Article

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be free to act in the broader public interest through protection of the environment, new or modified tax regimes, the granting or withdrawal of government subsidies, reductions or increases in tariff levels, imposition of zoning restrictions and the like. Reasonable governmental regulation of this type cannot be achieved if any business that is adversely affected may seek compensation, and it is safe to say that customary international law recognizes this

Id. ¶ 103.

315. *Id.* ¶¶ 110-111.

316. *Id.* ¶ 113. The tribunal cited *Azinian* in its discussion:

To paraphrase *Azinian*, not all government regulatory activity that makes it difficult or impossible for an investor to carry out particular business, change in the law or change in the application of existing laws that makes it uneconomical to continue a particular business, is an expropriation under Article 1110.

Id. ¶ 112.

317. *Id.* ¶ 116. Additionally, the tribunal held that the 1993 Mexican court decision regarding the unconstitutionality of the tax laws pertained only to CEMSA's ability to receive the zero percent tax rate. *Id.* ¶¶ 120-128. Because CEMSA could not comply with the invoice requirements, it really never had "right" to the rebates in the first place for purposes of complaining of expropriation. *Id.* The tribunal also made reference to previous Chapter 11 arbitrations against Mexico in dismissing some of claimant's arguments. It rejected claimant's argument that the lack of transparency in SHCP procedures was grounds for a Chapter 11 violation, referring specifically to the decision by the Supreme Court of British Columbia in *Metalclad*. *Id.* ¶ 133. It also rejected claimant's argument that it had been denied justice in Mexico. *Id.* ¶ 139. CEMSA had continued access to Mexican courts throughout the 1990s, and like the claimants in *Azinian*, claimants here made no argument that the decisions of the Mexican courts violated NAFTA. *Id.* ¶ 139.

318. *Id.* ¶¶ 115-16.

319. *Id.* ¶ 119. The Mexican law at issue required cigarette exporters to submit their paid taxes on separate invoices so that tax authorities could determine amounts subject to rebate. *Id.* ¶ 15. CEMSA did not do this because it was apparently impossible for it to do so because of the means by which it purchased its cigarettes from first sellers. *Id.* ¶ 17. CEMSA argued that for several years SHCP accepted this despite the technical flaw. *Id.* ¶¶ 18-19. The tribunal did not find invalid the law requiring the claimant to provide separate invoices for tax purposes invalid. *Id.* ¶ 129.

320. *Id.* ¶ 142.

1110 violation.[321]

In discussing CEMSA's Article 1102 claim, however, the tribunal reached a different result. Under Chapter 11's national treatment requirement, the issue was "whether rebates have *in fact* been provided for domestically owned cigarette exporters while denied to a foreign re-seller, CEMSA[,]" because "Mexico is of course entitled to strictly enforce its laws but it must do so in a non-discriminatory manner, as between foreign investors and domestic investors."[322] The tribunal found that other Mexican resellers of cigarettes had received rebates and did not experience any problems with obtaining export licenses from SHCP even though those resellers could not comply with the invoice requirements for rebates.[323] In accordance with its reasoning regarding the Article 1110 claim, the tribunal held that different treatment of producers and resellers of cigarettes in Mexico does not violate international law, because Mexico may have legitimate public policy reasons for doing so.[324]

However, Mexico violated Article 1102 when SHCP gave other similarly situated domestic cigarette resellers rebates but denied the same rebates to CEMSA, even though the domestic resellers could not comply with the invoice requirements either—this was *de facto* discrimination according to the tribunal.[325] Interestingly, the tribunal admitted that the evidence of discrimination was weak, but ultimately decided that the claimant's argument carried the day because Mexico was unable to refute the allegations with any tangible evidence.[326] Thus, in its lengthy analysis, the tribunal gave great deference to Mexico's authority over its own tax policies, and found a violation under the national treatment standards rather than under the expropriation provisions, which amounted to far less damages.

In assessing damages, the tribunal reasoned that the drafters of NAFTA did not provide much guidance for valuating damages other than a fair market value standard for expropriation, signaling confidence in the fact that Chapter 11 tribunals are competent to make such a determination.[327] The tribunal held that

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321. *Id.* ¶ 141.

322. *Id.* ¶ 169 (emphasis in original).

323. *Id.* ¶¶ 154.

324. *Id.* ¶ 135-36.

325. *Id.* ¶¶ 173, 184-88. The tribunal also pointed out that CEMSA was the only reseller that SHCP audited, which further evinced discriminatory treatment. *Id.* ¶ 174.

326. *Id.* ¶¶ 176, 186. Notably, the tribunal stated that "[t]he majority's view is based first on the conclusion that the burden of proof was shifted from the Claimant to the Respondent, with the Respondent then failing to meet its new burden, and on an assessment of the record as a whole. *Id.* ¶ 176.

One tribunal member, however, took an opposing viewpoint. In his dissent, Mr. Bravo agreed with the award except for the finding of discrimination and hence violation of Article 1102. Marvin Feldman v. United Mexican States, ICSID Case No. ARB(AF)/88/1, ¶ 1, Dissenting Opinion, (Dec. 16, 2002). *available at* http://www.state.gov/s/l/c3751.htm (last visited May 1, 2004). Specifically, Mr. Bravo argued that claimant failed to provide sufficient evidence that domestic resellers of cigarettes received sporadic rebates like the claimants, and in fact read the record to indicate that domestic resellers went through similar hurtles with the SHCP *Id.* ¶ 6.

327 Feldman Award, *supra* note 291, ¶¶ 194-98.

claimant's damages for Mexico's Article 1102 breach should be for claimant's "loss adequately connected with the breach."[328] Here, there was no expropriation and claimant's argument for lost profits was not persuasive given its continued operation; rather, the only issue regarding damages was the total amount of the rebates wrongly withheld from CEMSA.[329] The tribunal then awarded claimant 16.9 million pesos plus interest, and ordered each party to pay its own costs because each party was successful in part.[330] The award was substantially less than the 475 million pesos in damages that Mr. Feldman requested. Mexico subsequently petitioned the Ontario Superior Court of Justice to set aside the tribunal's award, however, the court denied the petition and ruled that the tribunal did not act outside its scope.[331]

At this point it should be clear that for Mexico Chapter 11 represents quite a departure from its traditional approach to international law and investment, and that the elaborate design of Chapter 11 presents, in the very least, an objective and alternative approach to international law and foreign investment.[332] The question that remains is whether Chapter 11 dispute resolution ultimately serves as a benefit or as a detriment to Mexico.

IV CHAPTER 11 AND MEXICO: THREATENING SOVEREIGNTY AND DEMOCRACY?

The text of Chapter 11 and its application are the critical sources for testing the validity of the concerns with Chapter 11, and then for addressing the real implications for Mexico. This is a less abstract method of deciphering the reality behind Chapter 11 dispute resolution, and it is a good way to emphasize the purposes and positive implications of Chapter 11 for Mexico. Overall, this analysis supports the argument that the broad concerns with Chapter 11 are unfounded. Indeed, while a few concerns are noteworthy and while some critics in the very least offer some pragmatic suggestions for possible reform, most of the criticisms are unsubstantiated.[333] Most importantly, the following discussion also illustrates how international law is a positive force in the governance of economic integration in Mexico as well as for Mexico's future participation in the

328. *Id.* ¶ 194.

329. *Id.* ¶¶ 199-202.

330. *Id.* ¶¶ 205-08.

331. *United Mexican States v. Karpa*, [2003] CarswellOnt 4929 (Sup. Ct. Ont. 2003) (Doc. No. 03-CV-23500).

332. For more discussion on the intricacies of Chapter 11 arbitration, *see* Frederick M. Abbott, *The Political Economy of NAFTA Chapter Eleven: Equality Before the Law and the Boundaries of North American Integration*, 23 HASTINGS INT'L & COMP L. REV. 303, 305 (2000); Justin Byrne, *NAFTA Dispute Resolution: Implementing True Rule-Based Diplomacy Through Direct Access*, 35 TEX. INT'L L.J. 415, 422-23 (2000); Camp, *supra* note 5, at 86-7.

333. One NAFTA commentator candidly asserts that "[s]o much attention has been paid to the phantoms and foibles of investor-state arbitration that its very purpose appears to have been overlooked by both its opponents and the governments that originally agreed to its placement in the NAFTA. Todd Weiler, *NAFTA Investment Arbitration and the Growth of International Economic Law*, 2 Bus. L. Int'l 158 (2002), *available at* http://www.naftaclaims.com (last visited Feb. 23, 2003) [hereinafter "Weiler, *NAFTA Investment*"].

international political economy.

Concerns with Chapter 11 emanate, at base, from the fact that Chapter 11 provides for binding international arbitration for the resolution of investment disputes between private investors and NAFTA Parties. Notably, the literature on Chapter 11 illustrates the debate between critics and proponents of NAFTA Chapter 11 in general, as applied to all NAFTA Parties.[334] And, most of the criticisms of Chapter 11 stem from two major general assertions: Chapter 11 is a threat to national sovereignty and is an abrogation of democracy.[335] The most often-cited arguments for this are that Chapter 11 promotes frivolous litigation and permits disproportionate compensation, lacks an adequate award review process, uses "secret" tribunals to reduce transparency, prevents legitimate governmental regulation, and derogates from notions of equality and sustainable development.[336] With respect to Mexico, these concerns are summarized and dealt with below.

A. Frivolous Litigation and Disproportionate Compensation

One argument against Chapter 11 is that it opens up NAFTA Parties to meritless, excessive litigation brought by market-hungry foreign corporations bent on using direct access to control their piece of the market share in a NAFTA Party.[337] This in turn is costly for NAFTA Parties and acts as a check on the governments' ability to regulate, which infringes upon national sovereignty and principles of democratic governance.[338] More than one commentator has suggested that NAFTA Parties establish some sort of screening mechanism, and Jones has specifically stated that such a mechanism would be useful "to diminish the ability of powerful U.S. companies to take advantage of a weaker Mexican government and would provide a level playing field for private investors from all three NAFTA countries."[339] Indeed, one would think that if the result of Chapter 11 has been to encourage frivolous lawsuits, Mexico would be experiencing the brunt of those suits.

First, however, the text of Chapter 11 reveals that an investor must go through various procedural requirements in order to utilize the Chapter 11 mechanism against a NAFTA Party.[340] These requirements on their face seem to dispel any concern that Chapter 11 grants investors free, unconditional opportunities to bring

334. *Id.*

335. *Id.*

336. Jones, *supra* note 184, at 545-46; Byrne, *supra* note 333, at 434; Public Citizen, "NAFTA Chapter 11 Investor-to-State Cases: Bankrupting Democracy, *available at* http://www.citizen.org/publications/release.cfm?ID=7076 (last visited Feb. 26, 2003) [hereinafter "Public Citizen"]; Daniel M. Price, *NAFTA Chapter 11 Investor-State Dispute Settlement: Frankenstein or Safety Valve?* 26 CAN. U.S. L.J. 1, 8 (2001) [hereinafter "Price, *Safety Valve*"]; Ian Laird, *NAFTA Chapter 11 Meets Chicken Little*, 2 CHI. J. INT'L L. 223, 226 (2001).

337. Jones, *supra* note 184, at 545-46; Byrne, *supra* note 333, at 434; Public Citizen, *supra* note 337; Price, *Safety Valve*, *supra* note 337, at 8; Ian Laird, *supra* note 337, at 226.

338. *See* Jones, *supra* note 184, at 543.

339. *Id.* at 546; Byrne, *supra* note 333, at 434.

340. *See supra* notes 178-82.

frivolous litigation against NAFTA Parties. Even more, the text encourages dispute resolution through consultation and negotiation before the arbitration provision is invoked.[341] For Mexico, this promotes dialogue between a foreign investor and Mexican authorities so that foreign investment can flourish in a friendly environment, but in one that is politically acceptable to Mexican authorities, who are ultimately responsible to their citizens.[342]

Second, the facts also refute the criticism that Chapter 11 gives investors the opportunity to bring frivolous actions against Mexico and take advantage of Mexico's weaker economic status compared to its NAFTA counterparts. After eight years of NAFTA, less than ten claims have been filed against Mexico.[343] There has been no evidence of an onslaught of U.S. or Canadian-based corporations seeking to use direct access dispute resolution as a means to trample Mexico's legitimate governance and obtain a greater market share. This in and of itself dispels the criticism that Chapter 11 has encouraged frivolous litigation and opens up Mexico to the mercy of litigious North American investors. The bottom line here is that there has not been excessive use of Chapter 11 against Mexico. Moreover, regarding those arbitrations that have proceeded against Mexico so far, Chapter 11 tribunals have scrutinized investors' adherence to the various jurisdictional requirements that must be met before an investor could proceed.

The tribunal's analysis in *Azinian* indicates that Chapter 11 is not to be exploited by private investors.[344] NAFTA Parties designed Chapter 11 for the purpose of protecting and thus stimulating investment activity in order to achieve greater economic integration. The tribunal's analysis lends direct support to the competence of a Chapter 11 tribunal to ensure those purposes and guide the dispute resolution process, and not to permit investor evasion of Mexican courts where legal actions beyond that which set forth in Chapter 11 should be taken. The competence of the tribunal to scrutinize these jurisdictional requirements provides further evidence that frivolous litigation against Mexico, in application, is not a reality

In *Waste Management*, the tribunal properly applied Annex 1137.1 of Chapter 11, which specifically protects Mexico against parallel or excessive litigation.[345] This is important because it supports the idea that investors must follow the rules in bringing legal action against Mexico. Mexico has abandoned its traditional policy regarding foreign investment and made a commitment to rules, despite its historically skeptical view of foreign investors. Investors must comply with the rules for bringing Chapter 11 arbitrations against Mexico. As evidenced in *Waste Management*, Chapter 11 in application does protect Mexico from the costs and burden of excessive litigation with foreign investors.[346] It also curtails any perceived advantage an investor may have in bringing actions against Mexico in

341. *Id.*
342. *Id.*
343. *See* State Department Website, *supra* note 198.
344. *See* Azinian Award, *supra* note 201.
345. Waste Management I Award, *supra* note 222, § 27
346. *Id.*

both arbitration and Mexican courts, in that an investor does not have two chances to prevail on its claim.[347]

Feldman supports the argument that a Chapter 11 tribunal engages in sophisticated legal analysis to decipher whether it has jurisdiction according the NAFTA.[348] There, Mexico appropriately was not subjected to retroactive liability.[349] Moreover, the investor's claim was narrowed so as to comport with the time limit requirements of Chapter 11, and thus Mexico was protected from possibly paying for the claimant's lack of following the rules.[350] These objective, balanced conclusions of the tribunal encourage a framework within which investment and potential compensation for damages to that investment in Mexico are to be determined with prudence. Such prudence coincides with both the economic reality of the investment as well as the protection of Mexico from improper claims.

Third, Weiler comments that an investor must take into account the political costs of bringing a frivolous lawsuit against a NAFTA Party, as such action could taint the investor's reputation and future prospects for investment.[351] This is particularly true in the case of Mexico, where history has not been kind to the reputation of foreign investors.[352] Even more, Price points out that there is a possibility of frivolous lawsuits in every legal system, every day, but that does not threaten democracy or sovereignty.[353] Again, there has not been excessive use of Chapter 11 against Mexico. Moreover, the text of Chapter 11 and the need of foreign investors to maintain a good reputation in Mexican markets provide adequate checks for potentially frivolous litigation. In this respect, a screening mechanism for Chapter 11 disputes is simply not necessary.

Another related criticism of Chapter 11 is that the potential damage award amounts could be astronomical even when there is a legitimate government measure taken for the protection of society, and thus foreign investors should not be able to claim such high amounts because taxpayers ultimately foot the bill.[354] Here, the argument seems to be that no compensation, or rather, some nominal compensation, is in order if a government legitimately acts to remedy a public problem, regardless of whether the investment is wiped out totally.

First, Brower correctly asserts that Chapter 11 minimizes the inherent risk NAFTA Parties face in balancing regulation of foreign investment by eliminating

347. *Id.*

348. Feldman Award, *supra* note 294, ¶ 47.

349. *Id.* ¶ 51.

350. *Id.* ¶¶ 57-58.

351. Weiler, *NAFTA Investment*, *supra* note 334, at 158 n.3.

352. *See supra* Part II.B.I.

353. *See* Price, *Safety Valve*, *supra* note 337, at 8. Price opines that "rather than being a threat to sovereignty, NAFTA checks the excesses of unilateral exercises of sovereignty by testing measures against generally accepted public international law standards. *Id.* at 7

354. Laird, *supra* note 337, at 228-29; Brower II, *supra* note 13, at 80; Public Citizen, *supra* note 337· "Bill Moyers Reports: Trading Democracy, February 5, 2002, 10:00pm (ET), PBS, *transcript available at* http://www.citizen.org/trade/nafta/CH__11/articles.cfm?ID=6687 (last visited Feb. 26, 2003) [hereinafter "Moyers"].

the possibility of punitive damages, as well as injunctive relief.[355] Also, Laird appropriately mentions the difficulty an investor faces in making a case for high damages under principles of international law, where the purpose of compensation is what makes an investor whole as measured by the value of the investment "the day before the expropriation, not after."[356]

This is particularly true where a NAFTA Party legitimately acts to protect the public from a "hazardous" investment, because "if the product or investment is legitimately a health or environmental hazard, and this was known before the expropriation, it would be difficult to assert that on the day of expropriation the investment had any value."[357] These realities seem to dispel the argument that Chapter 11 promotes disproportionate compensation at the expense of tax payers. As for Mexico, the Chapter 11 arbitrations demonstrate that it is difficult to make a case for high damages, and that Chapter 11 tribunals have been exercising a high degree of sophistication regarding damages.

With respect to *Azinian*, an important point is that Mexico did not have to pay damages after successfully arguing its case before a neutral tribunal.[358] The tribunal quickly dismissed the inappropriate claim of $16 million in damages, without really even discussing the claim on the merits.[359] This is important for the development of the rule of law in Mexico as well as among NAFTA Parties and private individuals doing business in North America. It sends a signal to investors that Mexico is willing to play by the rules, and it sends a signal to Mexico that when it is in the right it can use the international system and international law to its advantage and reap the benefits of increased foreign investment at the same time. Moreover, this reality in application refutes concerns that the Chapter 11 dispute resolution framework gives "implausible investors" the ability to "bankrupt" Mexican democracy

In *Metalclad*, the tribunal awarded the investor $16.7 million for Mexico's breach of Chapter 11, this instead of the $43 million in damages claimants demanded.[360] In this respect, little clout can be given to the argument that the tribunal was not careful in its damage calculation to decipher what part of claimant's demand was inflated and non-compensable under Chapter 11. The idea that investors can obtain disproportionate compensation for investment losses in Mexico did not hold in application here. Further, *Feldman* represents an appropriate distinction in that Chapter 11 seeks to encourage investment and compensate damages to such investment, but only to the extent that compensation is fair and makes economic sense.[361] The tribunal was careful not to allow conditions in which the investor could receive a windfall, subjecting Mexico to the

355. Brower II, *supra* note 13, at 80.
356. Laird, *supra* note 337, at 228.
357. *Id.* at 228.
358. *See* Azinian Award, *supra* note 201.
359. *Id.* ¶¶ 196-200.
360. Metalclad Award, *supra* note 250, at ¶ 131.
361. *See* Feldman Award, *supra* note 291, ¶¶ 189-207.

possibility of paying disproportionate compensation.[362] When *Feldman* is considered alongside *Metalcad*, it is difficult to say, even in those cases where Mexico has been required to compensate foreign investors, that Chapter 11 has subjected Mexico to disproportionate compensation to the detriment of the public.

B. Lack of Review Process

Another common criticism of Chapter 11, and one that has been put forth in particular by NAFTA Parties, attacks the binding nature of arbitral decisions.[363] Abbot questions whether democratic NAFTA Parties and their citizens should be "comfortable" with arbitral decisions given that there is no appellate review process, and he suggests that NAFTA Parties establish an appellate body or provide national courts with more of a role in Chapter 11 arbitrations.[364] Brower and Steven note the criticism by Canada and Mexico that tribunals "may not make the right decisions, and therefore an appellate review process is necessary."[365]

It may be said that the argument for an appellate review mechanism for Chapter 11 arbitrations is a pragmatic suggestion to a concern for more transparency in the dispute resolution process.[366] First, however, regardless of whether an appellate review process is politically necessary or even a viable option for NAFTA Parties, Chapter 11 is not a threat to democracy because it lacks an appellate review mechanism per se.[367] A NAFTA Party may petition a court to modify or set aside an award if it believes a Chapter 11 tribunal acted outside its scope—outside the requirements of NAFTA in making a ruling.[368] A NAFTA Party therefore potentially has access to both a highly-sophisticated arbitration tribunal as well as the courts of a particular NAFTA Party in a given dispute.

Metalclad demonstrates that NAFTA Parties have some type of recourse to a court system for review of a Chapter 11 award, although critics do not mention this.[369] It demonstrates that, even if one agrees that Chapter 11 arbitral awards should be reviewed, a NAFTA Party can in fact get review of a Chapter 11

362. *See id.*

363. Abbott, *supra* note 333, at 308; Brower II, *supra* note 13, at 47.

364. Abbott, *supra* note 333, at 308.

365. Brower & Steven, *supra* note 86, at 200.

366. Pending trade promotion authority legislation in the U.S. Congress calls for the establishment of an appellate review mechanism to review decisions rendered by international arbitration panels in investor-state disputes arising out of trade/investment agreements. CRS Report to Congress, *Trade Promotion (Fast-Track) Authority: Summary and Analysis of Selected Major Provisions of H.R. 3005*, April 15, 2002, *available at* http://fpc.state.gov/documents/organization/10090.pdf (last visited Nov. 22, 2003) [hereinafter "*TPA*"]. Interestingly, in an effort to bring greater transparency to the foreign investment dispute resolution process, the United States and Chile have left open the possibility for establishing an appellate mechanism for arbitration brought under the foreign investment chapter in the Chile-U.S. Free Trade Agreement. Chile-U.S. Free Trade Agreement, June 6, 2003, Chapter 10, *at* http://www.ustr.gov/new/fta/Chile/final/10.investment.PDF (last visited May 1, 2004).

367. *TPA*, *supra* note 369.

368. Jones, *supra* note 184, at 536.

369 Metalclad, *supra* note 277

award.[370] There, Mexico received the full benefit of the process by prevailing on two of its arguments.[371] Further, the British Columbia court served not only as a check on the tribunal's reasoning, but also on the damage calculation.[372] The court modified the damage award amount only slightly to correspond with its reasoning,[373] which gives further weight to the argument that Chapter 11 tribunals are sophisticated and fair when calculating damages against Mexico.

Second, in striking the balance between the need for economic efficiency and legal certainty, NAFTA Parties chose to side with finality over appellate litigation. One economic rationale behind this is to deal with an investment dispute in a neutral forum when it arises and move on, which lessens the likelihood of pending litigation inhibiting decisions to invest. Maintaining a steady flow of investment in Mexico is of course critical to building long term growth. Mexico has successfully used the two-tiered investment dispute review system and it continues to experience the benefit of increased foreign investment.[374] The Chapter 11 dispute resolution system is working.

In line with this, Brower adds a more abstract argument against appellate review of Chapter 11 arbitral awards, stating that

> heightened judicial review "constitutes an independent violation of Chapter 11. Although heightened review might not, for technical and political reasons, subject the NAFTA Parties to additional claims for liability, it undermines the principle of voluntary compliance with authoritative decisions rendered at the international level by impartial bodies charged with the supervision of treaty compliance. Thus, heightened judicial review impairs the development of the rule of law in international economic relations."[375]

Thus, if an appellate review mechanism is established, it is possible that Mexico could be given a small window of opportunity to shy away from its commitment to comply in all cases with international law, which would hurt its prospects for economic growth. For Mexico, old ways should not be given a chance to surface and trump Mexico's commitment toward progress in law and economic policy since NAFTA.

Third, it is important to emphasize again, as Brower adds, that the expertise of the tribunals far exceeds that of the courts in NAFTA Parties.[376] The notion that Mexico or any NAFTA Party cannot be "comfortable" with an arbitration decision, given the expertise and the option to get a second review in a domestic trial court, is unfounded. A close analysis of the arbitrations involving Mexico so far further underscores the sophistication, expertise and prudence of the tribunals in sifting through the facts of the investment disputes and applying the law to make

370. *See id.*
371. Metalclad, *supra* note 277, ¶¶ 133-34.
372. *Id.* ¶ 137.
373. *Id.*
374. *See id.*
375. Brower II, *supra* note 13, at 47
376. *Id.* at 78.

decisions. This approach facilitates Mexico's economic goals.

Azinian demonstrates the high degree of sophistication in the tribunal's analysis, discerning if an investor has a cause of action under Chapter 11 and whether what the investor alleged is something outside the scope of the tribunal's competence.[377] The complex factual history in *Feldman* and the tribunal's intricate analysis of the interlacing of previous court proceedings, tax issues and government regulations in that dispute further underscores the sophistication of Chapter 11 tribunals.[378] In *Waste Management*, the tribunal's sophisticated analysis of the jurisdictional requirements of Chapter 11 lends support to the idea that the tribunals are highly competent adjudicators and have a sophisticated knowledge of international law.[379] Mexico prevailed on its first jurisdictional objection, in line with the purpose of Chapter 11 to protect Mexico from excessive litigation.[380] The investors prevailed in round two, but they did so according to international law.[381] Another benefit to Mexico here is that Mexico has taken part in the development of the rule of law among NAFTA Parties and it has made important arguments, some of which have been successful. In other words, Mexico now has a stake in the Chapter 11 process and an important role in the development of international law pertaining to foreign investment.[382] And this is all being done through a highly competent adjudication system.

An additional comment on the adequacy of the dispute resolution framework as is and Mexico's participation in establishing the rule of law under Chapter 11 dispute resolution is important here. Although Chapter 11 arbitrations have no precedential value, the tribunal in *Feldman* stated that its decision regarding Article 1110 was consistent with the decisions in *Metalclad*, *Azinian* and other decisions.[383] This reference is both good for international law and foreign investment. It allows NAFTA Parties to acknowledge a common set of rules in developing the rule of law pertaining to North American investment activity, and it further adds to a more predictable legal environment for investors, which promotes investment. This in turn promotes deeper integration. Further, this reference supports the idea that even though there is no official appellate review process, Chapter 11 tribunals have sought "guidance" in prudently rendering their decisions.[384]

C. *"Secret" Tribunals*

Critics of Chapter 11 also complain of the confidential nature of international arbitration.[385] Public interest groups and non-governmental organizations in

377 Azinian Award, *supra* note 201, ¶¶ 81-86.
378. Feldman Award, *supra* note 291, ¶¶ 6-23, 105-112.
379. Waste Management II Jurisdiction Decision, *supra* note 240, ¶¶ 26-37.
380. Waste Management I Award, *supra* note 222, § 31.
381. *See* Waste Management II Jurisdiction Decision, *supra* note 240.
382. *See id.*
383. Feldman Award, *supra* note 291, ¶ 107.
384. *See id.*
385. *See* Jones, *supra* note 184, at 549; Fulvio Fracassi, *Confidentiality and NAFTA Chapter 11*

particular denounce the Chapter 11 process because, in line with international arbitration practice, it does not have any provisions for non-government third party participation.[386] The Chapter 11 dispute resolution process has been described as occurring "not in courts of law but before secret trade tribunals."[387] Others contest the principle of confidentiality in international arbitrations entirely, and vehemently oppose the confidentiality of NAFTA dispute settlement on grounds that investors must assume that documents will be made public for purposes of accountability to democratic governments.[388] In a more pragmatic tone, Jones recommends the implementation of mechanisms through which non-governmental organizations can access the proceedings.[389]

Whether or not Chapter 11 arbitrations should be more transparent with respect to third-party participation is certainly an issue for debate, but it is a misnomer to label the process as "secret. First, non-disputing NAFTA Parties may submit their interpretations of the law in a given dispute to a tribunal.[390] It is the NAFTA Parties, after all, who have the responsibility to monitor implementation and interpretation of NAFTA.[391] They do have access to influence Chapter 11 tribunals, even if they are not a party to the dispute. Also, there are provisions for expert witnesses, which further increases the opportunity for outside influences, where proper, to inform better the dispute resolution process in a particular case.[392]

Second, the NAFTA Free Trade Commission issued a clarification statement of NAFTA Chapter 11 dispute resolution, explaining that nothing in NAFTA precludes a Chapter 11 tribunal from accepting *amicus curiae* submissions.[393] Third, the argument for more public participation should be balanced with what others point out regarding confidentiality—that confidentiality in Chapter 11 arbitrations is an essential element in promoting international law along side foreign investment.[394] Loritz notes that the confidential nature of the arbitrations serves as an incentive for both parties to submit important documents regarding the investment dispute that would otherwise not come out in open court.[395] The

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Arbitrations, 2 CHI. J. INT'L L. 213, 217 (2001); Loritz, *supra* note 69, at 539; Maximo Romero Jimenez, *Considerations of NAFTA Chapter 11*, 2 CHI. J. INT'L L. 213,217 (2001); Public Citizen, *supra* note 337; Moyers, *supra* note 357.

386. *See* Public Citizen, *supra* note 337; Moyers, *supra* note 357· Abbott, *supra* note 333, at 308.

387 Moyers, *supra* note 357.

388. Fracassi, *supra* note 388, at 217, 221-22.

389. Jones, *supra* note 184, at 549.

390. NAFTA, *supra* note 10, at 645.

391. *Id.* at 645.

392. *Id.* at 646.

393. *Unofficial Statement of the Free Trade Commission on non-disputing party participation*, Oct. 7, 2003, *available at* http//:www.ustr.gov/regions/whemisphere/nafta2003/statement-nondisputingparties.pdf (last visited Nov. 22, 2003). For example, in United Parcel Service of America v. Canada, *available at* http://www.state.gov/documents/organization/6033.pdf (last visited Mar. 23, 2004), the Chapter 11 tribunal accepted written briefs by non-disputing parties.

394. *See* Camp, *supra* note 5, at 91-92, Laird, *supra* note 337, at 225, and Jimenez, *supra* note 388, at 250.

395. Loritz, *supra* note 69, at 539.

advantages gained from limited outside intervention in foreign investment disputes, both with respect to future investment and to the facilitation of dispute resolution, are perhaps an advantage for Mexico in particular.

The Chapter 11 framework allows Mexico to be forthcoming in the resolution of disputes without potentially sending a negative signal to foreign investors who may perceive a disputed governmental measure, although not fully adjudicated, as a risk. This, in turn, could cause capital flight, which is not what Mexico wants.[396] Also, Mexico has and will take measures that are violative of an investor's right under Chapter 11, and those measures should be dealt with in a way that does not scare capital inflows while Mexico adjusts to the international rule-based system of dispute resolution under Chapter 11.

Critics also attack the fact that Annex 1137 4 of NAFTA allows either a disputing Party or a disputing investor the choice of whether to make the arbitral award public.[397] However, all final arbitral awards involving Mexico thus far have been published.[398] Further, most documents involving the arbitrations are readily available on the Internet.[399] Lack of transparency in this respect is simply not the reality, and the potential economic benefit of a certain degree of confidentially arguably substantiates a delay in releasing documents to the public. This is not to say that this is not an area where potential reform of Chapter 11 dispute resolution may be proper for political purposes. It is just to say that there are strong economic arguments to the contrary, particularly with regard to Mexico.

D. Prevents Government Regulation

An overriding criticism of Chapter 11, which is related to those discussed above but is important on its own, is that Chapter 11 prevents a NAFTA Party from effectively taking measures to protect the public health and the environment.[400] The argument is, at base, that investors can deter or unfairly make

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396. John H. Chun, *Annual Survey Issue: International Insolvencies: NOTE. "Post-Modern Sovereign Debt Crisis: Did Mexico Need an International Bankruptcy Forum?* 64 FORDHAM L. REV. 2647, 2647-2659 (1996).

397 NAFTA, *supra* note 10, at annex 1137.4.

398. State Department Website, *supra* note 198; Weiler Website, *supra* note 198.

399. *Id.* It should be noted that NAFTA Parties have released an interpretation of the text regarding publication of awards, emphasizing that nothing in NAFTA prevents the release of Chapter 11 arbitration documents to the public. State Department Website, *supra* note 198. Also, although discussion of Chapter 11 arbitrations not involving Mexico is outside the scope of this article, the parties to the Chapter 11 arbitration United Parcel Service of America v. Canada, *supra* note 396, have decided to hold the arbitration open to the public via closed circuit television. ICSID Website, *supra* note 135, *at* http://www.worldbank.org/icsid/ups.htm (last visited Mar. 14, 2004).

400. Jones, *supra* note 184, at 555; Abbott, *supra* note 333, at 309; Laird, *supra* note 337, at 227-29; Brower & Steven, *supra* note 86, at 198; Public Citizen, *supra* note 337· Moyers, *supra* note 357; *Vendiendo El Futuro: Un documento preparado por la Comision de Asuntos Sociales (CCCB-CECC) en vistas a la conferenica Humamizando la Economia Global*, Presentada en La Universidad de Católica de América, Washington, D.C., Enero 28 al 30, 2002, *available at* http://www.citizen.org/documents/futuroGerardoTranslation.final.PDF (last visited Mar. 14, 2004) [hereinafter "*Vendiendo El Futuro*"].

governments pay for legitimate government regulation, all in the name of money For critics, this is a major intrusion on national sovereignty and democratic governance.[401] Jones voices his concern regarding environmental regulation and asserts that direct access "tips the scales too far for investors."[402] In fact, with respect to Mexico, these criticisms are very similar to the justifications Mexico put forth throughout the twentieth century for rejecting the application of international law to commercial disputes in Mexico involving foreigners.[403]

A plain reading of the Chapter 11 text seems to indicate something quite contrary to the argument that Chapter 11 prevents legitimate government regulation. Article 1114 deliberately protects a government's right to regulate—it does not prevent such a right.[404] Further, Loritz emphasizes that both a close reading of Chapter 11 and international law supports the legal conclusion that "the negative economic impact of environmental regulations does not trigger liability."[405] Brower and Steven also acknowledge critics' sentiments that corporate interests can 'undermine' legitimate governmental regulations in a 'supranational' forum insulated from the usual domestic political and legal processes, and respond by properly pointing out it is basic customary international law that states are responsible for indirect expropriation.[406]

It is here where Chapter 11 strikes a balance for all NAFTA Parties as the governments of those countries address the needs of their citizens. Those needs include not only necessary public health and environmental legislation, but also an environment where investment can flourish and economic livelihood can prosper. At base, Chapter 11 gives a qualified investor the right to argue a claim before a neutral tribunal.[407] The investor still has to argue its case—there is no blanket right for investors to strip away categorically a NAFTA Party's right to enact legislation.

Further, the tribunal cannot prevent implementation of a challenged regulation during the dispute.[408] And, if a violation is found, the tribunal cannot force a NAFTA Party to change its laws.[409] Chapter 11 just requires that a foreign investor be treated according to international standards of fairness and that when that does not happen, a NAFTA Party must compensate the investor accordingly [410] This stands in stark contrast to the lack of investment rules in place during the Porfiriato in Mexico, and hence the threat of foreign investors indirectly

401. Public Citizen, *supra* note 337· Moyers, *supra* note 357· *Vendiendo El Futuro*, *supra* note 403; Abbott, *supra* note 333, at 309 (arguing that Chapter 11 does not take into account social policies and thus tribunal review should be further limited until the parties establish a more sufficient dispute resolution structure to account for government regulation).

402. Jones, *supra* note 184, at 556.

403. *See supra* Part II.B.1.

404. *See supra* note 170.

405. Loritz, *supra* note 69, at 551.

406. Brower & Steven, *supra* note 86, at 198.

407. *See supra* note 175.

408. *See supra* note 190.

409. *Id.*

410. *See supra* Part III.B.

controlling Mexico's social policies is non-existent.[411]

The arbitrations discussed herein reveal the balance in Chapter 11 between government regulation and the protection of investment. In *Metalclad*, both the tribunal and the Canadian court found that Mexico did in fact indirectly expropriate claimants' investment through the ecological decree.[412] This entitled the claimants to money damages for their loss, but in the end the State of San Luis Potosi and Guadalcazar were successful in their goal to shut down the landfill.[413] In effect, Chapter 11 dispute resolution here did not prevent local Mexican governments from doing what was the political will.

In *Feldman*, the tribunal's reasoning represents a careful analysis of NAFTA. The tribunal appropriately disallowed a Chapter 11 claim to impede Mexico's right to regulate its own tax policy.[414] Further, in accordance with its reasoning regarding the Article 1110 claim, the tribunal held that different treatment of producers and resellers of cigarettes in Mexico does not violate international law, because Mexico may have legitimate public policy reasons for doing so.[415] Here, the tribunal showed great deference to the legitimate authority of Mexico to govern, and did not impose restrictions on Mexico that are not in NAFTA. In application, therefore, critics' argument that Chapter 11 dispute resolution categorically strips NAFTA Parties' rights to regulation is not the case. The tribunal in *Feldman* was careful to distinguish between an investor's rights under Chapter 11 and a government's rights and responsibilities in a democratic society.[416]

Additionally, Laird points out that the obligation to compensate expropriated investment according to international standards is a "small price to pay" for the overall benefits of free trade and open investment.[417] This, of course, is especially so for Mexico, which as emphasized throughout this article needs a predictable, stable legal climate to encourage foreign investment. Laird further summarizes, most appropriately, that "governments make mistakes and sometimes they intentionally create measures that hurt foreigners.[418] That is the history of international disputes. It is misguided reasoning to think that holding governments accountable is a threat to democracy."[419]

Overall, the Chapter 11 setup underscores the importance that NAFTA Parties placed on foreign investment in drafting the NAFTA text. It encourages compliance with international law, NAFTA and other international conventions in

411. *See supra* Part II.B.1.

412. *See supra* note 271; United Mexican States v. Metalclad Corp., 2001 BCSC 664, 89 B.C.L.R. (3d) 359, 38 C.E.L.R. (N.S.) 284, 14 B.L.R. (3d) 285, [2001] B.C.J. No. 950, ¶¶ 94-99 (Sup. Ct. Brit. Col. 2001) (Doc. No. L002904).

413. *See supra* Part III.C.3.

414. *See* Feldman Award, *supra* note 291, ¶¶ 209-13.

415. *Id.* ¶ 171.

416. *Id.* ¶185.

417 Laird, *supra* note 337, at 229.

418. *Id.*

419. *Id.*

an effort to create a balanced regulatory structure within which to govern cross-border investment. This is what is necessary for Mexico to realize its goals in becoming more competitive in the international political economy It does not in the meantime, moreover, prevent Mexico or any other NAFTA Party from legislating for the protection of the public health and environment.

E. Neglects Notions of Equality and Sustainable Development

One commentator categorically disapproves of the inclusion of Chapter 11 in NAFTA.[420] Professor Alvarez argues against Chapter 11 dispute resolution entirely, contending that its structure does not comport with ideas of equality and sustainable development, and thus is harmful to Mexico.[421] He characterizes Chapter 11 as "a U.S. bilateral investment treaty on steroids, the "most bizarre human rights treaty ever conceived, and as "a human rights treaty for a special-interest group."[422] He also asserts that Chapter 11 ignores "North/South power differentials" and merely "reflects U.S. law and perspectives."[423] For Professor Alvarez,

> There is no actual symmetry of direct benefits to the national investors of all three NAFTA parties—at least not for the foreseeable future. As few Mexican investors are likely to be in the position to penetrate the U.S. market, it is almost exclusively U.S., not Mexican, nationals that get the benefit of the investment chapter.[424]

Without a substantive commitment to investment rules applicable to all of North America, the policy interests of countries in North America as expressed in NAFTA to grow and integrate their economies would not have a chance of being realized. Moreover, without foreign investment, Mexico cannot realize its goals for economic growth. After years of opposition, Mexico believed it was necessary to accept international norms as pillars for governing transnational business activity in order to stimulate investment. In this respect, the contention that Chapter 11 is the antithesis of sustainable development and thus derogatory to human rights is something less than accurate.

First, although Chapter 11 provides broad substantive guarantees to NAFTA investors, it is hardly accurate to characterize it as derogating from human rights in

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420. *See* Jose E. Alvarez, *Critical Theory and the North American Free Trade Agreement's Chapter Eleven*, 28 U. MIAMI INTER-AM. L. REV. 303 (1996); *see also* Jones, *supra* note 184, at 544-45 (discussing Professor Alvarez's arguments).

421. Alvarez, *supra* note 420, at 307; *see also* Jones, *supra* note 184, at 544-45 (discussing Professor Alvarez); Sandrino, *supra* note 69, at 326 (arguing, also, against Chapter 11, adopting a traditional developing world skepticism to foreign investment, stating "[t]he open investment regime in NAFTA, with no provisions addressing either development objectives of the host state or TNC operations, in essence places the state in a position in which its sovereignty and autonomy are comprised").

422. Alvarez, *supra* note 420, at 304, 307-08.

423. *Id.* at 312.

424. *Id.* at 304.

Mexico. In negotiating Chapter 11, NAFTA Parties realized—including Mexico—that investment is just as critical to economic growth and development as trade. Investment, after all, is the impetus for long-term economic growth in any economy. This is especially true for developing economies. Foreign investment is necessary to promote the efficiency of investments in a particular market by infusing that market with new ideas and new technology This in turn leads to, on an aggregate scale, greater productivity greater profits, rising incomes and hence rising standards of living. A treaty provision that has the intent to raise standards of living in Mexico is certainly not derogatory to human rights.

As discussed earlier, foreign investment covering a wide variety of sectors in Mexico continues to increase.[425] Moreover, for as much as Chapter 11 does do to stimulate investment in Mexico, its mandate is not to effect issues pertaining to the redistribution of wealth in Mexican society, which is the real issue for sustainable development. If the investment is not there in the first place, however, issues regarding sustainable development are not even reached.[426]

Second, Professor Alvarez correctly notes that Mexico abandoned its traditional policy by accepting Chapter 11, which is based on U.S. law perspectives.[427] But those perspectives happen to be in line with customary international law practices. The historical reality and position in the international political economy in which Mexico finds itself today illustrates that Mexico's outright rejection of international law pertaining to foreign investment was perhaps not the best course of action. Moreover, it is anti-progressive and borderline senseless to suggest that Mexico should reject Chapter 11 standards simply because they are in line with U.S. standards. Mexico has now, through a highly technical treaty, correctly chosen to accept international norms regarding foreign investment because that is what stimulates investment, and those standards are as much a part of Mexico now as they are of the United States and Canada.

Third, there is no basis in asserting that Mexico will not or has not derived a benefit from Chapter 11 because Mexican investors have not "taken advantage" of Chapter 11 dispute resolution. The point of Chapter 11 is to stimulate investment, particularly in Mexico, and that should be the measure of Mexico's benefit. The perceived benefit should not be measured as a tally card on how many Mexican-based firms invest in the United States and Canada or on how many Mexican-based firms have sued other NAFTA Parties under Chapter 11.

Fourth, the basic framework of Chapter 11 dispute resolution does not ignore power imbalances between Mexico and other NAFTA Parties, as has been suggested. In fact, it does just the opposite by establishing a neutral, rule-based dispute resolution mechanism for investment disputes. In discussing the differences between power-based diplomacy and rule-based diplomacy, Byrne

425. *See supra* notes 108-110.

426. Alvarez, *supra* note 420, at 309. Alvarez somewhat admits that his comparison of Chapter 11 to human rights is somewhat tangential, stating that "[i]t might be said that the comparison between the NAFTA and human rights instruments is, in itself, rhetorical stance that is as questionable as the NAFTA's invocation of 'equal rights' *Id.*

427. *Id.* at 312.

astutely asserts that Chapter 11, as a rule-based regime, is more conducive to the development of international law.[428] This is especially advantageous for Mexico. By removing foreign investment disputes to a neutral, international mechanism, Mexico is not directly threatened by power-based political maneuvering by the United States or Canada with regard to a given investment dispute.[429]

Under Chapter 11, there is no altering of the rules of the game in the middle of an investment dispute to appease political demands adverse to Mexico's position. In this setting, then, "[j]ustice and fairness demand that Canada and the United States live up to the same substantive rules and procedural mechanisms as have been accepted by Mexico."[430] This is essential for the development of international law among NAFTA Parties and the rule of law in Mexico. And, because the role of power politics is diminished in investment disputes, it provides a framework within which Mexico can develop confidence in its decision to abandon its traditional policy regarding foreign investment.

Disallowing private investors direct access to dispute resolution would further exacerbate power differences between Mexico and the other NAFTA Parties, and would represent a step backward for Mexico. Leaving investor-state disputes up to NAFTA Parties for resolution "can be highly inefficient, arbitrary, and politically explosive."[431] This would do nothing to encourage foreign investment in Mexico, and it might in fact serve as a deterrent to such investment. Brower and Steven stress that "[w]ith each new case commenced, the NAFTA countries will be arguing their interpretations of international law and urging their views. [and] will gain expertise through their regular participation in such proceedings."[432] This is particularly important for Mexico, given its traditional stance on the applicability of international law to foreign investment. This new practice, in and of itself, is critical for Mexico's successful participation in an increasingly complex international political economy

Thus, Chapter 11 dispute resolution does not ignore power differentials between NAFTA Parties; rather, it successfully obfuscates those differentials by offering a neutral, international body for dispute resolution.[433] And, it is through this framework that Mexico can participate in and experience the link between international law and economic integration, which is imperative to Mexico's participation in the international political economy and economic growth.

F Sovereignty in General

A note on the sovereignty argument in general is appropriate here. At base,

428. *See* Byrne, *supra* note 333, at 419-20.

429. *Id.* at 429.

430. Brower & Steven, *supra* note 86, at 200.

431. *Id.* at 197.

432. *Id.* at 201. The authors underscore that this enables NAFTA Parties to influence and shape investment policy in North America. *Id.* This gives Mexico an extraordinary opportunity to play its hand in such development along with two developed countries.

433. *Id.* at 200.

"[i]t is illogical for governments who have willingly incurred limits on their sovereignty in order to respond to a perceived common threat to their international competitiveness, to then argue against flexible private remedies on the basis of a sovereignty argument."[434] Historical trends in integration in the Americas indicate that countries in the Western Hemisphere have acknowledged a common interest in establishing supranational frameworks in order to prosper economically, which, in essence, is an effort to protect themselves. The economics of global capitalism are in some ways outside the control of any particular country, and multilateral frameworks represent governmental efforts to join the system and make it more orderly for the benefit of their citizens.

Developing countries in the Americas, and in particular Mexico, have taken bold steps to build the groundwork for multilateral governance. Mexico took a more progressive step in agreeing to Chapter 11, acknowledging that in the world of foreign investment, international standards are the best ways to guarantee fair participation by itself and private investors in the investment dispute resolution process.[435] This in turn establishes a good environment for investment in Mexico, which in turn enhances its prospects for prosperity. It is an action of protection—it is a bold act of sovereignty that takes under consideration the realities of the age of globalization.

Notably, an international arbitration tribunal with binding or even non-binding authority serves as a "challenge" to traditional notions of sovereignty· but the evolution of international law and the representations made by NAFTA Parties seem to obscure the line between exercising sovereignty in an era of globalization and maintaining sovereignty under archaic Westphalian conceptions of the international system.[436] Without international law and nation-states' concessions to it economic integration, and more importantly progress, is impossible. Elaborating on the purpose of Chapter 11, Brower and Steven have offered the following insight:

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434. Robert Paterson, *supra* note 126, at 120; *see also* Price, *Safety Valve*, *supra* note 337, at 7 ("[A]ll treaties, all international agreements are in a sense a compromise of sovereignty. However, they are, first, an exercise of sovereignty.").

435. Robert Paterson, *supra* note 126, at 85.

436. For good discussion on the changing notions of sovereignty today, see Ronald A. Brand, *Sovereignty: The State, the Individual, and the International Legal System in the Twenty First Century*, 25 HASTINGS INT'L & COMP. L. REV. 279 (2002). Professor Brand notes the growing trends in international economic law, wherein private parties are increasingly receiving more rights in the international system. *Id.* at 290. Moreover, in discussing the historical origins of sovereignty and the relationship between nation-states and individuals, he concludes, most correctly, that "[r[ecognition that international law now limits the conduct of states in their relationships with individuals is not a bad thing, nor does it necessarily represent diminution of the 'sovereignty' of states. *Id.* at 294. *See also* Robert Paterson, *supra* note 126, at 119:

> In the future, there is likely to be less need for negotiations than for increasingly effective means of enforcing compliance with existing interstate rules. Without efficient means for private parties to secure enforcement of rules, such as those contained in NAFTA, the credibility of such agreements is undermined. At a time when the power of sovereign states to control transnational economic activity is at an all-time low, it seems contradictory that private international actors lack the ability to enforce new rules that are a direct response to this reality.

> In establishing this investment regime, the NAFTA Parties wanted to achieve three main objectives: (1) to tear down existing foreign investment barriers by eliminating arbitrary and discriminatory restrictions; (2) to build investor confidence throughout the region through the elaboration and enforcement of clear and fair rules; and (3) to 'depoliticize' the resolution of investment disputes by eliminating the need for State-to-State adjudication. Any criticism of the Chapter 11 regime that fails to take account of these three factors is, literally, beside the point.[437]

The concerns with Chapter 11 discussed herein in many ways do not take these motives into account. They not only give cursory effect to the actual Chapter 11 text, but they also refuse to acknowledge the tremendous amount of investment that continues to flow among NAFTA Parties, and into Mexico, beyond the realm of politics. Chapter 11 has so far achieved NAFTA Parties' goals and after some years of application, as discussed, Mexico is not any less sovereign.

The Chapter 11 rule-based regime is also a lesser challenge to Mexico's sovereignty, and all NAFTA Parties' sovereignty, by virtue of its structure. Without the arbitration option, a NAFTA investor would be left with the options of either litigating in foreign courts or pressuring the investor's home government to use political channels to resolve the dispute. This, among other things, would not serve as a catalyst to investment in Mexico. In this respect, international arbitration may be viewed as the best means of preserving Mexico's sovereignty for the time being. Given Mexico's historic stance on protecting its sovereignty from outside influences, coupled with the reality of economic integration and the importance of foreign investment to Mexico, the arbitration option is less intrusive on Mexico's sovereignty than say, legal harmonization with its common law North American partners.[438] Perhaps most importantly, from a Mexican standpoint dealing with the litigious character of North American investors in general, Byrne's comments may be appropriate: "one of the greatest attributes of the kind of effective resolution that is provided by direct access is that 'it encourages dispute avoidance. When potential disputants, whether they are party-nations or private entities, can anticipate the uniformity with which the law will be applied, they will be less likely to 'break the rules.'"[439]

Lastly, taken as a whole, the Chapter 11 arbitrations against Mexico so far represent Mexico's participation in the development of international law while it reaps the benefits of increased investment and enjoys a more equal footing with other NAFTA Parties. *Metalclad* and *Feldman* represent good examples of when and to what extent awards against a Party are appropriate, and further provide guidelines for Mexican regulation with respect to foreign investment. On the other side, *Azinian* and *Waste Management* demonstrate that Mexico will prevail when investors' claims are either unsubstantiated or when investors do not follow the proper rules for resolving investor-state disputes. Rather than a detriment to national sovereignty and democratic governance in Mexico, an informed

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437 Brower & Steven, *supra* note 86, at 195 (footnotes omitted).

438. *See supra* Part II.C.2.a.

439. Byrne, *supra* note 333, at 429.

discussion of the Chapter 11 and its application reveal that the system as is has been successful in balancing Mexico's economic goals, historical political realities and the reality of international law in economic integration.

V CONCLUSION: A HEALTHY MIX

Historical policy interests in the Western Hemisphere have placed the Americas on a path toward economic integration. Modern trade and investment agreements are the main tools for governance of such integration, and they serve to fuel dramatic increases in cross-border business transactions and to create an environment in which the intersection of international law, economics and politics is a reality Such integration creates the need for effective dispute resolution procedures, and this is especially the case with regard to disputes involving private investors and countries under trade and investment agreements. Investment is just as important as trade for deeper economic integration, and foreign investment is critical for growth in developing countries. And, it entails the interaction of private economic actors with sovereign entities in a way that begs adherence to objective, international norms.

International arbitration has emerged as a preferred method for international dispute settlement, and as an alternative to transnational litigation and diplomatic pressure it provides a sound, manageable framework for dispute resolution. It does so without forcing countries to engage in the monumental task of legal harmonization. This allows international law and economics to progress side-by-side.

NAFTA is a prime example of integration trends in the Americas. The Chapter 11 framework represents a historic, positive step by NAFTA Parties to grow and develop together and collectively aid in the development of international law. The significant changes made by Mexico to conform to Chapter 11, together with the Chapter 11 arbitrations involving Mexico thus far, serve as major stepping stones for the developed Mexico of tomorrow. Notably, some commentators offer potentially useful suggestions for future modification of Chapter 11 dispute resolution. However, although some concerns regarding Chapter 11 raise important questions regarding, for instance, appellate review, transparency and sustainable development, the record does not evince that Chapter 11 is detrimental to Mexico—or even to all Parties for that matter.

The broader criticisms that Chapter 11 is a threat to national sovereignty and an abrogation of democracy are unfounded. With respect to Mexico, this is supported by both a close look at the NAFTA text as well as the arbitrations involving Mexico so far. Rather, direct access dispute resolution, as an international law-based framework for investment dispute resolution, is an impetus for progression in Mexican law and a catalyst for increased investment in Mexico. It is also a platform for political equilibrium between Mexico and other NAFTA Parties. Indeed, Chapter 11 direct access dispute resolution is a healthy mix of international law, economics and politics for Mexico, and it is but one necessary tool for Mexico's successful participation in the international political economy.

IMMIGRATION POLICIES AND THE WAR ON TERRORISM

Theresa Sidebothom

INTRODUCTION

Beatrice Okum, a Christian woman from Southern Sudan, fled her village during attacks by the Sudanese National Islamic Front.[1] She was separated from her family and has never heard from them again.[2] At age 15, she was forced into slavery in Kenya, where she spent fourteen years.[3] She finally escaped and fled to America.[4]

Upon arrival, she was handcuffed, shackled and taken to a detention facility.[5] There she "watch[ed] daily the hopelessness, the ache, the anguish on the faces of fellow inmates as they [we]re filled with fear and uncertainty, because we are subjected to a system where hope often dies before it is realized."[6] As she suffered flashbacks to her time in slavery she said, "I am only fighting for freedom. I only want to be safe."[7]

This dream is shared by the rest of America, especially in these times. September 11, 2001[8] marked the United States' full engagement in the War on Terrorism. That name is given from an American perspective. The terrorism that has been driving refugees to our shores for years now threatens Americans. U.S. interaction with these refugees will be an integral component of winning this war.

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1. *Refugee Women at Risk: Unfair U.S. Laws Hurt Asylum Seekers*, Lawyers Committee for Human Rights, 11 (2002) *at* http://www.lchr.org.

2. *Id.*

3. *Id.*

4. Media Alert, Lawyers Committee for Human Rights, Refugee Women Fleeing Persecution Face Unfair U.S. Laws (Jan. 14, 2003) *at* http://www.lchr.org/media/2003_alerts/0114.htm.

5. *Refugee Women at Risk, supra* note 1, at 11.

6. Media Alert, Lawyers Committee for Human Rights, Refugee Women Fleeing Persecution Face Unfair U.S. Laws (Jan. 14, 2003) *at* http://www.lchr.org/media/2003_alerts/0114.htm.

7. *Id.*

8. This was the date when Al-Qaeda hijacked four U.S. airplanes. Suicide terrorists crashed two of the into the World Trade Center into New York City, bringing the two towers down and killing thousands. Another plane crashed into the Pentagon. The last group of terrorists was thwarted when passengers overwhelmed the terrorists, and the plane crashed in a remote area. No passengers or terrorists from the planes survived.

The threat that western secularism poses to Islamic societies may be no more intentional than was wiping out native Americans with measles, but for the survival of fundamentalism in the Muslim world, it is just as deadly Secularism spreads via satellite dishes, computers, McDonalds, Coca-Cola, multinationals, and air travel.[9] The entertainment industry and globalization are its missionaries. Refugees are often its proponents.

This war began long ago, in a titanic clash of cultures. Secularism, on the one hand, promotes religious plurality and freedom for conscience and expression, but also allows sexual promiscuity, redefines the family and disfavors state established religion. Opposing secularism is fundamentalist seventh century Islam, which features a rigid social structure withclearly defined moral values and state authority that is defined by particular beliefs about God and the after-life.

Islam is in crisis because its well-remembered glorious past does not match its present. As Bernard Lewis says, "Compared with its millennial rival, Christendom, the world of Islam had become poor, weak, and ignorant."[10] There is a profound debate within the Muslim world about the causes of decline in the Dar Al-Islam (rule of peace or Islam).[11] The fundamentalists say that what is needed is a restoration of authentic Islam.[12] The modernists see more of a problem in the retention of the old ways, including beliefs and practices that are not successful in the modern world, and they see fanaticism as stifling.[13]

Resurgent or fundamentalist Islam sees itself as the solution to the problem.[14] This type of Muslim fears the West, sees Western culture as corrupt, and believes "Western secularism, irreligiosity, and hence immorality" are "worse evils than the Western Christianity that produced them."[15] Secularism, although perceived by certain Christians as a threat to their religion as well, did in a sense spring out of Christian thought. The early years of persecution by imperial Rome made it clear that a separation of church and state was possible and later conflict between competing traditions eventually persuaded enough Christians that separation of church and state was necessary for peace to give birth to the modern secular state.[16] Christianity now and historically, survives when it is a minority and persecuted religion.[17] This is not true of Islam, which is inexperienced at being a minority religion, and has a theological vision of a religious state.[18]

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9. Bruce Sidebotham, *Kingdoms in Conflict: Radical Islam Collides with the American Way*, Dr. Bruce Sidebotham, Operation Reveille Shofar (Sept./Oct. 2001) *at* http://www.oprev.org/SepOct01.htm#feature1 [hereinafter Sidebotham 1]

10. BERNARD LEWIS, WHAT WENT WRONG? WESTERN IMPACT AND MIDDLE EASTERN RESPONSE 151 (Oxford Univ. Press 2002).

11. *Id.* at 151-156.

12. *Id.* at 156.

13. *Id.* at 157.

14. Sidebotham 1, *supra* note 9.

15. SAMUEL HUNTINGDON, THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER 213 (Simon & Schuster 1996).

16. LEWIS, *supra* note 10, at 96.

17. *Id.* at 96-97

18. *Id.* at 100-103.

Qutb is probably the greatest of the fundamentalist Muslim thinkers.[19] *In the Shade of the Koran* is his greatest work and Osama bin Laden is his disciple. He hated the West for its schizophrenia in putting religion in one corner and the state in a different one.[20] He hated the split in the sacred and the secular and "wanted Muslims to appreciate that, if God is the only god, God must rule over everything."[21]

Qutb hated America, not because America did not uphold its principles, but because of the very principles it holds, because it is a liberal society.[22] He and his followers truly feared an annihilation of Islam caused by liberal ideas.[23] Kemal Ataturk and his secular reforms in Turkey in 1924 were a despised example[24] and Osama bin Laden referred to that event in his first video after 9/11 when he said, "Our Islamic nation has been tasting the shame for more [than] eighty years."[25] Qutb believed that "Islamism's truest enemy was not a military force but instead, an insidious penetration of cultural influences and ideas, which could exterminate Islam.[26]

Qutb's answer is that "Koranic truth, to be grasped properly, requires not just a serious experience of religious commitment, but of revolutionary action on Islam's behalf."[27] And so, although Qutb died in an Egyptian jail, his ideas spread and the killing started.[28] The Islamist movement was successful: civil war in Algeria, genocide in the Sudan of up to 2 million, rioting in Nigeria, the Palestinian Hamas, and revolution in Afghanistan.[29] Torture, repression, and death were the fruits which grew in the shade of the Koran as interpreted by the fundamentalists.Although extremist Islam is a splinter group within broader Islam, its use of violence in the form of terror has triggered the current War on Terrorism. An ideological clash like the Cold War, it must be fought with ideological weapons as well as military ones. Soviet style Communism eventually collapsed because of perceived internal moral inferiority. One of the main battlegrounds of the War on Terrorism is the minds of the Muslim majority[30] Most Muslims are moderate in practice, but unwilling to oppose extremist groups for two reasons. One is their own fear of violent reprisal. The other is that extremist groups correctly articulate fundamentalist Islam; that is, Islam according to the literal meaning of the ancient

19. PAUL BERMAN, TERROR AND LIBERALISM, 60 (W W Norton & Co. 2003).

20. *Id.* at 79.

21. *Id.* at 87 Christianity maintains the same conviction, except that because it holds that the Kingdom of Heaven starts with internal transformation of the soul, deficiencies in the expression of faith in society are less threatening.

22. *Id.* at 89.

23. *Id.* at 91.

24. *Id.* at 91.

25. *Id.* at 117

26. *Id.* at 183.

27. *Id.* at 67.

28. *Id.* at 101-104.

29. *Id.* at 111-12.

30. Fatima Sayyed, *Bush Nominates Daniel Pipes to Board of US Institute of Peace: Moderate Muslims Welcome the Appointment*, PAKISTAN TODAY (April 15, 2003) *at* http://www.paktoday.com /pipes.htm.

writings. The modernists, who hold moderate and liberal strains of theological thought within Islam, interpret problematic texts figuratively or as limited in application to an ancient historical context.[31] For instance, Mahmud Muhammad Taha, founder of the Republican brothers in the Sudan, was hung in 1985. He had called for a "liberal, openly-debated, and humanistic revision of Shari'a, and had a vision of a democratic state.[32] He was executed for heresy on hearsay evidence.[33] In large part, world peace depends upon which interpretation of the religion captures the minds of the Muslim world.

This ideological war will be partly waged at America's own borders. The primary human intersection of America and the Muslim world is where people from Muslim countries (whether Muslim, Christian or other minority) immigrate to this country. American immigration policies and how they are applied, particularly to refugees, will affect the War on Terrorism. This paper discusses several aspects of international refugee law and U.S. immigration law with respect to refugees from Muslim countries. It makes recommendations related to the dual goals of respecting human rights and furthering the U.S. objectives in the War on Terror, with respect to both specific issues and overarching policy considerations.

I. HISTORY OF INTERNATIONAL AND U.S. REFUGEE LAW

> *And if a stranger dwells with you in your land, you shall not mistreat him. The stranger who dwells among you shall be to you as one born among you, and you shall love him as yourself; for you were strangers in the land of Egypt.* [34]

The United States has been a nation of immigrants and refugees from its beginnings. Its entire history has been marked and marred with the tension between the principles of human rights and the ingrained human tendency to dislike and persecute those outside one's own group. In 1783, George Washington said, "the bosom of America is open to receive not only the opulent and respectable stranger, but the oppressed and persecuted of all nations and religions. "[35] The League of Nations, which the United States helped to form in 1921 but ultimately did not join, established the position of High Commission for Refugees.[36] America's own immigration laws of 1924 were "designed to exclude

31. "The commandment to 'slay the pagans where you find them' in verse 9:5 speaks of the hostile Arab tribes surrounding Medina. When sincere scholarship and exegesis is applied, it becomes quite clear that verse 9:5 is one of self-defence and not a carte blanche to kill all non-believers. *Distortion of Islam*, THE INDEPENDENT (BANDGLADESH), Nov. 21, 2001.

32. Donna E. Arzt, *Religious Human Rights in Muslim States of the Middle East and North Africa*, EMORY INT'L L. REV. 139, 151-52 (1996).

33. *Id.*

34. Leviticus 19:33-34.

35. *Is This America? The Denial of Due Process to Asylum Seekers in the United States, I. The Asylum Tradition and Expedited Removal*, Lawyers Committee for Human Rights, ¶ 1, (Oct. 2000) *at* http://www.lchr.org/refugees/reports/due_process/due_process.htm. (hereinafter *Is This America?*)

36. Kenneth Regensburg, *Refugee Law Reconsidered: Reconciling Humanitarian Objectives with the Protectionist Agendas of Western Europe and the United States*, 29 CORNELL INT'L L.J. 225, 229 (1996).

Asians and restrict immigration from southern Europe" but had exemptions for people fleeing political and religious persecution.[37]

During the 1930s, the United States sharply limited the number of refugees from Nazism, and in 1939, more than 900 Jewish refugees aboard the *St. Louis* were turned away within sight of Miami.[38] Hundreds who were refused entry died in the concentration camps.[39] During the 10 years of 1933 to 1943, the "refugee quota from European countries dominated by the Nazis was underfilled by more than 400,000 places."[40]

The United States, ashamed of its failure towards the Jews, admitted 350,000 people displaced by World War II.. [41] It also led the effort to establish the United Nations and a concept of universally recognized human rights.[42] The General Assembly established the United Nations High Commission for Refugees (UNHCR).[43] America, during the following years, gave asylum to more than one million refugees, especially those fleeing Communism.[44]

The concept of asylum, deriving from the Latin counterpart of the Greek "asylon," means freedom from seizure.[45] Sacred places have provided a refuge from ancient times.[46] The Universal Declaration of Human Rights, Article 14(1) says the individual has a right "to seek and to enjoy in other countries asylum from persecution."[47] Article 13(2) says that "everyone has the right to leave any country, including his own."[48] However, this is only a right to seek asylum, not to receive it, because "an individual has no right to asylum enforceable vis-a-vis the state of refuge."[49]

In 1951, the United Nations Convention Relating to the Status of Refugees defined a refugee for the first time.[50] The United States did not sign this convention, but did sign the 1967 Protocol which strengthened it.[51] The Refugee Act of 1980 adopted the same definition of refugee, that of a person who "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion" could not or did not

37. *Is This America?*, *supra* note 35, at ¶ 4.

38. *Id.*

39. *Id.*

40. *Id.* at ¶ 5.

41. Regensburg, *supra* note 36, at 229.

42. *Is This America? supra* note 35, at ¶ 6. *The Denial of Due Process to Asylum Seekers in the United States, I. The Asylum Tradition and Expedited Removal*, Lawyers Committee for Human Rights, ¶ 6, (Oct. 2000) *at* http://www.lchr.org/refugees/reports/due_process/due_process.htm.

43. Regensburg, *supra* note 36, at 229.

44. *Is This America? supra* note 35, at ¶ 7

45. Roman Boed, *The State of the Right of Asylum in International Law*, 5 DUKE J. COMP. & INT'L L. 1, 2 (1994) [hereinafter Boed 1].

46. *Id.* at 3.

47. *Id.* at 9.

48. *Id.* at 7.

49. *Id.* at 9.

50. A. Roman Boed, *Past Persecution Standard for Asylum Eligibility in the 7th Circuit: Bygones are Bygones*, 43 DEPAUL L. REV. 147, 154-55 (1993) [hereinafter Boed 2].

51. *Id.*

want to return to his/her country of origin.[52] The Committee drafting the 1951 Convention said that "well-founded fear" means the person has either actually been a victim of persecution or can show good reason why he/she fears persecution.[53] Persecution is not defined in the Convention or Protocol.[54] The High Commissioner said in a UN Handbook that a "threat to life or freedom on account of race, religion, nationality political opinion or membership of a particular social group is always persecution. Other serious violations of human rights for the same reasons would also constitute persecution."[55] The Supreme Court's comment on the Handbook accepting this definition, is that the Handbook "provides significant guidance in construing the Protocol, to which Congress sought to conform."[56]

When there have been changes in the country of origin, a person is generally no longer eligible for asylum.[57] The 1951 Convention does exempt those who are "able to invoke compelling reasons arising out of past persecution,"[58] for the reason that there may not be a complete change either in local attitudes at home or in the mind of the refugee.[59]

The principle of *non-refoulement* in Article 33(1) of the 1951 Convention is that states are not to return a refugee "in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a social group or political opinion."[60] The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment also prohibits refoulement with respect to anyone who would be in danger of torture.[61] As Paul Weis, Legal Division Director of UNHCR says, Asylum entails admission, residence and protection; non-refoulement is a negative duty, not to compel a person to return to a country of persecution."[62] However, a state may send a person to another country where he would not be persecuted.[63] The reason there is no express duty to allow asylum seekers to enter is that "states have a legitimate interest in the control of their borders and in the maintenance of internal safety two areas affected by the arrival of aliens."[64]

Whether the principle of non-refoulement has become part of customary

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52. *Id.* at 155.
53. *Id.*
54. *Id.* at 157.
55. *Id.*
56. *Id.*
57. *Id.* at 159.
58. *Id.* (citing United Nations Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259).
59. *Id.* at 160.
56. Ved P Nanda, *Introduction, in* REFUGEE LAW AND POLICY: INTERNATIONAL AND U.S. RESPONSES 8 (Ved P Nanda ed.) (Greenwood Press, NY 1989).
61. Karen Parker, *The Rights of Refugees under International Humanitarian Law, in* REFUGEE LAW AND POLICY: INTERNATIONAL AND U.S. RESPONSES 35 (Ved. P Nanda ed.) (Greenwood Press, NY 1989).
62. Boed 1, *supra* note 45, at 17.
63. *Id.*
64. *Id.* at 31.

international law generates disagreement.. In practice, refugees are often rejected at borders.[65] The Immigration and Nationality Act of 1952 gave the Attorney General discretion to withhold deportation where an alien would face "physical persecution" upon return.[66] It also allowed aliens to be paroled temporarily into the United States, and this clause was often used for people fleeing Communist countries.[67] The Refugee Act of 1980 established annual parole programs subject to discretion and influenced by public policy.[68] For instance, the Act showed "congressional preference for refugees fleeing states that were hostile to the United States."[69] The U.S. Supreme Court has interpreted the non-refoulement provision to have no extraterritorial effect, i.e., it is acceptable to reject aliens who have not yet entered the country.[70] If refoulement does not apply to these people, there is no barrier to sending them back. The United States accepts non-refoulement in such a limited form that unless non-refoulement is not an accepted principle of international law, the United States is in breach of it.

The Immigration and Nationality Act (INA), of which the 1980 Refugee Act is part, and the regulations under it, govern the asylum process in the United States under the supervision of the Attorney General.[71] The Attorney General delegates the implementation of the INA to the Immigration and Naturalization Service (INS).[72] The Executive Office for Immigration Review (EOIR) is an administrative body in the Department of Justice.[73] It has a trial division, run by Immigration Judges and an appellate division, which is the Board of Immigration Appeals (BIA).[74] From the BIA, an alien may appeal to a federal court, which is a limited review based on the administrative record.[75]

If the alien is granted asylum, he may stay in the United States for one year then be examined for admission as an immigrant.[76] Unless the refugee status has been revoked, the alien can become a lawful permanent resident and remain in the U.S. to qualify for naturalization.[77] The two hurdles are to qualify as a refugee under the definition of the Refugee Act and to obtain a discretionary grant of asylum from the Attorney General.[78] The two grounds for eligibility to qualify as a refugee are "well-founded fear of persecution" or "past persecution."[79] If an alien no longer qualifies as a refugee (because of changed situations in the country of

65. *Id.* at 22.
66. Regensburg, *supra* note 36, at 222.
67. *Id.* at 233.
68. *Id.*
69. *Id.* at 234.
70. Boed 1, *supra* note 45, at 2 (*citing* Sale v. Haitian Centers Council, 113 S.Ct. 2549 (1993)).
71. Boed 2, *supra* note 50, at 149.
72. *Id.* at 12.
73. *Id.* at 151.
74. *Id.*
75. *Id.* at 152.
76. *Id.*
77. *Id.*
78. *Id.* at 159.
79. *Id.* at 180.

origin), his/her asylum can be revoked.[80] He/she is still eligible for a claim for past persecution, but the courts have rarely accepted claims based purely on past persecution.[81] If an alien is denied asylum or it is revoked, he/she can only appeal when the INS begins exclusion or deportation proceedings.[82]

A critical U.S. Supreme Court decision in 1987 *I.N.S. v. Cardoza-Fonseca*, explained the difference between asylum and withholding of deportation.[83] The Attorney General must withhold deportation if an alien demonstrates that either life or freedom would be threatened.[84] This is a "clear probability" standard,[85] requiring that persecution is more likely than not, which is controlled by U.S.C. § 1253(h), also called Section 243(h) of the Act.[86] A second type of broader relief, found in 8 U.S.C. § 1158(a) or Section 208(a) of the Act, authorizes the Attorney General to grant asylum "to an alien who is unable or unwilling to return to his home country 'because of persecution or a well-founded fear of persecution.'"[87] As the Court said, "the 'well-founded fear' standard which governs asylum proceedings is different and in fact more generous, than the 'clear probability' standard which governs withholding of deportation proceedings."[88]

In a second critical U.S. Supreme Court decision in 1992, *I.N.S. v. Zacarias*, Zacarias asked for asylum on account of his political opinion and the Court interpreted the phrase "on account of" to require proof of the persecutor's motive or intent.[89] The 1980 Refugee Act had used the international definition, departing from the prior U.S. standards of admitting refugees on a basis of geography or ideology.[90] However, the Board of Immigration Appeals, by adopting an intent based analysis, effectively divorced the U.S. determination of refugee status from international human rights norms.[91] For example, the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion and Belief is a non-binding declaration which proclaims and promotes religious freedom in international law.[92] An intent based analysis, which makes refugees prove an intent to persecute on the basis of religion, "falls short of providing protection from religious persecution in asylum cases" by making persecution

80. *Id.* at 176-77.

81. *Id.* at 179.

82. *Id.* at 153.

83. I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 424 (1987).

84. *Id.* at 423.

85. *Id.* at 425.

86. The modern version of § 8 U.S.C.S. 1253(h), amended in 1996, reads, "(h) Withholding of deportation or return (1) The Attorney General shall not deport any alien to country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

87. I.N.S. v. Cardoza-Fonseca, 480 U.S. at 423.

88. *Id.* at 425.

89. Karen Musalo, *Irreconcilable Differences? Divorcing Refugee Protections from Human Rights Norms*, 15 MIJIL 1179, 1180 (1994); I.N.S. v. Zacarias, 112 S.Ct. 812 (1992).

90. *Id.* at 1184.

91. *Id.* at 1213.

92. *Id.* at 1218.

much harder to prove.[93]

The United States has made efforts, although imperfectly, to align itself with international law concerning refugees and to develop international and U.S. law in humanitarian directions. America is one of the main havens for refugees in the world. U.S. policy has attempted to balance a concern for human rights with furthering its domestic and foreign policy interests, hence the limitation on immigration and the deliberate preference towards refugees from Communism during the Cold War.[94] Next this paper examines a more recent development in refugee law

II. EXPEDITED REMOVAL

> *If you look at our history and our immigration policy, our best days. have been when we reached out and said, 'Yes. We are this country that is different. The few times in our history when we have turned our back on people who are persecuted. .we have lived to regret it.* [95]
>
> -- Senator Mike DeWine (R-OH), May 1, 1996.

In 1986, Congress passed a law requiring non-citizen workers to have work permits.[96] Illegal aliens who wanted work permits found a loophole.[97] If they made an affirmative asylum application, they were granted a temporary work permit.[98] The number of asylum applications rose, creating an enormous backlog.[99] As the applications were processed so slowly, there was even more of an incentive to make the asylum application so that one could work.[100] Therefore, a system driven by two good motivations, the humanitarian desire to provide asylum on the part of the U.S., and the desire to work on the part of aliens, was out of control by the early 1990s.[101]

In January of 1993, a Pakistani gunman who had filed an affirmative asylum application killed two CIA employees.[102] This was followed by the discovery that one of the perpetrators of the car bomb under the World Trade Center had requested this asylum.[103]

In 1993, the INS began a major administrative overhaul, which both

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93. *Id.* at 1219.

94. *Is This America? supra* note 35, at ¶ 7 ¶ 7, (Oct. 2000) *at* http://www.lchr.org/refugees/reports/due_process/due_process.htm

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at ¶¶ 10-11.

100. *Id.* at ¶ 12.

101. *Id.*

102. *Id.* at ¶ 13.

103. *Id.*

streamlined the process and canceled the temporary work permit provision.[104] There was an immediate drop in asylum applications and the asylum approval rate was up to 38% by 1999.[105]

Congress, concerned about the same problem, passed the Illegal Immigration Reform and Immigrant Responsibility Act in 1996, also referred to as expedited removal.[106] Congress was also acting on its finding that "thousands of aliens arrive in the U.S. at airports each year without valid documents and attempt to illegally enter the U.S."[107] In an effort to block immigration of criminals, Congress added crimes such as selling marijuana and drunk driving to the list of felonies that were grounds for deportation, and included prior offenses.[108] The law also applies to illegal aliens within the country who have not been physically present for two continuous years.[109]

Here is how the 1996 law works. First an alien seeking entry presents documents at the primary inspection.[110] Any discrepancies, including a suspicion of fraudulent use of facially valid documents, trigger a referral to a secondary inspection.[111] If the officer at the secondary inspection determines that the alien is inadmissible, he/she is subject to either expedited removal or regular removal.[112] Expedited removal is not only more prompt, but bans re-entry for five years.[113] This decision is reviewed briefly by a supervisor, but there is no federal judicial review.[114]

At the secondary inspection, aliens must be given the following information about asylum in a language they understand: "If you fear or have a concern about being removed from the United States or about being sent home, you should tell me so during this interview because you may not have another chance."[115] This is the time when the alien needs to state his/her well-founded fear of persecution.[116] The alien is allowed no representation at this point.[117] Although there is supposed to be an interpreter, it is not guaranteed.[118] The lack of representation is because

104. *Id.* at ¶ 14.

105. *Id.* at ¶ 17.

106. *Id.* at ¶ 19.

107 Am. Immigration Lawyers Ass'n v. Reno, 18 F Supp. 2d 38, 42 (D.C. 1998) (citing H.R. Rep. No. 104-469, pt. 1 at 158 (1996)).

108. Anthony Lewis, A *Bad Time for Civil Liberties*, 5 ANN. SURV. INT'L & COMP L. 1, ¶ 8 (1999).

109. Thomas J. White, Center on Law & Government, *The Expedited Removal Study: Report on the First Three Years of Implementation of Expedited Removal*, 15 ND J.L. ETHICS & PUB. POL'Y 1, 4 (2001).

110. *Am. Immigration. Lawyers Ass'n v. Reno*, 18 F Supp. 2d at 42.

111. *Id.*

112. *Id.*

113. *Is This America? supra* note 35, at ¶ 22.

114. *Id., Am. Immigration. Lawyers Ass'n v. Reno*, 18 F Supp. 2d at 56.

115. *Am. Immigration. Lawyers Ass'n v. Reno*, 18 F Supp. 2d at 43, 44.

116. *Id.*

117. *Is This America? supra* note 35, at ¶ 22.

118. *Id.*

the INS conducts more than 10 million [sic] secondary inspections a year.[119]

Aliens who express this fear of persecution are scheduled for a credible fear interview within seven days.[120] Detention is mandatory until the credible fear interview.[121] Applicants are informally allowed to have an attorney at this interview.[122] Credible fear approval rates are about 88%, and Muslim countries overall have high approval rates.[123] Also, if a person is determined not to have a credible fear, he/she may request a *de novo* review by an Immigration Judge, though without a right to representation.[124] Once credible fear has been established, aliens are allowed to apply for asylum.[125]

Mr. A., a 26 year old Algerian, was a member of the Islamic Salvation Front (FIS), a major opposition political party which was outlawed by the Algerian government in 1992.[126] In 1994, he was detained and tortured by the police.[127] In late 1994, the Armed Islamic Group (GIA) abducted him and tried to coerce him to plot to assassinate his employer, a former Algerian president.[128] He fled to a friend's home.[129] Months later, he and his friend were caught by the GIA.[130] Both were beaten and his friend was shot.[131] After being arrested and tortured again by Algerian security forces, he fled to the United States via China and asked for asylum in San Francisco.[132]

He was referred to secondary inspection where he was shackled and placed in a room with a shackled Iraqi man, whom he was afraid of.[133] Mr. A's English was poor.[134] The INS officer seemed angry at him and told Mr. A he would be sent back to China.[135] Mr. A said he would be killed.[136] The INS officer said he did not care.[137]

When the officer left, Mr. A grabbed a coffee cup, smashed it, and stabbed himself in the abdomen with a shard, causing a deep wound.[138] He began slamming his head into the table[139] and had to receive 10 to 15 stitches at the

119. *Am. Immigration. Lawyers Ass'n v. Reno*, 18 F Supp. 2d at 54.
120. *Is This America? supra* note 35, at ¶ 24.
121. *Id.* at ¶ 77.
122. *Id.* at ¶ 13.
119. White, *supra* note 109, at 60.
124. *Id.* at 7.
125. *Is This America?*, *supra* note 35, at ¶ 24.
126. White, *supra* note 109, at 71.
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.* at 71-72.
133. *Id.* at 72.
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*

hospital.[140] His medical report said that he was "alert, "cooperative, and "in handcuffs."[141] He was finally interviewed in Arabic.[142] Mr. A was referred to a credible fear interview and two weeks later he was found to have a credible fear.[143]

INS policy only requires shackling when an officer has "reasonable, articulate facts, such as known criminal behavior, observed dangerous or violent behavior, or other indicators of risk of escape or assault to support the decision to restrain."[144]

Rita Joy Martins-Beckley, a married Sudanese woman fleeing religious and political persecution, was ordered deported although she expressed a fear of persecution.[145] Her husband had come through separately and gotten his credible fear interview, She however, was sent to detention pending her expedited removal.[146] After a pro bono lawyer and the husband's lawyer intervened on the wife's behalf she eventually received asylum.[147]

INS policy requires that Any applicant for admission who expresses a fear or concern about physical or psychological harm from any individual or organizations, or who mentions past physical or psychological harm" should be referred for credible fear, as well as any "applicant who exhibits any non-verbal clues–such as crying, hysteria, trembling, unusual behavior, or fear of harm "[148]

Mr. C, a 25 year old Egyptian Coptic Christian who worked as an accountant and baked bread for his Coptic Christian Church in Egypt in his spare time, had been harassed and assaulted many times, including one serious beating.[149] He came to the United States on a tourist visa and went home when his extension expired.[150] While home in his country a Muslim group tried to make him convert or pay a fee.[151] He fled back to the United States to ask for asylum and entered at JFK airport in 1999 [152]

He was referred to secondary inspection and shackled for eight hours to a bench.[153] He tried to explain the problems he had from Muslims in Egypt.[154] The

140. *Id.* at 72.

141. *Is This America? supra* note 35, at ¶ 30.

142. White, *supra* note 109, at 73.

143. *Id.*

144. *Id.* at 74 (citing Memorandum from the INS, Expedited Removal Regional Training P III (H) (4) (1998)).

145. *Is This America? supra* note 35, at ¶ 19.

146. *Id.*

147. *Id.*

148. White, *supra* note 109, at n21 *Expedited Removal Study: Report* (*citing* Memorandum from the Office of Program, INS, Supplemental Training Materials on Credible Fear Referrals 1-2 (Feb. 6, 1998)).

149. *Id.* at 79.

150. *Id.*

151. *Id*

152. *Id.*

153. *Id.* at 80.

154. *Id.*

INS officer said, "I am a Muslim. What is your problem with Muslims?"[155] Mr. C was told the INS would contact his government, which frightened him so he said he wasn't seeking asylum and was not referred for a credible fear interview [156] He called his sister in Egypt from detention and was told it was not safe to return.[157] From solitary confinement, "he wrote a desperate note to an INS asylum officer, which finally prevented his deportation" and was eventually granted asylum.[158]

The International Religious Freedom Act of 1998 bars the INS from using interpreters "with potential biases against individuals on the ground of religion, race, nationality. etc.[159] The INS has been told to avoid the use of airline interpreters wherever possible, but to improve the use of contracted interpreter services.[160] INS also requires training for its officers "on the nature of religious persecution abroad, including country-specific conditions"[161] and training in internet research access.[162]

Mahamoud Farah, an asylum seeker from Somalia, arrived at JFK in 1997 [163] He was insulted, cursed, pushed over backwards, and had his ear pulled.[164] His wrists and ankles were shackled to a chair while he was in a bent over position.[165] He watched others being kicked and spent fourteen hours in chains without food, water, or a bathroom break.[166] Then he had to discuss his fear of returning "with the same people who were being abusive to [him]."[167]

The INS says it is "committed to ensure that all claims for refugee and asylum protection are treated with fairness, respect and dignity "[168] In practice, this area still needs work.

Ms. A., a pregnant Nigerian who had been tortured and suffered a miscarriage as a consequence, was told she would be sent back to Nigeria, that she was a liar, and that she would be jailed for five years.[169] She was shaking and vomiting in the airport.[170] Officers said, "Die if you want to, we're not getting you a doctor."[171] She was not informed about U.S. law and protection for those facing torture and

155. *Id.* at 80.
156. *Id.*
157 *Id.*
158. *Is This America? supra* note 35, at ¶ 21.
159. White, *supra* note 109, at 82.
160. 2000 ANNUAL REPORT ON INTERNATIONAL RELIGIOUS FREEDOM: APPENDIX D, INS AND THE INTERNATIONAL RELIGIOUS FREEDOM ACT, Released by the Bureau of Democracy, Human Rights, and Labor, U.S. Dep't of State, 6 (Sept. 5, 2000).
161. White, *supra* note 109, at 82.
162. 2000 ANNUAL REPORT ON INTERNATIONAL RELIGIOUS FREEDOM, *supra* note 160, at 3.
163. *Is This America? supra* note 35, at ¶ 27.
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.* at ¶ 27
168. 2000 ANNUAL REPORT ON INTERNATIONAL RELIGIOUS FREEDOM, *supra* note 160, at 1.
169. *Is This America? supra* note 35, at ¶ 50.
170. *Id.* at ¶ 62.
171. *Id.*

did not find out about asylum until she was in detention.[172]

The INS Inspector's Field Manual says, "if the alien indicates in any fashion that he or she has a fear of persecution, or that he or she has suffered or might suffered [sic] torture, you are required to refer the alien to an asylum officer for a credible fear determination."[173]

Mr. O., a Nigerian theology student, was whipped and thrown in jail in Nigeria because of his political views.[174] Upon arriving in the United States, he was told he could not apply for asylum.[175] He was stripped naked and given a body cavity search in the hallway of the airport.[176] When he cried he was mocked by the INS officer, who said, "I have been in this business a long time. I have seen people like you crying and pretending. I send them back for lying, whether they cry or not."[177] Mr. O. was later granted asylum.[178]

INS policy requires that strip searches or body cavity searches are to be conducted in private.[179] Body cavity searches are to be supported by a search warrant and recorded.[180] This is not always the case.[181]

There are some innate difficulties with the expedited removal process. Refugees are unlikely to have documents.[182] If they have been tortured and persecuted, they may be frightened of officials.[183] There are language problems, they are worn out with traveling, and they may be ill or injured.[184]

Some officers are reported to be polite, courteous, professional, and follow INS regulations scrupulously [185] Some refugees are treated kindly [186] Others are treated badly [187] One bipartisan group of congressional staffers investigating expedited removal conditions at JFK said that the INS officers had hostile body language and tone and "acted as if every asylum claim was a personal affront."[188]

Refugees may not understand the process. In some countries, refugees do not apply for asylum until after entering the country, so seekers may not be aware of the need to express their fear of persecution and desire for asylum at the secondary inspection unless the purpose of the inspection is explained.[189] If refugees think

172. *Id.* at ¶ 50, 62.
173. White, *supra* note 109, at 74 (citing INS, Inspector's Field Manual 17.15 (b) (2) (1999)).
174. *Is This America?*, *supra* note 35, at ¶ 39.
175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.* at ¶ 36.
180. *Id.*
181. *Id.*
182. *Id.* at ¶ 1.
183. *Id.* at ¶ 6.
184. *Id.* at ¶¶ 6, 7, 12.
185. *Is This America? supra* note 35, at ¶ 64.
186. *Id.*
187. *Id.* at ¶ 68.
188. *Id.* at ¶ 75.
189. *Id.* at ¶ 47

they will be deported, they may be afraid to criticize their own government for fear of reprisals at home.[190]

Despite public outcry over some of the flaws in the expedited removal law, it seems unlikely that the law will be, or perhaps even should be, changed at this time because of U.S. security concerns. Because this law means that an enforcement officer of the INS, rather than a trained Immigration Judge, can turn refugees away, the INS enforcement officers should undergo the same training that the asylum officers do. Open access to secondary inspection, allowing monitoring of the process by outside groups, would hold INS officers accountable. Refugees should be allowed to contact family, friends, and counsel for support, even if they are not allowed to participate in the secondary inspection.

Although opinions differ as to whether the law is fair, it appears that the worst abuses happen when existing regulations are flouted. Aliens should be treated with courtesy and respect. Inspectors must remember that the consequences of their decision can mean life or death for the refugees. Enforcing existing regulations would ensure appropriate privacy during (justifiable) searches, that only people who seem dangerous are shackled and all refugees have access to adequate food, water, and the bathroom.[191] Regulations about interpreters should be followed as well.[192] Having a brutal attitude or callously breaking regulations should be sufficient cause for ending an INS officer's career. Random, but regular exit surveys of asylum applicants, would be a good way of checking "customer service.

Besides the fact that people should be treated with respect and dignity, there is an important U.S. policy concern. Each and every alien, whether granted asylum or not, is a talking advertisement of U.S. attitudes (as embodied in INS inspectors) and values. Each person has many links to friends and families. Many asylum seekers may be well known in their own countries. International travelers entering a foreign country are always a little frightened and impressionable; how much more so those fleeing persecution and seeking asylum. Those first hours form a permanent impression of our country Their views, collectively, are taken around the world by word of mouth. The United States is engaged in an ideological war about freedom and should make sure that this "advertising" is positive and a recommendation for this country

190. *Id.* at ¶ 49.

191. Am. Immigration Lawyers Ass'n v. Reno, 18 F Supp. 2d 38, 63 (D.C., 1998).

192. *Id.* at 54.

III. DETENTION

> Being a refugee in America has become a crime, we are handcuffed, shackled and treated like criminals.[193]
>
> --July 20, 1999 letter from Olufema Abdulai, Nigerian asylum seeker

Once someone has been referred for a credible fear interview, detention is mandatory.[194] After the credible fear interview, the refugee is eligible for parole while the asylum case is pending.[195] Unfortunately, refugees are more commonly kept in detention[196] with the average detention being fifty-seven days.[197] Refugees from Sudan averaged 167 days, and those from other Muslim countries are also high above the average.[198]

The INS has been building and expanding detention facilities and contracting jail space as well, so that refugees are sometimes put among criminal inmates.[199] The cost ranges from $58 to $100 per person per day, and was estimated to exceed $500 million annually by 2001.[200] Curiously, while "it is INS policy to favor release of aliens found to have credible fear of persecution, provided that they do not pose a risk of flight or danger to the community,"[201] in actuality, very few are paroled.[202] Detention makes it difficult for detainees to prepare their asylum pleas with counsel.[203] If the facility is far away it can take counsel most of a day just to spend a few minutes with the detainee.[204]

Whether refugees have family or friends willing to support them does not appear to matter.[205] One Somali seeker who was detained nearly four years had U.S. citizen relatives willing to support him, but his parole requests were denied or ignored.[206]

Mr. Ladipo of Nigeria, who was repeatedly arrested and beaten in Nigeria because of pro-democracy activities and whose brother was killed, came into the U.S. without documents.[207] He asked to be paroled to his six cousins who were all

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193. *Refugees Behind Bars: The Imprisonment of Asylum Seekers in the Wake of the 1996 Immigration Act*, Lawyers Committee for Human Rights, ¶ 1 (Aug. 1999) *at* http://www.lchr.org/pubs/descriptions/behindbars.htm [hereinafter *Refugees Behind Bars*].

194. *Is This America*, *supra* note 35, at ¶ 77.

195. *Refugees Behind Bars*, *supra* note 193, at ¶ 1.

196. *Id.*

197. White, *supra* note 109, at 68.

198. *Id.* at 69.

199. Alisa Solomon, *A Dream Detained*, THE VILLAGE VOICE, March 30, 1999, at 46.

200. *Refugees Behind Bars*, *supra* note 193, at ¶¶ 1-2.

201. *Id.* at ¶ 4.

202. *Id.* at ¶ 1.

203. *Id.* at ¶ 3.

204. *Id.* at ¶ 4.

205. *Refugees Behind Bars*, *supra* note 193, at ¶ 4.

206. *Id.*

207. *Id.* at ¶ 6.

legal residents, andone being a U.S. citizen.[208] He was refused parole.[209]

Dr. Z, an Afghani tortured by the Taliban because he touched a woman while helping to deliver her woman baby escaped to the United States.[210] His cousin was willing to support him, but his parole was denied for two and a half months.[211]

Yudaya Nanyonga, from Uganda, was a high school student who was forced to quit school to work and buy food and clothes for the rebels.[212] Military officials suspected her as a collaborator and she fled to the United States..[213] Her sister disappeared and her brother was killed the following year.[214]

She was put in chains at secondary inspection and chained to a chair for 20 hours.[215] She spent nearly two years dressed in prison uniform.[216] Part of the time was in a county jail.[217] One day she was crying hysterically and was put in maximum security for not paying attention to orders.[218] At that point, "five guards forced Nanyonga to disrobe, took her to a small cell, and fastened her to a cot."[219] She was "secured spread-eagle onto a coverless bed in four-point restraints while men in riot gear laughed at her nakedness."[220] They sedated her by roughly injecting a needle.[221] "No one ever saw me naked like that. They made it even worse because they were laughing and making fun of me."[222] She was injected again and woke up two days later "wondering who had put her bra and panties back onto her body and wondering what else they might have done."[223] Jail officials justified it by saying she was suicidal.[224] Next she spent a month and a half in maximum security with criminals who called her "African monkey."[225] Although she has since been granted asylum, she is clinically depressed.[226] "I have no desire to go anywhere, to do anything. I am afraid of being outside. I don't trust anyone."[227]

Conditions can be very poor in detention. The only access to fresh air may be

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208. *Id.*
209. *Id.*
210. *Id.* at ¶ 10.
211. *Id.*
212. Elizabeth Llorente, *A Young Woman's Search for Safety Puts Her in Chains*, THE RECORD, (BERGEN COUNTY, N.J.), Feb. 13, 2000, at A10.
213. *Id.*
214. *Id.*
215. *Id.*
216. *Id.*
217. *Id.*
218. *Id.*
219. *Id.*
220. Solomon, *supra* note 199, at 46.
221. Llorente, *supra* note 212, at A10.
222. *Id.*
223. Solomon, *supra* note 199, at 46.
224. *Id.*
225. *Id.*
226. Llorente, *supra* note 212, at A10.
227. *Id.*

"an hour in a walled-in cement courtyard with a chain-link roof."[228] Refugees must wear a prison uniform, which is difficult for women who culturally wear long dresses.[229] A typical setting is a large dorm-type room and open showers and toilets separated by three foot walls and no doors.[230]At times there have been unsanitary conditions, inadequate medical care, and physical and sexual abuse.[231] One active tuberculosis patient at Wackenhurt apparently exposed 90 other people, who then tested positive for tuberculosis.[232] Sometimes detainees are mixed with criminals and sometimes shocked with stun guns, cursed, or beaten.[233] Guards have been prosecuted for putting detainees' heads in the toilet, pulling their genitals with pliers, and forcing sexual acts.[234]

Adelaide Abankwah, a woman from Ghana who spent two years in detention[235] said, "Please tell [the INS] that I am not a criminal. I just want to be free. .I feel like I am dead here. There is no fresh air. I cannot eat. I feel that this is where I will die."[236]

District Director McElroy said that paroled applicants are unlikely to appear at hearings, but Ms. McClenahan of Catholic Legal Immigration Network says that check-in requirements and other procedures can be very successful.[237] The Secretary of State's Advisory Committee on Religious Freedom said, "The unnecessary detention of already traumatized victims of religious persecution, as well as other types of persecution, should be examined with the goal of providing release "[238] Torture victims, for instance, can experience panic attacks and flashbacks from being detained.[239]

Because the INS has recommendations but not regulations, it would be helpful for Congress to clarify that detentions after the credible fear interview are not the desired policy and for the INS to issue regulations providing for parole of asylum seekers who pose no danger to the community [240] This would achieve a human rights policy goal, and save a great deal of taxpayer money.[241] The INS should be regularly accountable for detention conditions. Detainees should be kept away from criminal populations. Besides releasing detainees to friends and families of good character, the INS can use refugee accommodation centers, group homes, and supervised release programs. Refugees can also be released on bond

228. Solomon, *supra* note 199, at 46.

229. *Refugee Women at Risk, supra* note 1, at 10.

230. Solomon, *supra* note 199, at 46.

231. *Refugees Behind Bars, supra* note 193, at ¶¶ 17-21.

232. *Id.* at ¶ 28.

233. *Id.* at ¶¶ 18-19.

234. *Id.* at ¶ 20.

235. Solomon, *supra* note 199, at 46.

236. *Refugees Behind Bars, supra* note 193, at ¶ 23 (citing Ginger Thompson, *Asylum for Woman Threatened with Genital Cutting*, N.Y. TIMES, April 25, 1999).

237. Solomon, *supra* note 199, at 46.

238. *Final Report of the Advisory Committee on Religious Freedom Abroad to the Secretary of State and to the President of the United States*, May 17, 1999, at 48.

239. *Refugees Behind Bars, supra* note 193, at ¶ 29.

240. *Id.* at ¶¶ 7-8.

241. *Id.* at ¶ 6.

or to a guarantor. Non-profit groups spend money more efficiently than the government at no cost to taxpayers, and should be encouraged. This frees both money and energy to more fully investigate those who might actually be a danger to the community.

IV WHEN DOES RELIGIOUS DISCRIMINATION BECOME PERSECUTION?

The very God! think, Abib; dost thou think? So, the All-Great, were the All-Loving too– So, through the thunder comes a human voice. [242]

--Robert Browning

Zaid b. Aslam reported that the Apostle of Allah (may peace be upon him) declared that the man who leaves the fold of Islam should be executed.

-- Muwatta Imam Malik[243]

The INS has seen an increase in religious asylum claims from Muslim countries.[244] The majority of these claims are Christian, either ethnically Christian or converts from another religion, usually Islam.[245] Sudan and Iran retain the Shari'a rule of apostasy in which conversion from Islam is "punishable by death or imprisonment," while in other countries converts are executed as spies.[246] Some of these refugees flee their country out of fear of persecution, but others are *sur place* asylum claims, resulting when "an asylum applicant claims religious conversion while in the United States."[247]

The international law standards on religious freedom are expressed in the 1981 U.N. Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.[248] This was an "update" of the 1948 Universal Declaration of Human Rights, which said in Article 18 "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship, and observance."[249] The 1981 Declaration provides a

242. ROBERT BROWNING, *An Epistle*, THE POETICAL WORKS (New York: Hurst & Co., 1872).

243. John Gilchrist, *The Social Laws and Customs of Islam, in* MUHAMMAD AND THE RELIGION OF ISLAM, orig. JESUS TO THE MUSLIMS, at ¶ 4 (Benoni, Republic of South Africa 1986), *at* http://answering-islam.org/Gilchrist/Vol1/8d.html.

244. Tuan N. Samahon, *The Religion Clauses and Political Asylum: Religious Persecution Claims and the Religious Membership-Conversion Imposter Problem*, 88 GEO. L.J. 2211, 2211 (2000).

245. *Id.*, *see also* cases discussed in this article.

246. Samahon, *supra* note 244, at 2211.

247. *Id.* at 2214.

248. Derek H. Davis, *The Evolution of Religious Freedom as a Universal Human Right: Examining the Role of the 1981 United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, 2002 BYU L. REV. 217, 217 (2002).

249. *Id.* at 224.

"comprehensive list of rights to freedom of thought, conscience and religion."[250] However, it does not specifically include the right to change religion because of protests from Muslim countries.[251] In compromise, Article 8 says, "Nothing in the present Declaration shall be construed as restricting or derogating from any right defined in the Universal Declaration of Human Rights "[252] Therefore, by implication, the right to change religion may be preserved.[253] The Declaration is limited because it is not a convention or binding international law but it still has the "most prestige among all the international human rights documents; it has become the highest standard by which religious human rights are upheld."[254] As such, it should guide the United States in its refugee policy and in determining who has been persecuted on account of their religious beliefs.

Congress, in passing the 1998 International Religious Freedom Act,[255] wanted to "heighten the awareness of religious persecution as a ground for refugee status."[256] It developed guidelines for INS office training, for interpreters, for training in understanding religious persecution, and for evaluation.[257] There were also to be annual reports on religious freedom in different countries, which were to be used as a resource.[258] The changes were "intended to ensure that victims of religious persecution receive the same consideration given to refugees fleeing persecution" for other reasons.[259] The Congressional intent, which has probably not been effectively carried out, is worth noting.

For a well-founded fear, the "asylum applicant bears the burden of establishing that he or she qualifies as a refugee 'either because he or she has suffered past persecution or because he or she has a well-founded fear of future persecution.'"[260] In an unpublished case, Dib, a native of Syria, was denied application for asylum by the Board of Immigration Appeals (BIA).[261] His father was an evangelical preacher and he and his father had both been warned to stop preaching the gospel and stop providing humanitarian aid to Christians.[262] They were both beaten until they were unconscious, and his father died of the injuries.[263] Although the Immigration Judge mysteriously did not find that this rose to the

250. *Id.* at 226.
251. *Id.* at 229.
252. *Id.*
253. *Id.*
254. *Id.* at 232
255. International Religious Freedom Act of 1998 (H.R. 2431); U.S. Committee for Refugees, *Compromise Religious Persecution Bill Passes*, at ¶ 1, http://www.refugees.org/world/articles/religious_rr98_10.htm.
256. U.S. Committee for Refugees, *Compromise Religious Persecution Bill Passes*, at ¶ 2, http://www.refugees.org/world/articles/religious_rr98_10.htm.
257. *Id.* at ¶¶ 7, 10, 14, 15.
258. *Id.* at ¶ 15.
259. *Id.* at ¶ 5.
260. Ouda v. INS, 324 F.3d 445, 451 (C.A. 2003).
261. Dib v. INS, No. 96-70524, 1997 U.S. App. LEXIS 10807 at *2 (9th Cir. 1997).
262. *Id.* at 3, 4.
263. *Id.* at *4.

level of persecution,[264] the Ninth Circuit overruled and granted asylum, saying that he was both personally threatened and had a reasonable fear because of his father's death for his faith.[265]

Asylum based on a well-founded fear of persecution satisfies a subjective test of genuine fear and an objective test of "credible, direct, and specific evidence in the record" supporting a reasonable fear.[266] Muslim Abkhaz Separatists gained control in Abkhazia, part of Georgia, and starting killing and torturing non-Abkhaz.[267] Melkonian and his wife Angela were Armenian Christians with a large farm and a herd of cattle.[268] Angela's father spoke out against Muslim tactics, and then had to flee with Melkonian to Russia.[269] Separatists stole all the cows and murdered an elderly woman and man associated with the family [270] Melkonian and Angela eventually made their way to the United States and asked for asylum.[271] The lower court denied asylum, but the Circuit Court said that the proper standard was whether he had a credible subjective fear and whether it was objectively reasonable.[272] The Court decided that with the campaign of ethnic cleansing and the possibility that Melkonian would be killed "because of his prior support of the Georgians (political opinion), and because he is an Armenian (ethnicity) and a Christian (religion), the Immigration Judge (IJ) was in error.[273]

In granting or denying asylum, the court must consider past persecution.[274] El Moraghy, a young Coptic Christian, applied for asylum after his tourist visa expired "to escape the persecution of the Muslim Fundamentalists in Egypt, because I am a Coptic Christian."[275] Four fellow students, members of a fundamentalist Muslim group, beat him up, dislocating his shoulder and giving him a concussion.[276] He suffered violence other times as well. A Muslim woman friend of his asked to visit the monastery with him.[277] They were stopped and forced out of her car by Islamic fundamentalists, who told him that because of their relationship, El Moraghy must convert and marry her.[278] He was forced to sign a paper promising to convert, but since the official in charge of conducting marriages was not available, they were told to return to complete the marriage later.[279] Fearing for his life because he did not intend to convert, El Moraghy left

264. *Id.* at 5.
265. *Id.* at *7-8.
266. Melkonian v. Ashcroft, 320 F.3d 1061, 1065 (C.A. 9 2003).
267. *Id.* at 1065.
268. *Id.* at 1066.
269. *Id.*
270. *Id.*
271. *Id.* at 1066-67
272. *Id.* at 1068.
273. *Id.* at 1069.
274. Nagi El Moraghy v. Ashcroft, 331 F.3d 195, 198 (2003).
275. *Id.*
276. *Id.* at 199.
277. *Id.* at 200.
278. *Id.*
279. *Id.* at 200.

the country, and applied for asylum.[280] He argued that the "government could not control fundamentalists and did little to protect Coptic Christians."[281] The IJdismissed the State Department country condition reports for Egypt, which described anti-Coptic terrorism, because a "review of those documents does not refer to the respondent or any members of his family in Egypt."[282] The IJ did not address whether El Moraghy had suffered past persecution and concluded that he was not likely to be persecuted.[283] The Circuit Court remanded, ruling that this was improper use of the country reports, and the court must make findings on past persecution.[284]

If the government is doing the persecuting, it should be possible to demonstrate a lack of safety in the country. Abdel's claim as a Sudanese Christian under the Islamic military government was that he had been arrested and beaten twice during protest demonstrations and the government was looking for him.[285] The BIA did not find that this rose to the level of persecution, but the Circuit Court found that while the previous beatings were not persecution, there was "little reason to generally suppose that a government's past actions in this respect create an 'outer limit' on its future actions."[286] Conditions in Sudan showed that the government was promoting a plan to impose Shari'a on all citizens and that there was civil war raging against Christians in the southern part of Sudan.[287] The Circuit Court reversed.[288]

Courts usually deny a claim when the attacks are made by individuals; "persecution must be at the hands of the government or a group the government is unable or unwilling to control."[289] In an unpublished case, Morgan, a 42 year old Egyptian Coptic Orthodox Christian who applied for asylum in 1982, had been arrested and beaten by the police in 1972, to the point where he had broken bones.[290] In 1981 he was threatened with death because he was a Christian.[291] The court denied his claim, saying that "Copts have full constitutional protection in Egypt"[292] and that "Morgan had failed to establish that the Egyptian authorities were unwilling to help him in such circumstances."[293]

In another unpublished case, Lina Mozian, a Lebanon-born Palestinian Christian, was threatened and interrogated by Christian militia because she was

280. *Id.* at 201.
281. *Id.*
282. *Id.* at 202.
283. *Id.*
284. *Id.* at 198.
285. Abdel-Masieh v. U.S. I.N.S., 73 F.3d 579 (5th Cir. 1996).
286. *Id.* at 584.
287. *Id.* at 586.
288. *Id.* at 586-87.
289. Mozian v. INS, No. 95-70551, 1997 U.S. App. LEXIS 1380 at *3 (9th Cir. Jan. 27, 1997).
290. Morgan v. INS, No. 92-70818, 1994 U.S. App. LEXIS 23893 at *2 (9th Cir. Aug. 29, 1994).
291. *Id.* at *3.
292. *Id.* at *4.
293. *Id.* at *5.

Palestinian and tortured by Muslim groups because she was a Christian.[294] The court was unsympathetic because she did not establish that the Lebanese government could not or would not control the problem.[295]

Courts seem to think that having "full constitutional protection" is meaningful in Muslim countries. They also are reluctant to call "isolated incidents" persecution. This is analogous to lynchings which occurred in the South in the last century African-Americans had "full constitutional protection, at least of their lives, and lynchings were, relative to the number of black people, merely isolated incidents. However, an entire race of people lived in terror because the laws protecting them were not implemented. This is exactly the situation today in many Muslim countries.

The writer of this article saw a young Pentecostal preacher dying in a hospital in a predominantly Muslim area of Indonesia from a beating that occurred when he was in police custody, which left marks of burns and electric shocks. What was the reason? At a revival service he led, converts to Christianity from animism burned their magic charms. A Muslim observer accused him of burning a copy of the Koran. He died on his 22nd birthday The whole proceeding was illegal and unconstitutional in that secular country, and was statistically unlikely to happen to the other 20 million Indonesian Christians, so a U.S. court would have been unlikely to give protection to an Indonesian Christian threatened in this way

Sadeghi was an Iranian teacher who did not agree with the Islamic principles of the 1979 revolution.[296] He was teaching in 1982 when he advised a fourteen-year-old student not to go fight in the Iraqi war to be a "martyr for God."[297] Because of this episode, four armed men came to arrest him, and while other teachers and students distracted them, Sadeghi fled.[298] He managed to leave the country and asked for asylum from America.[299] Despite the fact that he presented evidence that he was still on a wanted list, the decision to deny asylum was affirmed.[300] The dissent indignantly pointed out that assuming Sadeghi's behavior was subject to legitimate prosecution was wrong, as "Iran has ratified the Convention on the Rights of the Child which prohibits nations from permitting or requiring children to participate in fighting wars."[301] This judge believed that denying Sadeghi asylum was "ignoring the very purpose of our immigration laws as intended by Congress."[302] Moreover, our court essentially aided the Iranian regime, which was violently anti-American, to persecute its own dissidents who were promulgating a viewpoint consistent with a democratic one.

Courts can have a very narrow definition of persecution. In an unpublished

294. Mozian v. INS, No. 95-70551, 1977 U.S. App. LEXIS 1380 at *4.
295. *Id.*
296. Sadeghi v. INS, 40 F.3d 1139, 1141 (10th Cir. 1994).
297. *Id.*
298. *Id.* at 1144.
299. *Id.* at 1140.
300. *Id.* at 1140.
301. *Id.* at 1145.
302. *Id.* at 1148.

case, they denied a claim for Ghali, a Christian Syrian woman, on the grounds that what she experienced was merely harassment.[303] The dissent brought out some interesting facts. She was insulted by a male Muslim supervisor in the government Ministry where she worked who said, "Christian women are all whores, and "I know your [sic] a virgin and you want to give it up, and put his hand on her body whenever he saw her.[304] Once the supervisor and two of his bodyguards detained her for an hour, groping her and saying, "Let us see if you really are a virgin."[305] The bodyguards held her down while the supervisor simulated rape.[306] She appealed to higher Ministry officials, who told her that "because she was a Christian, she would have to solve the problem herself."[307] She then complained to the police, "who also refused to help because she was a Christian."[308] After that, she received a letter threatening her life because she had complained to the police, whereupon she fled the country.[309] It is hard to see why this is not considered persecution, and one cannot help but wonder if a judge would see this differently if it happened to a member of his/her family

Sometimes it is hard for an applicant to articulate what is happening, especially if the court is unsympathetic. Grachik and Anik Rostomian were Armenian Christians, age 80 and 77 respectively, who had fled to the United States to live with their only daughter because of their Christian beliefs.[310] Their application was denied.[311] The dissent pointed out that Muslim Azeris had beaten Mr. Rostomian and cut his back with knives, that the Azeris had come back "constantly, and the Rostomians had fled because there was no police protection.[312] Their claim was denied because it was not detailed enough, but the court had insisted on questioning Mr. Rostomian who was "an elderly gentleman [who] has difficulty remembering a lot of things that happened" and refused to allow his wife to speak.[313] The dissent protested, "Leaving aside the fundamentally unfair treatment they received at their deportation hearing, what purpose does it serve to send this elderly couple back to Armenia?"[314]

Courts will deny the claim if there is a subjective fear, but not enough objective evidence about the country.. In an unpublished case, Fatmir Visha was a native of Albania and a Muslim convert to Christianity who filed for asylum after studying in the United States.[315] He said he feared being killed as an outspoken convert from Islam and that he had been harassed and threatened.[316] The INS

303. Ghali v. INS, No. 98-70947, 2000 U.S. App. LEXIS 19156 at 4 (9th Cir. Aug. 4, 2000).
304. *Id.* at *7
305. *Id.*
306. *Id.*
307. *Id.*
308. *Id.*
309. *Id.* at *8.
310. Rostomian v. INS, 210 F.3d 1088, 1089 (9th Cir. 2000).
311. *Id.*
312. *Id.*
313. *Id.* at 1090.
314. *Id.* at 1093.
315. Visha v. INS, No. 00-3446, 51 Fed. Appx. 547, 548 (6th Cir. Nov. 13, 2002).
316. *Id.* at 549.

agreed that his fear was subjectively genuine but denied his claim saying he had not shown objective evidence and his country reports were too general.[317]

Sometimes the court can get confused between ethnic and religious groups. Mansour, a 42 year old native of Iraq and an Assyrian Christian, made an asylum claim because of religious persecution.[318] The Iraqi army, in which he served, beat him up, broke his leg, and damaged the vision in one eye because of his faith and because "they thought I had joined the Kurdish rebels."[319] The BIA denied Mansour's claim, but the appellate courts questioned "whether the BIA adequately comprehended and addressed Mansour's torture claim,"[320] because the BIA called his group Syrian Christian rather than Assyrian Christian.[321] "Mansour is not a citizen of Syria, as the phrase 'Syrian Christian' may suggest.[322] He is an Iraqi national, an ethnic Assyrian, and a member of the Chaldean Catholic Church."[323] Pointing out that the U.S. Department of State Report (1998) said that Assyrian Christians were abused, the Seventh Circuit vacated the BIA s decision against Mansour.[324]

In other cases the court has sometimes applied its own limited experience. Bandari, a 25 year old Armenian Christian from Iran, fell in love with Afsaneh, a Muslim girl, and kissed her one night in the street.[325] The police arrested him for breaking a law against public display of affection, but when they found he was a Christian, they knocked him down, beat, and kicked him.[326] He was beaten with a rubber hose, and they wanted him to confess to rape.[327] Bandari was given the choice between conversion and being convicted of an interfaith relationship.[328] When he would not convert, he was sentenced to 75 lashes and a year in prison.[329] His grandfather got him out of prison with a bribe.[330] When it became clear that the situation was not over, he fled Iran, where there is still a rape charge pending.[331] The BIA judge did not find his testimony credible however, because of minor discrepancies and because she did not believe that beating with a rubber hose would not cause him to bleed.[332] (Bandari said his back swelled but did not bleed.)[333] The Ninth Circuit reversed.[334]

317. *Id.* at 549, 550.
318. Mansour v. INS, 230 F.3d 902, 904 (7th Cir. 2000).
319. *Id.*
320. *Id.* at 908.
321. *Id.* at 907.
322. *Id.* at 908.
323. *Id.* at 909.
324. *Id.* at 908.
325. Bandari v. INS, 227 F.3d 1160, 1163 (9th Cir. 2000).
326. *Id.*
327. *Id.*
328. *Id.*
329. *Id.* at 1164.
330. *Id.*
331. *Id.*
332. *Id.* at 1167
333. *Id.* at 1167.
334. *Id.* at 1169.

Rape is a common charge against Christians in the Muslim world. Again, this is analogous to the common accusation prior to a lynching that a black man had raped or slept with a white woman. The author of this article has personal friends in Indonesia whose family sheltered Defi, a teenage Muslim girl who ran away and converted to Christianity. When Defi's family found her, she denied that she ran away and converted voluntarily to protect herself. Despite a statement that the girl had signed when she moved in with the family rape and kidnapping charges were filed against the father of the host family and two pastors. When a lynch mob threatened to burn down the court and kill the judge and the defense counsel as well as the defendants, the court quickly convicted the three men to a several year jail sentence.. When released, their lives will be in danger. It is sobering that they might not be eligible for asylum in the U.S.

Sometimes the court has limited cultural experience. In an unpublished case, Wissa, a 38 year old Coptic Christian, experienced multiple threats, detentions, and beatings by both police and Muslim fundamentalists because of his religion.[335] There was a fraud issue as well and the BIA found it incredible that he had not contacted a lawyer about being defrauded by fundamentalists.[336] The conversation went as follows:

> Immigration Judge: "The question is why didn't you contact a lawyer.
>
> Wissa: "I didn't know how to get in touch with a–
>
> IJ: "How about–you happen to be sitting here with a beeper on your pants on your belt. Do you know how to use a telephone?"
>
> "In Egypt, we don't have telephones or beepers.
>
> "Oh, you don't have telephones in Egypt? I see.
>
> "In my pocket just like now, no."[337]

The Ninth Circuit remanded, commenting that he was "less concerned about being defrauded and more concerned about being beaten or killed."[338]

One difficulty for refugees from Muslim countries is that Westerners do not understand that Islam is not monolithic and has more than one tradition.[339] For instance, Shari'a law can impose a death penalty for conversion (apostasy) and many families throughout the Muslim world will kill a relative who converts.

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335. Wissa v. INS, No. 98-70974, 2000 U.S. App. LEXIS 8212 at *2 (9th Cir. 2000).

336. *Id.*

131. *Id.* at *4.

338. *Id.* at *3.

339. Susan Musarrat Akram, *Orientalism Revisited in Asylum and Refugee Claims*, IJRL 2000.12(7), at 4 (Oxford Univ. Press 2000).

Poison was a favorite method in areas where this author has lived. The death penalty for apostasy is of long tradition, but there "does not seem to be any Qur'anic authority for this extreme form of punishment The Hadith, however, openly states that Muhammad demanded the death sentence for those who turn their backs on Islam "[340]

However, many modern Muslim jurists disagree that the death penalty for conversion is part of Islamic law.[341] They also differ on whether violence should be used on unbelieving outsiders. One writer said,

> The commandment to 'slay the pagans wherever you find them' in verse 9:5 speaks of the hostile Arab tribes surrounding Medina When sincere scholarship and exegesis is [sic] applied, it becomes quite clear that verse 9:5 is one of self-defense and not a carte blanche to kill all non-believers.[342]

Moreover, what a government professes and what extremist groups do is often different. Muslim government officials often do not intervene on behalf of Christians or minorities to whom they are not very sympathetic anyway because they fear violence to themselves or widespread riots by sympathizers with the extremists.

The court must consider how different governments react to apostasy. Najafi, a native to Iran, lived in the United States for a number of years and converted to Christianity.[343] He asked for asylum as a refugee because apostasy is a capital crime in Iran.[344] The lower court denied his claim, apparently unsure as to whether Najafi was really a Christian.[345] The higher court said that how "apostates are treated in Iran is at the heart of the asylum inquiry" and remanded the claim, giving Najafi some good advice as to what sort of evidence he should present.[346]

Without understanding how complex Islamic thought is, courts will not understand a Muslim refugee who has a genuine Islamic belief but is also being persecuted by an Islamic government.[347] It is important for the INS and the immigration court system to understand these complexities, both for human rights reasons, and because it is current U.S. policy to encourage moderate positions within Islam.

Asylum seekers on religious persecution grounds are rightly questioned about their faith but not always in sensible ways. The questioning tends to take the form of a doctrinal quiz.[348] Sometimes a new convert, or an uneducated applicant, or an applicant from a country where his/her religion has been repressed cannot answer

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340. Gilchrist, *supra* note 243, at ¶ 3.

341. Akram, *supra* note 339, at 48.

342. *Distortion of Islam*, THE INDEPENDENT (BANGLADESH), Nov. 21, 2001.

343. Najafi v. INS, 104 F.3d 943, 945 (7th Cir. 1997).

344. *Id.* at 948.

345. *Id.*

346. *Id.* at 949-50

347. Akram, *supra* note 339, at 6-7.

348. *Testing the Faithful: Religion and Asylum, Summary Results of Survey*, Lawyers Committee for Human Rights, 1-2 (Nov. 2002) *at* http://www.lchr.org.

detailed questions.[349] In once case a Shi'ite Muslim knew the names of the main imams, but could not name all twelve, which caused the judge to deny his claim (which was later granted on appeal.)[350] In another case a refugee from Russian Tatarstan, who had converted from Islam to evangelical Christianity, could not answer a series of questions about the difference between Orthodox and evangelical beliefs (and neither could most American Christians).[351] He knew the "Lord's Prayer" but not the English name for it.[352] The judge found this so outrageous that he started jumping up and down and yelling at him.[353] An Iraqi Chaldean Christian had to recite the Ten Commandments and demonstrate prayer for about half an hour until his translator refused to keep translating.[354] Particularly in conversion cases, it is a problem if either the translator or the decision-maker is a member of the group the asylum seeker fears.[355] Some adjudicators seemed to believe that the right to practice faith freely is important, while others appeared to want refugees to go home and be quiet about their religion.[356] On the whole, "U.S. immigration judges were generally receptive to learning about religions that they [we]re not familiar with."[357]

A better approach than quizzing applicants about details of their religion is to elicit information about how they practice their religion, what the religion means to them personally, and their experience of persecution.[358] Judges should have a respectful attitude and also be aware that not all refugees can afford expensive expert testimony [359]

One concern about convert applicants is whether or not they are imposters, and no doubt some are. There is a perception that asylum applicants abuse religious asylum to avoid deportation and to get welfare benefits or work authorization.[360] Asylees who apply *sur place* (from within the United States) because they have converted "likely will only have recourse to the religion ground for protection."[361] They do not need to have suffered past persecution but must be identified with a religious group that would be subject to persecution.[362] Tuan Samahon argues that the INS cannot define religion too explicitly without interfering in the Establishment Clause or the Free Exercise clause and points out that mainstream Christianity has a lack of verifiable outward observances.[363]

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349. *Id.* at 3.
350. *Id.* at 11.
351. *Id.* at 10.
352. *Id.*
353. *Id.* at 10.
354. *Id.* at 12.
355. *Id.* at 17.
356. *Id.* at 4.
357. *Id.* at 5.
358. *Id.* at 6.
359. *Id.* at 7.
360. Samahon, *supra* note 244, at 2215.
361. *Id.*
362. *Id.* at 2218.
363. *Id.* at 2215-16.

While lack of outward observances is a problem, those working with Muslim converts widely accept that the watershed of true commitment is baptism. Baptism is seen by Muslims as the point of betrayal and by Christians as full commitment. It is generally the one single act that puts the convert's life at risk. Furthermore, the community, the brotherhood of the faith, (*ummah Islam*) is absolutely crucial in Islam. Leaving the *ummah Islam* will bring personal rejection at a minimum. Generally, people are unlikely to sever these important ties without some real conviction. Those whose conversion is not entirely genuine are usually fleeing a dysfunctional and unhappy background. Supporting even doubtful conversions is good public policy because conversions within an ethnic group spark more conversions and any encroachment on the monolithic practice of Islam tends towards pluralism and moderation.

V SPECIAL ISSUES FOR WOMEN

> *Around the world women often suffer persecution because they are female, and experience persecution differently because they are women.*[364]

Female refugees outnumber males,[365] but unless gender-related claims are acknowledged, female refugees are less likely than men to be found eligible.[366] The 1951 Convention does not include gender as a ground of persecution[367] and some even argue that women are not a social group because it would be too broad.[368] Sometimes women face the same persecution as men and sometimes persecution is gender-specific.[369] At times women are persecuted for having transgressed the mores of their culture, and sometimes just for being a close relative of another persecuted person.[370] For a long time, gender-specific persecution was not recognized, but that is changing.[371] The 1979 Convention on the Elimination of All Forms of Discrimination Against Women, Article 1, defines "discrimination against women" as

> any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.[372]

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364. *Refugee Women at Risk, supra* note 1, at 1.

365. Nancy Kelly, *Gender-Related Persecution: Assessing the Asylum Claims of Women*, 26 CORNELL INT'L L.J. 625, 625 (1993).

366. *Id.* at 627.

367. Ninette Kelley, *Opinion–The Convention Refugee Definition and Gender-Based Persecution: A Decade's Progress*, IJRL 2002.13(559), August 2002, at 5.

368. *Id.*

369. Kelly, *supra* note 365, at 642.

370. *Id.*

371. Kelley, *supra* note 367 at 4.

372. Anna Jenefsky, *Permissibility of Egypt's Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women*, 15 MDJILT 199, 200 (1991).

Muslim countries make a number of reservations to this treaty based on Shari'a law.[373] The argument is that the reservations are based on religion and expressions of religion are protected by international human rights law.[374] Religion however, "may not be used as a justification for the derogation of rights that are universally recognized and upheld."[375] The U.S. government is trying to develop appropriate responses and its "leadership in recognizing gender-based asylum claims is crucial in settling an example for many other nations and should be applauded."[376]

Rape is now legitimately considered persecution, though it was not in the past.[377] As recently as 1989 the Fifth Circuit denied the claim of a Salvadoran woman whose male family members were hacked and shot to death.[378] She was forced to watch and then she was raped.[379] The rape was found not to be political but personal.[380] However, it has become increasingly known that while men are tortured in other ways, women are often raped or sexually tortured by the same actors for the same reasons.[381] Rape and sexual assault on female family members of political opponents is seen more and more as persecution.[382]

Women who have been raped and assaulted have difficulty talking about their experiences, especially to a male interviewers or judges.[383] In some cultures, a woman will be ostracized if a sexual assault becomes known.[384] One Albanian woman fled to the United States in May 1997 after being gang-raped by armed and masked men who were hunting her husband for political reasons.[385] She was put into expedited removal and was too ashamed to talk about the rape to an Albanian male interpreter, because of the shame in her culture.[386] She was then deported to Albania.[387] Later on, her case became known in the press and the INS allowed her to return and be granted asylum.[388] If women are suffering from Post-Traumatic Stress Disorder, they may be unable to talk about their experiences at all.[389] The INS should provide female staff and interpreters, and where this is not possible, make an assumption that they may be needed, and be generous in granting a credible fear interview.

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373. Bharathi Anandhi Venkatraman, *Islamic States and the United Nations Convention on the Elimination of All Forms of Discrimination Against Women: Are the Shari'a and the Convention Compatible?* 44 AMULR 1949, 1951 (1995).

374. *Id. at 1962.*

375. *Id.* at 1963.

376. *Refugee Women at Risk, supra* note 1, at 4.

377. Kelly, *supra* note 365, at 647

378. *Id.* at 638.

379. *Id.*

380. *Id.* at 638-639.

381. *Id.* at 647.

382. Kelley, *supra* note 367, at 5.

383. Kelly, *supra* note 365, at 630.

384. *Id.*

385. *Is This America? supra* note 35, at ¶ 7.

386. *Id.*

387. *Id.*

388. *Id.*

389. *Refugee Women at Risk, supra* note 1, at 6.

Women seem to be more frequently subjected to expedited removal, perhaps because they present themselves more often without proper travel documents, or perhaps the law is applied in a way that disfavors women.[390] The interviews are not necessarily conducted in private, and shackling and strip searches add to their fear.[391]

In detention, parents are separated from their children who are detained in separate facilities.[392] Lengthy separation from small children causes some women to abandon legitimate claims,[393] as the "INS has refused to provide some mothers with contact visits, even with young children."[394] People caring for young children should be paroled routinely. The U.N. Convention on the Rights of the Child, signed by the United States and most other countries, gives guidelines on how children should be treated.[395] As the United States has signed the treaty, it is binding international law upon the United States. Article 2(2) says that "States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members."[396] This would imply that a child should not be separated from his mother or father just because they are refugees. Article 9(1) is even more explicit, saying "States Parties shall ensure that a child shall not be separated from his or her parents against their will, except that such separation is necessary for the best interests of the child."[397] It would be hard to argue that it would be in the best interests of a refugee child to be torn away from his mother. Article 22(1) talks specifically about refugee children, saying that "States Parties shall take appropriate measure to ensure that a child who is seeking refugee status .shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights. "[398] By separating refugee parents from their young children, the United States is in breach of international law and must move to find more humanitarian solutions to detention.

Under the 1996 law, refugees have one year to file an asylum claim when they are in the country.[399] The only two exceptions are if circumstances affecting their eligibility have changed or if there are extraordinary circumstances relating to the delay.[400] More than 13,000 women have had claims rejected because they

390. White, *supra* note 109, at 50-51.

391. *Refugee Women at Risk, supra* note 1, at 7.

392. *Id.* at 13.

393. *Id.*

394. *Id.* at 12.

395. Convention on the Rights of the Child, G.A. Res. 25, U.N. GAOR, 44th Sess., Supp. No. 49, at 166, U.N. Doc. A/44/736 (1989).

396. *Id.* at art. 2(2).

397. *Id.* at art. 9(1).

398. *Id.* at art. 22(1).

399. *Refugee Women at Risk, supra* note 1, at 14.

400. *Id.*

missed the filing deadlines.[401] Refugee women, who may be illiterate, abused, or caring for young children, may not even know about asylum. Not knowing the English language is a problem, as is finding legal representation.[402] Women are often less familiar with dealing with the government and legal authorities.[403] The deadline can be long past before they realize they are even eligible.[404]

Women have attempted to make persecution claims because of gender-specific oppressive treatment, though not very successfully Ms. Sargis, a 71 year old Armenian Christian from Iran, did not want to go back partly because she did not want to conform to the dress code.[405] Women would be spray painted or even sprayed with acid if their face wasn't covered.[406]Their lips would be rubbed with glass if they wore lipstick often.[407] She argued that her social group was Christians "who fear the threat of persecution for failing to conform to the dress code imposed by Islamic laws."[408] The court said it was not persecution because she had complied with the dress code before.[409] It can be even more difficult for Muslim women, who are not prepared "to articulate their objections to the particular 'Islamic' regime in question as a fundamental rejection of the faith itself."[410] Saideh Hassib-Tehrani, who did not want to follow the Iranian rules for women, and who previously had confrontations with the religious police and been fired from her job, was denied asylum.[411] Susan Musarrat Akram suggests that perhaps she could have made the argument that she disagreed with the government's interpretation of Islam in a way that repressed women, and that she held a different and valid Muslim interpretation.[412]

Bangldeshia Muslim author Taslima Nasrin wrote about a Hindu family being tormented by Muslims and has also criticized the treatment of women in Islamic states.[413] The Council of Islamic Soldiers formed a 100 person death squad to kill her.[414] When a newspaper quoted her as saying that the Koran (although she insists she said the Shari'a) should be "thoroughly revised to eliminate passages which discriminate against women," a crowd as large as 200,000 supported demands for her death, and a local court issued a warrant for her arrest for "deliberately hurting religious sentiments."[415] After two months in hiding, the

401. *Id.* at 14.
402. *Id.* at 15.
403. *Id.*
404. *Id.* at 16.
405. Yadegar-Sargis v. INS, 297 F.3d 596, 600 (7th Cir. 2002).
406. *Id.* at 599.
407. *Id.* at 599-600.
408. *Id.* at 600.
412.*Id.* at 606.
410. Akram, *supra* note 339, at 12.
411. *Id.* at 14-15.
412. *Id.* at 14.
413. Donna E. Arzt, *Religious Human Rights in Muslim States of the Middle East and North Africa*, EMORY INT'L L. REV. 139, 147 (1996).
414. *Id.*
415. *Id.*

European Union offered her asylum.[416] For Muslim dissidents to be able to speak out about the treatment of women, there needs to be some place to seek asylum.

Female genital mutilation is gradually becoming recognized as a ground for asylum. Before 1996, two judges ruled in opposite directions about two women from Sierra Leone who were abducted and mutilated.[417] One judge granted asylum, but the other denied it, saying "she could choose to support the practice to maintain tribal unity."[418] In 1996, the "Board of Immigration Appeals issued a ground-breaking decision recognizing that asylum could be granted based on fear of female genital mutilation."[419]

Female genital mutilation (FGM) dates back to the time of the Pharaohs and is a traditional belief strongly associated with Islam, though it is not officially required by Islam, and a few Christian and animist groups practice it as well.[420] Some Asian Muslim groups who do not ethnically have the tradition, such as the Minangkabau, practice it in order to be good Muslims, although according to this author's informants, in a very mild form not involving the removal of the clitoris. FGM involves 85 to 114 million women[421] and is practiced as early as infancy and as late as pregnancy with the first child.[422]

There are three main forms of FGM. Clitoridectomy removes the clitoral prepuce and is the least severe, though there is still horrible pain and a danger of death from shock and blood loss when the clitoral artery is cut.[423] Excision removes the labia minora and the clitoris.[424] Infibulation, known as Pharaonic circumcision because it is traditionally practiced in upper Egypt, involves removing the clitoris and labia minora, then sewing together the labia majora and binding the legs together twenty days or more to let scar tissue form.[425] A tiny opening is left for blood and urine.[426]

Because FGM is usually done without anesthetics and with non-sterile knives, razors, or pieces of glass, infection is common and the woman may contract tetanus or AIDS.[427] Side effects include constant pain, painful intercourse, infertility, dangerous childbirth, urine retention, urinary infections, back pain, accumulation of menstrual blood with offensive odors, blood clots, cysts, and psychological fear of sex.[428] In the more severe form, nothing is left of the genitals

416. *Id.*

417. Kris Ann Balser Moussette, *Female Genital Mutilation and Refugee Status in the United States–A Step in the Right Direction*, 19 B.C. INT'L & COMP. L. REV. 353, 355 (1996).

418. *Id.*

419. *Refugee Women at Risk*, *supra* note 1, at 4.

420. Moussette, *supra* note 417, at 360.

421. *Id.* at 359.

422. *Id.*

423. *Id.* at 358, 364.

424. *Id.* at 358.

425. *Id.*

426. *Id.* at 359.

427. *Id.* at 364.

428. *Id.* at 363, 365-7.

but a long, ugly scar.[429]

Proponents say that it maintains tradition, enhances fertility, prevents promiscuity, and protects virginity (by removing sexual desire), maintains hygiene, and is aesthetically pleasing.[430] It is perpetuated by women themselves.[431] One woman of the Meru tribe felt that it proved one was part of the communityand recalled her circumcision "as if it was something sweet."[432] Mothers will do it to ensure a good marriage for their daughters, as men will not marry an uncircumcised girl, considering her unclean and oversexed.[433]

Lydia Olulero, a Nigerian citizen with two American-born daughters, was to be deported and asked for asylum because her little girls would have been subject to FGM had she returned.[434] She had been circumcised herself and her family strongly believed in it.[435] The court said it would be an extreme hardship for the little girls and granted the application for suspension of deportation.[436]

As FGM becomes more a matter of common knowledge, it is agreed to be gender-based persecution.[437] The INS has adopted guidelines that will make it easier to get asylum for FGM claims.[438]

Women who transgress the mores of their culture may be subject to persecution. Abankwah,[439] from the Nkumssa tribe of Ghana, which worshiped the goddess Kwasi Nkumssa, had converted to Christianity, and because of or despite her new beliefs, had a premarital sexual relationship with a man.[440] Her tribe condemns women who practice premarital sex by punishing them with FGM.[441] Abankwah's mother was Queen Mother of the tribe, and when she died, Abankwah was to become the next Queen Mother.[442] However, it was required that the Queen Mother remain a virgin until she was installed.[443] For part of the ceremony, they would pour water into her cupped hands, and if it spilled, she was not a virgin.[444] In any case, when a husband was selected for her, he would discover she was not a virgin.[445] Abankwah requested asylum.[446] The Immigration Judge believed that Abankwah was genuinely fearful, but did not

429. *Id.* at 363.
430. *Id.* at 360.
431. *Id.* at 356, 357
432. *Id.*
433. *Id.* at 360-361.
434. *Id.* at 388-389.
435. *Id.* at 389.
436. *Id.* at 390.
437. *Id.* at 394.
438. *Id.*
439. She was mentioned briefly in the detention section.
440. Abankwah v. INS, 185 F.3d 18, 20 (2d Cir. 1999).
441. *Id.* at 20.
442. *Id.*
443. *Id.*
444. *Id.*
445. *Id.*
446. *Id.*

have objectively reasonable fears.[447] The Second Circuit pointed out that the "practice of FGM has been internationally recognized as a violation of women's and female children's rights,"[448] and pointed out that it is criminal under federal law if done to a minor, regardless of cultural practice.[449] Between 15 and 30% of all women and girls in Ghana had been subject to FGM, so Abankwah's fear was objectively reasonable.[450] In reversing the decision, the judge pointed out dryly that "a genuine refugee does not flee her native country armed with affidavits, expert witnesses, and extensive documentation."[451]

Recent asylum rights for women have been expanding into the arena of domestic violence. Janet Reno vacated a 1999 BIA Appeals decision that "would have prohibited a victim of severe domestic violence from receiving asylum."[452] There are also some limited protections against domestic violence for victims who are already in the country under the Violence Against Women Act[453] and the Victims of Trafficking and Violence Protection Act,[454] which provide some additional means to obtain visas.[455]

Many women's asylum claims are made by women from Muslim countries. Women in these countries are beginning to challenge the traditional order and it is no longer extraordinary for a woman to be a Muslim feminist. If women, either Christian or Muslim, are to make challenges to repressive regimes, they need a place of asylum if those challenges fail and they are endangered. Freedom for women is one of the most appealing characteristics of American society for women worldwide. One of America's best chances to moderate repressive ideology is for it to support those attempting to reform their societies.

V POST 9/11 DEVELOPMENTS

The common stereotypes are that we re all Arabs, we re all violent, and we're all conducting a holy war [456]

--Ibrahim Hooper

Right after the terrorist attack which destroyed the World Trade Center on

447. *Id.* at 21.

448. *Id.* at 23.

449. *Id.*

450. *Id.* at 25.

451. *Id.* at 26.

452. *Refugee Women*, *supra* note 1, at 4.

453. Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902-55, 8 U.S.C. §§ 1151, 1154, 1186a, 1254, and 2245 (1994).

454. Victims of Trafficking and Violence Protection Act of 2000, 114 Stat. 1464, Pub. L. No. 106-386 (Oct. 28, 2000).

455. Gail Pendleton & Ann Block, *Applications for Immigration Status Under the Violence Against Women Act*, THE COLORADO LAWYER (March 2003).

456. Susan M. Akram & Kevin R. Johnson, *Migration Regulation Goes Local: The Role of States in U.S. Immigration Policy*, 58 N.Y.U. ANN. SURV. AM. L. 295, 301 (2002).

9/11, the program to admit refugees shut down almost completely for three months, stranding more than 22,000 people who had already been given permission to enter.[457] U.S. INS offices in Europe, Turkey, and Pakistan canceled immigration interviews.[458] Some refugees had heard no decision.[459] Others who had been granted asylum were waiting to fly.[460] Because they had no legal status in Europe, they were often stranded or deported to face more persecution.[461] On December 11, 2001, the program resumed, but much more slowly.[462] By December of 2002, Canada, with one-tenth the population of the United States, had accepted more refugees than the United States since 9/11.[463]

Moreover, in February of 2001, before the terrorist attack, the INS in Europe had begun to require transit visas for refugees coming into European countries, but because "of restrictions and persecutions faced by many Muslim convert Christians [sic], it [was] nearly impossible for them to obtain such a visa."[464] One solution to the problems of expedited removal would be to make it easier for refugees to obtain the visas they need to legally enter the United States and then apply for asylum.

After the 9/11 attack, the 2001 Foreign Terrorists Tracking Force was formed.[465] Attorney General John Ashcroft commented,

> We will arrest and detain any suspected terrorist who has violated the law. If suspects are found not to have links to terrorism or not to have violated the law, they'll be released. But terrorists who are in violation of the law will be convicted, in some cases deported, and in all cases be prevented from doing further harm to Americans.[466]

Around 1200 people were detained, mostly Arab, South Asian, and Muslim men.[467] Some were charged with criminal activity related to the investigation.[468] Some were held as material witnesses.[469] Some were deported for fraudulent documents, illegal entry overstaying visas, etc.[470] The courts are busy sorting out

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457. *A Year of Loss, Chapter 3: Treatment of Immigrants, Refugees and Minorities*, Lawyers Committee on Human Rights, ¶ 3 (2002) *at* http://www.lchr.org/us_law/loss ch3a.htm.

458. Letter from Abe Ghaffari, Executive Director of Iranian Christians International, to U.S. government official (2002).

459. *Id.*

460. *Id.*

461. *Id.*

462. *A Year of Loss, Chapter 3: Treatment of Immigrants, Refugees and Minorities*, Lawyers Committee on Human Rights, ¶ 4 (2002) *at* http://www.lchr.org/us_law/loss_ch3a.htm.

463. Abe Ghaffari, *The ICI Partner Prayer Letter* (Iranian Christians International,Inc.), Dec. 2002.

464. Ghaffari, *supra* note 463.

465. *A Year of Loss, Chapter 3: Treatment of Immigrants, Refugees and Minorities*, Lawyers Committee on Human Rights, ¶ 11 (2002) *at* http://www.lchr.org/us_law/loss_ch3a.htm.

466. *Id.* at ¶ 12.

467. *Id.* at ¶ 6

468. *Id.* at ¶¶ 7-8.

469. *Id.* at ¶ 19.

470. *Id.* at ¶ 17.

whether rights were violated.[471]

The USA Patriot Act of October 26, 2001 gave the Attorney General (AG) power to detain non-citizens suspected of terrorism.[472] The AG is required to charge them with a crime, initiate deportation, or release them within seven days.[473] Certification of a suspected terrorist must be reviewed every six months to be renewed or revoked.[474] The administration has used this detention power sparingly, if at all.[475] Also, INS regulations have been expanded to let a detainee be held 48 hours without charge, or for an additional "reasonable period of time" in an extraordinary circumstance.[476] Apparently some people have been detained for a longer period.[477]

In January 2002, "Operation Absconder" removed 6000 Middle Eastern young men who had ignored deportation orders.[478]

Also in 2002, the National Security Entry-Exit Registration System was implemented, also known as special registration.[479] The point of the law is to track visitors to prevent future terrorist attacks. Immigrants who are not permanent residents and who pose "national security risks" as determined by the federal government, are subject to fingerprinting, photographing, and special registration.[480] The current group for special registration is males over the age of sixteen from certain countries, all of which are heavily Muslim except for North Korea.[481] The law has resulted in the arrests of seven hundred Muslim men in Southern California.[482]

Shah Afshar, an Iranian Christian and legal resident, commented on the special registration, and went on to say, "Well, many people including some of my church members were arrested. FBI broke into one of the member's house arrested [sic] and within a month sent him back to Iran."[483] This is despite the fact that a Christian immigrant from the Middle East is one of the least likely people in the world to sympathize with Islamic terrorism. In fact, this man was here illegally because his asylum claim had been denied.[484] Mr. Afshar went on to say, "My own parents who live in Iran and have permanent residency in the U.S. are having

471. *Id.* at ¶ 21.
472. *Id.* at ¶ 25.
473. *Id.*
474. *Id.*
475. *Id.*.
476. *Id.* at ¶ 28.
477. *Id.* at ¶29.
478. Akram & Johnson, *supra* note 456, at 342.
479. *Id.*
480. *Id.*
481. Kari Moreno, *New Immigration Law on the Books*, THE WRIT, Denver University, Feb. 2002, at 7.
482. *Id.*
483. E-mail from Shah Afshar to Bruce Sidebotham (Mar. 10, 2003)(on file with the author).
484. E-mail from Shah Afshar, to Theresa Sidebotham (Mar.13, 2003, 16:53) (on file with the author).

a hard time getting here."[485]

It is important to note that "INS Special Registration does not discriminate between Christian Indonesians and Muslim Indonesians or between Jewish Iranians and Muslim Iranians or Christian Iranians."[486] Although discrimination within special registration would not be legal and would be inflammatory, it should be possible to expedite legitimate asylum claims. Extremist Muslims are unlikely to be eligible for asylum. Special registration ends once a person is a permanent resident.[487]

The tension is between protecting the human rights of individuals and protecting the security of the country Considering that all of our terrorist attacks have been perpetrated by Arab Muslim non-citizens, it is not unreasonable to track that group carefully. U.S. immigration laws have always discriminated between groups[488]. for instance, people from certain countries are not even required to have visas to enter the United States. Measures such as fingerprinting and tracking the location of immigrants are commonly accepted worldwide. This author remembers being fingerprinted on every finger every year, along with each of her small children, and having to register with the police every time she moved.

Concerns have been raised as to whether this will antagonize Muslim countries. Most Muslim countries practice equal or greater control over their alien residents, so U.S. measures should come as no great shock. Although there will undoubtedly be formal protests, Muslim cultures historically despise weakness and respect strength, including firmness, force, and control. U.S. concern for human rights and hesitancy to use force is generally perceived as a weakness. If people have ignored deportation orders, it is appropriate that they be removed. If special registration picks up immigrants who are here illegally with invalid visas, it may create hardship in the short run to remove them, but it will create a more orderly system as immigrants realize they must comply with U.S. laws. Perhaps there could be an option to seek asylum as well as discretionary immunity granted to those who would be separated from citizen spouses or American-born children, or to those who can demonstrate they have contributed positively to their U.S. community. Greater control of the immigrant population will not harm the United Statesin the eyes of the Muslim world.

It is important however, not to slide into the other extreme of hostility towards a group of people just because some enemies of America can be found within the group. The United States stands to repeat the injustices perpetrated against Japanese-Americans if it allows such attitudes to develop. American Arabs and Muslims are frightened by the hostility some hold towards them. Muslims are actually a minority among Arabs in this country (because more American Arabs are Christian), and Arabs are a minority among Muslims (because more Muslims

485. *Id.*

486. E-mail from Ahmed Jabri, U.S. Committee for Refugees, to Theresa Sidebotham (Feb. 20, 2003, 13:34 EST) (on file with the author).

487 Moreno, *supra* note 481, at 7.

488. *Is This America? supra* note 35, at ¶¶ 3, 4.

are from Asia).[489] America must not turn against innocent people as she roots out the guilty During World War II, the country did not successfully come up with a way to deal with possible Japanese spies without indiscriminately punishing all Japanese-Americans.[490] With thought and care, perhaps America can do better this time.

The Attorney General should ensure that INS officers and others who are questioning detainees treat them respectfully. He will have to work out with the courts what are violations of civil rights and how to balance individual rights against tipping off the terrorist networks. The United States should solicit the aid of the Arab and Muslim communities in this country in reporting possible terrorist activity It should reassure all its people that appropriate measures are being taken, as fear will often trigger an irrational lashing out against a group of people.

And indeed, appropriate measures must be taken if we are not to be the victims of repeated terrorism. Terrorism is now an ever present threat. The evil of a few causes citizens and immigrants to suffer.

Some who suffer the worst are the refugees fleeing from fundamentalist Islam. "It is important to note that Muslim convert Christians [sic] from the Middle East are often fleeing the very same extremist Islamic regimes or groups who sponsor terrorism."[491] In fact, the campaign against terrorism has made their plight worse, as the hostility of fundamentalist groups has been stirred up against them.[492] As Mr. Ghaffari, an Iranian convert to Christianity says, "In this light, non-Muslims, and particularly Muslims who have turned from Islam and embraced Christianity, are seen as Western spies and traitors by these fundamentalist Muslims."[493] Christians are associated with the West, and both ethnic Christians and converts are facing increased persecution.[494]

VI. SUGGESTIONS FOR U.S. POLICY

The two policy goals for the United States with respect to immigrants are to provide security within the country and to preserve human rights for immigrants. These goals are not morally incompatible, as they involve the pursuit of safety and freedom for both society and individuals, including immigrant and citizen.

The War on Terrorism involves the ideological clash between secularism, as represented by the West, and fundamentalist Islam. President Bush "spoke bluntly of a 'freedom gap' between the West and totalitarian Arab regimes."[495] However, there is also an ideological clash within Islam itself.The President commented that some leaders in the Middle East "speak of a new Arab Charter that champions

489. Akram & Johnson, *supra* note 456, at 312.

490. Korematsu v. United States, 323 U.S. 214 (1944).

491. Letter from Abe Ghaffari, Executive Director of Iranian Christians International, to U.S. government official (2002).

492. *Id.*

493. *Id.*

494. *Id.*

495. Joel C. Rosenburg, *FlashTraffic*, WORLD, Mar. 8, 2003, at 10.

internal reform, greater political participation, economic openness, and free trade."[496]

The extremist, fundamentalist groups are only a fragment of Islam.[497] As a minority position they may be compared to the splinter of Christians who bomb abortion clinics. The analogy does not extend fully however. By far the vast majority of Christians, even those who are actively pro-life, outspokenly and routinely condemn violence as unacceptable and un-Christian. The vast majority of Muslims would not perpetrate violence themselves. However, a large proportion agree theologically with the principles animating terrorist groups and admire them to some extent. Terrorist groups make an appeal to the masses.

> The Taleban are Muslims working for the establishment of the Shari'ah, and Muslims in the East and West therefore have an obligation to support them. .O Muslims, stand together and unite to fight. .The Book of Allah calls you, and Paradise awaits you. Verily, Allah (SWT) orders you in the Qu'ran: "Go and fight, young or old and sacrifice your wealth and life in order to get Paradise."[Q 9·41][498]

Muslims who speak out against terrorism are in the minority although more would speak out if not for the risk of being targets of violence themselves. This silence contributes to the Western perception that Islam is monolithic and to the hostility and suspicion towards Muslims and Middle Easterners in the United States.

There are signs that this is changing in the Muslim world. Recent attacks against obviously innocent people, including children, are sobering to many Muslims. A newspaper in Bangladesh said, "I don't think any Islamic country can support such sort of terrorism because Islam itself is a religion of peace."[499] In Indonesia, the Bali bombing killed Muslims or relatives of Muslims as well as foreigners.[500] The financial impact of the loss of the Bali tourist trade had repercussions throughout Indonesia.[501] It is human nature to ignore atrocities that are committed far away to someone "other. This is demonstrated constantly in the American news media, when catastrophes are ignored unless there are American deaths. The impact of terrorism perpetrated in Indonesia by Indonesian Muslims (rather than by Middle Easterners against Westerners) is horribly surprising, and "moderate Muslim organizations are finally speaking out to support and encourage the police in this work."[502] One devout elderly Muslim man said, .it's the first time I've ever heard them preaching what I've always believed

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496. *Id.*

497 Irshad Manji, *A Muslim Plea for Introspection*, GLOBE AND MAIL, Nov. 8, 2001.

498. Press release, Al-Muhajiroun (Sept. 16, 2001) *at* www. al-muhajiroun.f2s.com.

499. Zahidul Haque, *Terrorist Attacks*, THE INDEPENDENT (BANGLADESH), Sept. 18, 2001.

500. Bruce Sidebotham, *Indonesians Feel Shame of Extremism*, OPERATION REVEILLE SHOFAR, FIRST QUARTER 2003, at 7

501. *Id.*

502. *Id.* at 7.

that we should be friends with people of other religions. "[503]

It should be a goal of U.S. policy to support influences that moderate Islam, with the goal of secularizing it enough so that pluralism is acceptable. Once pluralism is accepted, the violence against Western secularism will fade away and human rights conditions will improve. During the Cold War, the United States supported pro-democracy activity within Communist countries. For instance, Alexander Solzhenitsyn was able to publish his body of work, which had a profound influence within Soviet Russia, only because he had asylum in the United States. A comparable figure is Salman Rushdie, the Muslim writer of *The Satanic Verses*.[504] Because of his criticism of Khomeini, a *fatwa* was issued, offering a huge reward for assassinating him or his publishers.[505] This was no idle threat, as 59 exiled Iranian dissidents were assassinated between 1979 and 1993.[506] Technically Shari'a law only applies within the Muslim world, but an exception was made for Rushdie and other dissidents.[507] America should support those in the Muslim world with views that will tend to moderate extremist Islam, including Christians seeking freedom to worship, Muslim women working against oppression of women, pro-democracy advocates, and anyone who is fighting oppression. In order for courageous people to be able to speak out, there should be a safety net or somewhere to flee. Asylum for people like this should be quickly and easily secured.

For example, Abbas Zahedi, an Iranian, was nearly denied asylum by both an Immigration Judge and the Board of Immigration Appeals, but was declared eligible for asylum by the Ninth Circuit.[508] He heard Khomeini's *fatwa* against Salman Rushdie's *The Satanic Verses* and concluded that the government was "trying to hide something from people, from us."[509] With great difficulty, he obtained a copy of the book.[510] His friend Moshen started translating it, while Zahedi copied and distributed the chapters.[511] However, after about four chapters, Moshen was arrested, tortured, and killed.[512] Zahedi fled the country and asked for asylum.[513] The IJ found that although he might face criminal charges if he went back, "[t]hat is a matter for the government of Iran to decide. This is not a basis for the grant of asylum."[514] Fortunately for Zahedi, the Ninth Circuit granted his appeal.[515]

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503. *Id.*

504. Donna E. Arzt, *Religious Human Rights in Muslim States of the Middle East and North Africa*, EMORY INT'L L. REV 139, 147-48 (1996).

505. *Id.*

506. *Id.* at 148.

507. *Id.*

508. Zahedi v. INS, 222 F.3d 1157, 1160 (9th Cir. 2000).

509. *Id.* at 1161.

510. *Id.*

511. *Id.*

512. *Id.*

513. *Id.* at 1161.

514. *Id* at 1162.

515. *Id.* at 1168.

Another reason for this is that the United States is putting these people at more risk in pursuing the War on Terrorism. Just as America gave special preference to refugees from Communism during the Cold War, so now the United States owes it to the asylum seekers whose suffering has intensified due to the war on terrorism.

Another area that should be considered is witness or agent protection. Those who are willing to help track down terrorist activity or speak out against oppressive regimes such as Saddam Hussein's, should be given immunity and residency Illegal aliens within the country who help U.S. security interests should be rewarded with legal residency. Pragmatically, the United States should both protect and reward those who are helping it pursue policy interests.

For U.S. policy to be fair towards refugees or useful in the War on Terrorism, it needs to be more finely crafted. During the Cold War, the United States managed to distinguish between Communists, defectors, and pro-democracy refugees. It should do the same in this conflict.

Asylum rights should be granted quickly to those with a genuine credible fear. Groups that are not a threat to national security such as Christians, Jews, women fleeing oppression, children, and Muslims fleeing repressive regimes, should be identified. Detention after the credible fear interview should be nearly eliminated in favor of releasing people to the care of relatives and nonprofit organizations. The money saved can be used to investigate real security risks.

America should begin with the assumption that its own Arab and Muslim citizens and permanent residents are loyal to the United States. That is usually the reason they or their forebears came here.

All immigrants should be treated with the fairness and respect they deserve as humans, and in keeping with this country's traditions. People are not nearly as likely to resent procedures, such as special registration, as they are attitudes of racism, condescension, or hatred. Each encounter with an immigrant should be treated as a public relations opportunity to spread U.S. values. Arab and Muslim immigrants realize that we are dealing with a massive security threat. Those who want to be here regret, by and large, the activities of extremists. As Shah Afshar, an Iranian immigrant, said, "Their angers should be directed at the Arabs who created this mess rather than the U.S. government!"[516] As long as security measures are carried out with respect and decency immigrants will understand. Mr. Afshar also commented, in response to a question about racial profiling,

> You may find my answer a bit different than what you might expect from a Middle Eastern, but if he acts like a duck and quacks like a duck, he could very well be a duck. I have no problem with racial profiling. As one who travels much, for me, no amount of security is just enough. We have to do what we need to do in order to protect our people, those who live in this country. By the way, for a while after 9/11 while traveling, I would wear an American flag as a

516. E-mail from Shah Afshar to Bruce Sidebotham (Mar. 10, 2003) (on file with the author).

bandana.[517]

Mr. Afshar acknowledges the real enemy and is prepared to make sacrifices of convenience and the embarrassment of being profiled on behalf of his adopted country [518]

Those who are not permanent U.S. residents and who have been proven to be anti-American and who support violence should be deported. Living in America is a privilege,not a right for aliens and there can be certain obligations attached to the granting of a visa.

INS officials should be informed of U.S. policy and human rights objectives and held accountable. Officials who are brutal should be dismissed and the INS should actively recruit workers who are compassionate towards refugees and concerned about human rights.

While there has been great concern expressed about the INS being placed under Homeland Security, the new arrangement is an opportunity to consistently pursue the goals of improving the INS' human rights record, improving internal security, and supporting U.S. international policy objectives. The recommendations in this paper do not involve a great deal of extra expense, or a radical overhaul of U.S. laws. They do involve changes of attitude and approach, better training of immigration officers, and more consistent implementation of existing recommendations. However, they would better the situation for refugees, catalyze change that would benefit millions in the Muslim world, and contribute to America's own security

517. *Id.*
518. *Id.*

THE CONTINUING RELEVANCE OF ARTICLE 2(4): A CONSIDERATION OF THE STATUS OF THE U.N. CHARTER'S LIMITATIONS ON THE USE OF FORCE

John D. Becker

INTRODUCTION

Following the devastating terrorist attacks on the World Trade Center and the Pentagon on September 11, 2001, the United States launched a military campaign against the terrorist network, Al-Qaeda.[1] This campaign included attacks against the Taliban government in Afghanistan for its support and protection of Al-Qaeda leadership, which ultimately resulted in the collapse of that government.[2] U.S. military action also disrupted and dispersed the various elements of Al-Qaeda and its affiliated terrorist groups.[3]

The United States undertook that campaign with the tacit support of many countries of the world, including the United Nations, although without the formal invocation of Article 2(4) of the U. N. Charter.[4] The United States' argument for use of force rested on claims under customary international law of self-defense and under Article 51's provision for self-defense, of the U.N. Charter.

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1. Presidential News Release, The White House, President's Building Worldwide Support Against Terrorism, September 19, 2001, *at* http://www.whitehouse.gov/news/releases/2001/09/20010919-1.html (last visited May 1, 2004). *See* also Presidential News Release, The White House, President Issues Military Order, November 13, 2001, *at* http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html (last visited May 1, 2004)

2. *See* Secretary of State Donald Rumsfeld, Statement of the Secretary of Defense, October 7, 2001, *available at* www.defenselink.mil/news/Oct2001/b10072001_bt491-01.html (last visited May 1, 2004)(discussing the objectives and outcomes for U.S. military campaign).

3. *See* Presidential News Release, The White House, President, General Franks Discuss War Effort, December 28, 2001 *at* http://www.whitehouse.gov/news/releases/2001/12/20011228-1.html (last visited May 1, 2004).

4. *For example*, Lawyer's Committee on Nuclear Policy, The United Nations Charter and the Use of Force Against Iraq *at* http://www.lcnp.org/global/iaqstatement3.html (last visited May 1, 2004).

More recently, the United States initiated an invasion of Iraq, based in large measure upon claims that the government of Saddam Hussein possessed weapons of mass destruction (WMD).[5] That possession, in turn, posed a threat of some sort—be it imminent or be it further in the future—to the security of the Middle East region and the United States.[6] The subsequent war toppled the Bath Party regime and has lead to a U.S. occupation, pending the implementation of a new, democratic government.[7] The justification for the war against Iraq was in part based on the Bush doctrine of pre-emptive war.[8]

Prior to U.S. action, an acrimonious debate was waged within the United Nations and the Security Council.[9] The resulting split between permanent members has lead to continuing strained relations, ongoing animosity and lingering bad feelings, as well as a sense of the futility of future collective action.[10]

These events have culminated in Secretary General Kofi Annan's new appointment of a high-level panel to conduct a through review of global security threats, and the role that collective action plays in addressing these threats.[11] The panel is also charged with recommending changes necessary for that collective action, particularly with the United Nations.[12] In light of almost fifty years of history, any consideration to change existing approaches, instruments, and mechanisms of the United Nations is serious and self-evident.

Additionally, these events have led to a return to the old debate on the effectiveness of Article 2(4) of the U.N. Charter in dealing with security threats.[13] Article 2(4) reads in its entirety:

> All Members shall refrain in their international relations from the hreat or use of force against the territorial integrity or politicalindependence of any state, or in any other manner inconsistent withthe Purpose of the United Nations.[14]

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5. *See e.g., A Nation at War: Bush and Blair at Camp David, Acting Together in Noble Purpose*, N.Y TIMES, March 28, 2003, at B12.

6. U.N. Charter, Article 2(4) specifies that only "the threat or use of force" against the "maintenance of international peace and security" justifies the use of force.

7. *See* "U.S.-led occupation of Iraq, in Wikipedia: The Free Encyclopedia, *at* http://en.wikipedia.org/wiki/U.S._occupation_of_Iraq (last visited May 1, 2004.

8. *See National Security Strategy of the United States*, *at* http://www.whitehouse.gov/nsc/nss.html (last visited May 1, 2004). *Also see* National Security Advisor, Speech at the Waldorf Astoria Hotel, New York, New York (October 1, 2002), *at* http://www.whitehouse.gov/news/releases/2002/10/20021001-6.html (last visited May 1, 2004).

9. *See* N.Y. TIMES, from January 30, 2003 to March 14, 2003, for discussions of the debate on Iraq.

10. *See* Pew Research Center for the People & the Press, *Views of Changing World 2003: War with Iraq Further Divides Global Politics*, June 3, 2003, *available at* http://people-press.org/reports/display.php3?ReportID=185 (last visited May 1, 2004).

11. *See* U.N. Press Release SG/A/857, Secretary-General Names High-Level Panel to Study Global Security Threats and Recommend Necessary Changes, March 11, 2003.

12. U.N. Press Release SG/SM/9051, Newly Appointed High-Level Panel on Threats, Challenges, Change to Meet 5-7 December.

13. As discussed later by Franck, Henkin, and others throughout this article.

14. *See* U.N. Charter, *available at* http://www.un.org/aboutun/charter/.

This debate on the prohibition of the use of force by states has a long history among both practitioners and legal scholars.[15] As early as 1970, Tom Franck posed the question in his now famous article, in simple and stark terms, "Who Killed Article 2(4)?"[16] Louis Henkin's reply, published the following year, responded likewise with its title, "The Reports of the Death of Article 2(4) Are Greatly Exaggerated."[17] Since then, many have participated in ongoing and cantankerous debate, which has led to some interesting and insightful conclusions.[18]

This paper will trace the history and arguments of that debate, as well as some of the debaters' conclusions, with the intention of reaching some preliminary findings of where we are today and whether Article 2(4) is dead, alive, or somewhere in between. It will also consider the idea behind the possibility of changing the U.N. Charter, a suggestion put forth recently by scholars, and the implications for such changes in addressing the problem of using force in our contemporary world.

THE PREMATURE DEATH OF ARTICLE 2(4)

While Thomas Franck was not the first person to question the viability of the U.N. Charter's prohibition against the use of force, he can be credited with suggesting the framework of the debate by his evocatively titled article—Who Killed Article 2(4)?[19] Franck opens his article by noting that U.N. prohibition against the use of force by states was imperfect and somewhat obsolescent from the start.[20] It was predicated on the false assumption that the wartime partnership of the Big Five—the United States, the Soviet Union, the U.K., France, and China—would continue and provide the means for policing the peace under the auspices of the United Nations.[21] This presumption failed to take into account not only the tensions of a continued partnership but also failed to recognize the changing nature of warfare.[22] While the partners could, and on occasion did, address conventional military aggression,[23] it would fail in addressing non-conventional forms of military aggression.

Additionally, Franck notes that the Charter itself provided enough exceptions

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15. Oscar Schachter, INTERNATIONAL LAW IN THEORY AND PRACTICE 129-31 (Martin Nijhoff Publishers, Dordrecht, The Netherlands) (1991).

16. Tom Franck, *Who Killed Article 2(4)?* 64 AM. J. INT'L L. 809 (1970).

17 Louis Henkin, *The Reports of the Death of Article 2(4) Are Greatly Exaggerated,* 65 AM. J. INT'L L. 821 (1971).

18. Many of these points of view and positions will be sketched out here.

19. Franck, *supra* note 16, at 809.

20. *Id.* at 810.

21. *Id.* Not foreshadowing the Cold War and the split between the Big Five.

22. *Id.* at 811-812. Changes in nature of warfare itself have been noted by a variety of authors, including Phillip Bobbitt in *The Shield of Achilles,* John Keagan in *A History of Warfare,* and David Halberstram in *War in a Time of Peace.*

23. Franck, *supra* note 16, at 812. The examples cited are Korea and the Congo.

and ambiguities to open the rule to deadly erosion.[24] Add to that, the temptations of both powerful and not-so powerful states to settle a score, end a dispute, or pursue their national interests, and it is clear that state practice has severely shattered the mutual confidence in the rule itself.[25] Without mutual confidence in the *sine qua non* of an operative rule, the rule becomes only words without meaning.[26]

Based upon that analysis of the demise of the rule, Franck poses the open-ended question of having violated it, ignored it, run roughshod over it, and explained it away can the nations of the world live without it?[27]

Franck's article is structured around five concerns.[28] First, he looks at factors undermining Article 2(4). Beyond what he sketches out by way of faulty presumptions in the introduction, he notes an invalid premise underlying collective action by the United Nations: that the Security Council would be able to discharge its responsibilities as the United Nations' principal organ for world peacekeeping.[29] Collective action by the Council—perhaps best defined as the decision that a threat of peace exists or aggression has been committed and the steps taken by the world organization to best remedy the situation—is predicated on the unanimity of the great powers.[30] Without the assent of all members, collective enforcement action is an illusion.[31]

With the sole exception of the U.N. action in defense of South Korea—based on the fortuitous absence of the Soviet Union from the Security Council—and the United Nations' limited role in the Congo, it has not been possible to invoke collective enforcement actions under Chapter VII (at least through 1970).[32] This lack of action didn't denote a peaceful world community As Franck notes, since the San Francisco conference there had been some one hundred separate outbreaks of hostilities between states.[33]

Without the U.N. action, states had fallen back on their own resources and military and regional alliances.[34] These state responses to hostilities were

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24. *Id.* This has effected a systemic transformation, discussed later by Franck.

25. *Id.* at 809. Blame should be shared here, by both the powerful and not-so-powerful states.

26. *Id.* at 809.

27. *Id.* at 810.

28. The bookends here are small-scale warfare—guerilla warfare—and global warfare—nuclear warfare—for where Article 2(4) is placed.

29. Franck, *supra* note 16, at 810. Clearly one problem here is the lack of an independent military staff and forces—or international police forces—to support Security Council's decisions to take action.

30. This really means the affirmative vote or lacking that consent, at least the benevolent abstention of each of the Big Five.

31. It is unclear as to whether or not the Charter requires assent or, if what has become the common practice, abstention, qualifies as an affirmation.

32. Franck, *supra* note 16, at 810.

33. *Id.*

34. *Id.* at 811. Despite claims of the supremacy of the U.N. Charter to other treaties, regional military alliances do not serve as subordinate systems to the U.N. organization, subject to command and control. This was seen most recently in the case of NATO intervention in the Balkans, and specifically in Kosovo. While U.N. resolution condemned the ongoing atrocities was issued prior to the commencement of military action, and later, U.N. tribunal, at the time of this writing, is trying former

facilitated by both Chapter VII being seen to rust and increasing reliance on the use of U.N. Charter Articles 51, 52, and 53.[35] The corresponding increase in the use of exceptions to collective enforcement action have overwhelmed the rule and transformed the system.[36]

Article 51 permits the use of armed force by a state responding in self-defense to an armed attack.[37] But the problem, Franck notes, is that there is no conclusive way for the international system to establish which state is the aggressor and which state is the aggrieved.[38] With no system for objective fact finding, the concept of self-defense remains a convenient shield of for self-serving and aggressive conduct.[39] In other words, as the facts about the initiation of a dispute are not satisfactorily ascertainable, the operation of Article 51 is effectively and dangerously unlimited.[40] The temptation remains what it was before Article 2(4) was conceived and implemented: to attack first and lie about it afterwards.[41]

Franck then looks to the effect of small-scale warfare on Article 2(4).[42] Small-scale warfare operates differently than conventional warfare.[43] Manifest most often in the form of guerilla warfare and tactics, this kind of warfare also generates a corresponding different kind of assistance. Armies are not dispatched across borders, rather they took the form of encouragement and assistance that the Allies provided to resistance fighters in occupied countries. Neither the form of warfare nor the assistance and support provided to it fits into conventional international legal concepts and categories.[44]

Serb leader, Slobodan Milosevic and others for war crimes it was NATO forces, not U.N. forces, that intervened.

35. Specifically, these articles address self-defense and regional arrangements, which in certain areas, like Europe; have been utilized in lieu of the U.N. and its organs.

36. Franck, *supra* note 16, at 810.

37. Article 51 reads in its entirety, "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security. Much has turned on how this article is interpreted and that, like Article 2(4) itself varies.

38. Franck, *supra* note 16, at 811.

39. Claims of self-defense have been made in numerous situations, where the aggressor is clearly identifiable, including North Korea invading South Korea, India into Goa, and Cambodia into Vietnam.

40. Therefore, what is and what is not self-defense isn't clear and many nations make self-defense claims that are clearly not the case.

41. Franck, *supra* note 16, at 811.

42. *Id.* at 812. Context is important here for Franck is writing at the height of the guerilla war in Vietnam.

43. Many texts note this difference in forms of warfare, but two important ones are Charles W Thayer's GUERILLA, (Harper & Row1963), which says "Guerilla warfare has been defined as "irregular war carried on by independent bands. *Id.* at xvi. .or another definition is found in Mao's observation, "The essence of guerilla warfare is thus revolutionary in character. MAO TSE-TUNG'S ON GUERILLA WARFARE, 43 (Samuel B. Griffith trans., Praeger 1961).

44. Franck, *supra* note 16, at 812. One major difficulty with international law is that is set-up to regulate conduct between state actors, not conduct involving non-state actors. Therefore, guerillas and

This encouragement by one state to a guerilla movement in another state does not rise to the level of an "armed attack, at least in the conventional sense and therefore cannot be said to have taken place.[45] In fact, the more subtle and indirect the encouragement, the more tenacious the analogy becomes to an "armed attack" and Article 51 would not apply.[46] Article 51 does not, on its face, recognize the existence of these newer modes of aggression, or attempt to deal with the new problems of characterization they create for international law

Franck traces the United Nations' then-history with small-scale warfare, from actions in Czechoslovakia and Greece in 1948 through Lebanon a decade later to Vietnam in the 1960's.[47] His consideration of U.S. conduct in Lebanon opens up two further dilemmas: 1) that of deciding the factual question of who attacked whom and 2) defining what the level of foreign intervention should suffice to permit counter-intervention by way of collective self-defense.[48]

The first dilemma was "solved" by the establishment of an international observation group, which was tasked with ensuring that no illegal infiltration or personnel or supply of arms or material across the Lebanese borders occurred.[49] Initiated by a proposal from the Swedish Government, and endorsed by the United States, the observer group was able to report back within a month of its arrival in Lebanon on who was at fault and who was not.[50]

Yet, even this solution was not definitive, given its later rejection by the United States, for other political purposes.[51] The second dilemma has been more elusive in finding a definitive solution. Since each circumstance is different and varies in both scope and scale, the appropriate level of response is also changeable.[52] Franck passes over this unresolved dilemma and moves on to another concern—the application of Article 51.[53]

The Lebanese crisis is illustrative of two problems inherent in applying Article 51.[54] The first problem is a procedural one and relates to the dilemma mentioned earlier—how is the fact of an armed attack to be established?[55] The

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terrorists present challenges to international norms.

45. *Id.*

46. Attacks by organized military forces such as tanks going across a border are clearly direct attacks under Article 51, but terrorists blowing up buildings or guerillas infiltrating to blow up bridges and power plants are not.

47. Franck, *supra* note 16, at 811-13.

48. *Id.* at 814.

49. *Id.* at 815-16. The Observation Group serves in the peace keeping role, as opposed to the peace-making role. An excellent treatment of that distinction is found in The U.N.

50. *Id.* Interestingly, this predates the advent of the "CNN effect, where the media now often serves an additional set or sets of eyes on the ground and shows the public what is happening where.

51. The role that "other" political considerations play in the Big Five decision-making is, in part, behind calls for an independent military force, under U.N. auspices. But more will be said of that later in this article.

52. Franck, *supra* note 16, at 817

53. *Id.* at 816.

54. These problems are defined as procedural ones and substantial ones.

55. This lack of procedure for establishing when an attack has occurred is one argument advanced for revisions to the Charter. This issue is developed later in this article, specifically in

Charter provides no answer, and in its absence, Article 2(4) can be virtually nullified by self-serving allegations. The second problem is substantive—how to define an "armed attack" in a way relevant to the modern conditions of indirect, unlimited warfare without broadening it to the point at which disproportionate armed force can be used under the guise of self-defense against imagined or slight provocation.[56] And it too suffers from a lack of a definitive answer in the Charter. The default position seems to be whatever levels the provider of assistance or the requester of assistance cares to provide.[57]

Franck analogizes the problems and dilemmas with what would happen if the law were to leave two drivers in a motor vehicle collision the sole responsibility for apportioning liability, helped only by the unruly crowd gathered around them at the scene of the accident.[58]

This leads Franck to identify another of what he calls the great vulnerabilities of the norm established by Articles 2(4) and 51. If grievous threats to world peace are to appear to hereafter in the guise of civil wars or wars involving portioned states with rival regimes, then Article 51 by itself is likely to be of very little use in distinguishing individual or collective self-defense from aggression.[59]

It is worth noting here that the Charter doesn't have an answer to this question, particularly in the situation where two great powers recognize different regimes in the same country and both exercise their right to come to the collective self-defense of the side each prefers. Franck does claim that ad hoc machinery has played a role here— primarily that of the observers groups, as in Lebanon and later, in Vietnam. But the problem with ad hoc machinery is that it does not allow for a universally creditable method of determining the facts behind who attacked whom.

Once again, in the absence of an objective international system of recognition of governments for determining which party to a dispute is the aggressor and which is the victim, Article 51 is a wide-open invitation to the great Powers to engage each other in limited wars fought vicariously on borrowed terrain and with other's lives.[60]

Next, Franck considers the effect of potential nuclear warfare on Article 2(4).[61] Whereas small-scale warfare has made the rules of the United Nations hard to apply, the development of nuclear technology and nuclear delivery forces has lead to far more devastating potentiality for states.[62] Taken literally, Articles 2(4)

Franck's follow-up article on Article 2(4), 2003.

56. This is a further extension and consequence of the argument about the changing nature of warfare, mentioned earlier *supra* note 22.

57. Another allusion to the role that Big Power's dominance plays in the U.N.

58. Franck's analogy seems to suggest that the lack of an independent adjudicator than damns us to an unruly, and apparently unreasonable mob. Yet, reasonable people often play rational roles in traffic accidents, including serving as witnesses in trials and even as "good Samaritans.

59. Franck, *supra* note 16, at 820.

60. *Id.* at 818.

61. *Id.* at 820.

62. Franck is echoing the analysis found in the works of many nuclear war and deterrence

and 51 together seem to require a state to await an actual nuclear strike against its territory before taking forceful counter-measures.[63] The inanity of such a course of action is clear and no state, it is safe to presume, would sit by while another prepares it doom.

Clearly, a correction for this possible absurdity is required. As Myres McDougal has noted, it would be against reason and nature, particularly in the age of jets, rockets, and nuclear weapons, to interpret Article 51 so literally as to preclude a victim from using force in self-defense until it has actually been attacked.[64]

Customary international law accords a protection under the doctrine of necessity, permitting pre-emptive strikes against an anticipated rather than an actual attack.[65] Of course, a concern is that one can over-correct, making the right measure on the scale of anticipatory action important.[66] The line between imminent attack and between any threatening activities can be a broad one. On the one end of the scale, even conventional military action does not raise to the same threat of catastrophic destruction as nuclear attacks.

Few times are states really threatened with imminent danger or attack and required to take pre-emptive action. The one notable exception being the case of Israel's invasion of the Arab states in 1967 which was undertaken in reasonable anticipation of imminent large-scale armed attack for which there was substantiated evidence.[67] Even here there seem to be circumstances that are unusual—including the relatively small size of Israel—which lead to persuasive demonstration of the case[68]

The lack of any definitive determinative correction results in an on-going problem for the rules of the United Nations. Furthermore, as recent events demonstrate, the question of when an attack is imminent continues to be problematic for states.[69]

Regional enforcement and Article 2(4) is another central concern of Franck's article.[70] Changing circumstances in international relations, including the way states perceive their self-interest, of strategy and tactics, have combined to take advantage latent ambiguities behind the U.N. rules and in turn, have enlarged the

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theorists, like Bernard Brodie's STRATEGY IN THE MISSILE AGE (1959).

63. Franck, *supra* note 16, 820-21.

64. *See* American Society of International Law, *1963 Proceedings*, 164.

65. Franck, *supra* note 16, at 821.

66. Michael Walzer notes as much in his seminal work, JUST AND UNJUST WARS 77 (1977).

67. Cited in the "Anticipations" chapter of Walzer and also cited in numerous international law texts, including Schachter's.

68. The case for smaller states is all the more compelling given that a failure to respond might lead to complete collapse and surrender before the blow could be sustained and strike back.

69. CIA Director George Tenet's recent speech, February 5, 2004 at Georgetown University, defending pre-war intelligence assessments that were the basis for the U.S. invasion of Iraq in 2003 is illustrative of this problem.

70. Franck, *supra* note 16, at 822.

exceptions to the point of virtually repealing the rule itself.[71]

Actions by regional organizations are a major part of that development.[72] Specifically, Articles 52 and 53 of the Charter have been interpreted to legitimize the use of force by regional organizations in their collective self-interest.[73] Arguably these exceptions to Article 2(4) play an important role in the growth of international violence.[74]

The regional organizations permitted by these articles have developed tight codes of loyalty and they have not hesitated to enforce them against members suspected of deviation.[75] Their enforcement actions have tended to be beyond the reach of the larger world community, particularly if they happened to occur within an organization lead by a Super-Power.[76] Intended to supplement the U.N. peacekeeping system, these regional organizations instead have become instruments of violence eroding the Article 2(4) injunction.[77]

Tracing the struggle at the San Francisco conference between supporters of regional organizations and those who stood firmly behind the United Nations as a global organization, a compromise was reached.[78] In essence, a regional organization may act by means short of force to preserve the peace without having to await an outbreak of hostility—Article 52—but it may engage in enforcement action only after obtaining a fiat from the Security Council—Article 53.[79] An individual state or group of states may use force defensively prior to Security Council approval but only to respond to an armed attack—Article 51.[80]

But the problem, Franck notes, is that since 1945, these three articles have melded to produce an increasingly asserted right of regional organizations to take the law into their own hands, to act militarily without Security Council approval even in the absence of an actual armed attack, and to exclude the United Nations from jurisdiction over disputes in which one member is being forcibly purged of ideological non-conformity by the rest of the organization (or the Superpower who leads it).[81]

Two other issues have arisen and created tension between the United Nations

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71. Franck's point is that too many exceptions break the rule completely.

72. These organizations include NATO and OAS, as well as others. See more on this issue later in the article.

73. Examples are cited later in the article.

74. As it allows exceptions to the rule against aggression and even further, against self-defense.

75. Franck, *supra* note 16, 827-829.

76. Two representative examples were the Soviet Union and the Warsaw Pact and the U. S. and NATO.

77 Franck, *supra* note 16, at 822.

78. Franck distinguishes here between regionalists—those seeking to provide more authority to regional organizations—and Universalists—those favoring more authority to the U.N.

79. *See* U.N. CHARTER, art. 53, which notes that enforcement action by a regional organization maybe engaged in only after Security Council approval. Given this Article, we can see the problems behind the Kosovo campaign by NATO in 1999, which occurred without fiat, in the eyes of the U.N. and world opinion.

80. Franck, *supra* note 16, at 824.

81. *Id.*

and regional organizations. First, in the event of a dispute between two members of the same regional organization, who should have primary jurisdiction to bring about a peaceful settlement.[82] The ambiguity of this question is found both in the language of Article 52—which provides that members of regional organizations "should make every effort to achieve peaceful settlement of local disputes through such agencies or arrangements before referring them to the Security Council"[83] and the language of Articles 34 and 35, which, in turn state, the "Security Council may investigate any dispute " and that any "Member of the United Nations may bring any dispute to the attention of the Security Council or of the General Assembly "[84] The result is really a double jurisdiction and, with it, a lack of clarity as to who has priority and preference.[85]

Second, is the problem of defining who is a regional organization?[86] The multitude of potential regional organizations is vast and defining who qualifies is not just a political question but also a legal one. For example, the Charter's provisions for regional action using pacific settlement, do not, on their face, apply to regional organizations established for collective self-defense—under Article 51—but only to those organizations under Article 52.[87] Additionally, the fact that regional organizations are accorded such extensive powers in derogation of Article 2(4) and have garnered much greater powers in practice, it is important to have a clear view of which groupings of states are entitled to regard themselves as regional organizations.[88] The OAS, NATO, EEC, COMECOM, the WARSAW Pact, as well as, the Organization of African States, the Arab League, and other third-world regional groups have all set forth arguments for their inclusion in this grouping and yet, not all have been seen fit to be included.[89]

The unsatisfactory conclusion is that regional organizations which are lead by superpowers have established regions where Article 2(4) does not apply.[90] Motivated by a duty to comply or conform, members are subject to superpower unilateral military action, whenever they claim to see a threat to their security.[91]

Finally, Franck looks at what he says is the way ahead (at least from the vantage point of 1970).[92] In essence, Franck's argument is:

> that the prohibition against the use of force in relations between states has been

82. *Id.* at 825.

83. *See* U.N. CHARTER, art. 52.

84. *See* U.N. CHARTER, art. 35.

85. Franck, *supra* note 16, at 825.

86. *Id.* at 827.

87. One measure is the degree of coverage an organization has in both military and non-military matters, like the OAS. This definition, however, can be considered too restrictive.

88. Given the NATO intervention in Kosovo, it also seems to matter in excuses for interventions; like in criminal law, some excuses—we are a regional organization and therefore can use force—are better than others in terms of punishments enforced on the perpetrator.

89. Recognition as a regional organization seems to be a function of Great Powers acknowledge as anything else.

90. Franck, *supra* note 16, at 835.

91. *Id.*

92. As we shall see later, his views change a bit by 2003.

> eroded beyond recognition, principally by three factors: 1. the rise of wars of "national liberation"· 2. the rising threat of wars of total destruction; 3. the increasing authoritarianism of regional systems dominated by a super-Power. These three factors may, however, be traced back to a single circumstance: the lack of congruence between the international legal norms of Article 2(4) and the perceived national interests of states, especially the super-Powers.[93]

The result is one of two worlds: one where peacefully, co-existing superpowers dominated regional spheres exist—a world of superpowers run ghettos, marked by limited freedoms—or another world, arising from the ruins of Article 2(4), which is alive, vibrant, and meaningful, where national interest is not defined in numbers, but rather where national interest is perceived to be congruent with a renunciation of the use of military force in inter-state relations.[94] The second world is only reached, Franck argues, if we can redefine what national interests are and return to an international legal system of norms such as those found in Article 2(4).[95]

ARTICLE 2(4): A VICTIM OF AGGRAVATED ASSAULT, NOT MURDER.

Louis Henkin notes in "The Reports of The Death of Article 2(4) Are Greatly Exaggerated, his reply to Franck's article, that the death certificate is premature and the indictment for legicide must be redrawn to the lesser charge of aggravated assault.[96] Henkin concedes the validity of all of the arguments that Franck makes: the ills of the Charter; the mistaken assumption of continued big-Power unanimity· the changing character of war; the loopholes for "self-defense" and "regional" action; the lack of impartial means to find and characterize facts; the disposition to take the law into their own hands and distort and mangle it for their own purposes.[97] But, even granting all of those claims, he argues that to concede death would mistake the lives and the ways of the laws.[98]

Henkin's principle critique of Franck's diagnosis is that it judges the vitality of the law by looking only to its failures.[99] It needs to be noted that the purpose of Article 2(4) was to establish a norm of behavior and help deter violations.[100] Further, despite common misimpressions, Article 2(4) has accomplished those goals.

Granted, deterrence is hard to prove or measure—as in individual penology—but war is less common now than before the advent of the U.N. Charter and the rules. It is less likely, less frequent, and expectations of international violence do

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93. Franck, *supra* note 16, at 835.

94. *Id.* at 837.

95. *Id.*

96. Henkin, *supra* note 17, at 544.

97. Henkin notes Franck as a pathologist for the ills of the international body politic, although like Franck he acknowledges the legitimacy of his claims.

98. Henkin, *supra* note 17, at 544

99. *Id.* at 545.

100. Part of Henkin's argument is that the Cold War was a result of the controlling norm of Article 2(4), in places like Cyprus, Kashmir, and Berlin.

not underlie every political calculation of every nation or state.[101] While indeed we have outbreaks of hostilities, not every one of them became a full-fledged war; many of the one hundred hostilities cited have not. Most have remained subject to Cold War constraints. Threats to peace have remained just that, threats, and issues only remained in regard to peaceful settlement or non-settlement.[102] Cyprus, Kashmir, and Berlin are cited as examples.[103]

While it is possible to credit the lack of traditional war to other factors, including the changing nature and character of war, to more territorial stability, and to other changes in national interests, that does not make Article 2(4) any less a norm.[104] Law often reflects dispositions to behavior as much as it shapes them.[105] If we accept Franck's claim that "new forms of attack were making obsolete all prior notions of war and peace strategy, one may conclude that development reflected and supported Article 2(4) and made it viable.[106] Alas, nothing has rendered war obsolete as indicated by conflicts between India and Pakistan, India and China, Turkey and Greece, Honduras and El Salvador, Egypt and Israel.[107] The causes of war remain but what has changed is the notion that states are free to indulge in it whenever and wherever they want. The death of that notion is accepted in the Charter.[108]

Even the supposed transforming effect of nuclear weapons is erroneous. Neither the era when the United States had a monopoly on nuclear weapons, nor the era when the Soviet Union and the United States had a duopoly, was aggression induced by either party.[109] Nor have the superpowers'' caches of nuclear weapons deterred war by lesser Powers as demonstrated by repeated conflicts in the Middle East.[110]

The fissures of the Charter are worrisome but they are not as wide in international life as they are in the academic imagination. Pre-emptive war as "anticipatory self-defense," illegitimate self-defense claims by states attacking under the guise of Article 51, and even regional loopholes are not as prevalent and widespread as suggested.[111] There is danger out there in the international arena but it is not always fatal.

The differences here are ones in degree, not in kind. Article 2(4) remains.

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101. Henkin, *supra* note 17, at 544

102. It means that the use of force is not the only action that needs to be considered here but other options too.

103. Henkin, *supra* note 17, at 544.

104. *Id.* at 545.

105. *Id.*

106. *Id.*

107 Recall this article was written in 1971; perhaps what is interesting is that many of the same states would be on any similar list in 2004.

108. Henkin, *supra* note 17, at 545.

109. *Id.* at 545.

110. *Id.* at 545-6. Part of the deterrence argument of the Cold War rested on this premise—that nuclear weapons would have chilling effect on other forms of conflict. As Henkin notes, that was not proven out.

111. *Id.* at 546.

Donning the mantle of regionalism does not dispose of it. Not even the most stringent advocates of doctrines like the Brezhnev doctrine have suggested that Articles 52 and 53 afford it any legitimacy.[112]

Franck notes that war has not been eliminated but simply channeled into more or less blatant intervention in internal wars and affairs, often by more than one Power, often by major Powers.[113] The emergent triangle of superpowers—the United States, the Soviet Union, and China, has made competition in intervention a dominant political determinate.[114] Even so, Henkin argues, if Article 2(4) has not precluded these types of interventions—and clearly it has not—it may have signaled the effective end of conventional war.[115] If it has accomplished this change in the international order, it would signify a substantial advance and a worthy one to note. It would mean that we move from terrible destructiveness in war to lesser losses in life and property as a result of interventions.[116]

Interventions are problematic in themselves. They cannot be undertaken alone, even by superpowerss.[117] And if they do intervene, they can only be successful if they do so for a limited time, for limited objectives, and only if they are willing to accept political consequences from both their allies and their enemies.[118] Even small-Power intervention is limited and hampered, as indicated by the example of Syria's support of Palestine guerillas against Jordan.[119]

Henkin concludes by noting that Franck's warning makes its point and his cry of alarm is warranted and necessary.[120] But they can be co-opted by those super-realists who claim that the U.N. Charter is as irrelevant as the Kellogg-Briand Pact. But rather than condemn Article 2(4) to its death, it is enough to encourage the changes in individual and national perceptions that Franck recommends.[121] We need to remind everyone—citizens, policy-makers, national societies, transnational and international bodies—that this law is indeed in the national interest of all nations. War, however, prefers one interest over another, depreciates the tangible costs of life, and usually prefers the immediate and short-term to the deeper and longer-term national interest.[122]

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112. *Id.*

113. Including the previously mentioned regional organizations and their ideological wars.

114. *Id.* at 547.

115. In this way then, we see a value from Article 2(4) as it stands. If it cannot preclude war per se, it can reduce the effects through pushing states to the use of lesser forms of war, like intervention.

116. Henkin, *supra* note 17, at 547.

117 The recent example of Iraq simply validates this claim about superpower limitations. Other examples that are illustrative include the U.S.S.R. in Afghanistan and the U.S. in Vietnam.

118. In fact, interventions of any kind carry this caution. Causal connections lead to effects that intervening states have to deal with their action. For example, the U.S.'s intervention in the Middle East in 1991 had effects on their later intervention in Iraq in 2003, including the debate at the U.N., the assembly of a coalition, and the post-war occupation and nation building efforts.

119. Syria could send tanks but not air support to help their allies. The Superpowers would not allow more.

120. Henkin, *supra* note 17, at 547.

121. *Id.* at 548.

122. *Id.*

IS ARTICLE 2(4) STILL WORKABLE?

Almost fifteen years after the Franck-Henkin exchange, the debate over the U.N. Charter and the use of force continued. The number of wars—significant armed conflicts—had increased to over one hundred and twenty, with one study listing 65 major conflicts between 1960 and 1982.[123] More than 25 million men and women were under arms and world military budgets approached 700 billion dollars.[124] Correspondingly Article 2(4) continued to be central to the debate—with assessments ranging from it being still-born, to being ailing, to being out of date and senile, to even once again, it being dead![125]

In a panel presentation at the American Society of International Law Proceedings of April, 1984, seven panelists and commentators addressed issues relating to Article 2(4).[126] Domingo Acevedo opened with the topic of "Collective Self-Defense and the Use of Regional or Subregional Authority as Justification for the Use of Force."[127] Drawing upon two case studies—the Malvinas-Falklands conflict and the invasion of Grenada, he notes that regional authority clearly tried to subvert prior U.N. claims.[128]

In the first case, the Security Council's passage of Resolution 502—demanding an immediate withdrawal of Argentine forces from the Malvinas-Falklands Islands—had occurred before later action by the Organization of American States (O.A.S.) requesting British Forces withdrawal.[129] There were additional problems with regional action including the fact that one of the parties was a major Western power that was not a member of the O.A.S., creating a serious obstacle to the effective use of a regional forum and that the O.A.S. machinery's usefulness is dependent upon the support of U.N. resolutions.[130]

In the second case, U.S. reliance on regional authority of the Organization of Eastern Caribbean States (O.E.C.S) treaty, Article 8(4) is questionable at best.[131] Under that article, the collective action provided for is against external aggression, which was not the case in Grenada.[132] It also required the unanimous decision of the seven state parties.[133] While stronger arguments can be made under customary international law for protection of intervening state's own nationals—in this case

123. 78 AM. SOC'Y INT'L L. PROC. 68. Reference is made to Ruth Leger Sivard's, study of World Military Expenditures, accounting for more than 10 million deaths.

124. *Id.*

125. The panel discussion referenced here offers that range of opinions.

126. Presenters are referenced below, in order of presentation.

127. 78 AM. SOC'Y INT'L L. PROC. 68.

128. Interestingly, the U.N. claims could only be enforced in these cases by regional authorities.

129. 78 AM. SOC'Y INT'L L. PROC. 71.

130. *Id.*, The tension was also evident between Britain and the U.S. and the O.A.S. in this case.

131. 78 AM. SOC'Y INT'L L. PROC. 72.

132. Protection against outsiders, as opposed against other members of the regional organization puts strain on the system as well.

133. The member States of the OECS, founded in 1981, are Antigua and Barbuda, Dominica, Grenada Montserrat, St Kitts and Nevis, Saint Lucia and St Vincent and the Grenadines. The British Virgin Islands and Anguilla are associate members.

approximately 1,000 U.S. citizens were at risk—and based on the request of the troubled state—in this case, by the Governor-General of Grenada, the argument for treaty authority fails.[134]

Acevedo concludes that one can hardly argue that Article 2(4) is unworkable, unless one is willing to concede that the use of force as an instrument of national policy is acceptable—clearly not a tenable position.[135]

Michael Reisman's contribution is titled Article 2(4): The Use of Force in Contemporary International Law."[136] In it, he traces the developments in international law that lead to Article 2(4).[137] Specifically, he argues that the rule was never meant to be an independent ethical imperative for pacifism.[138] While persuasion was certainly preferred, it was also clear that coercive force was acknowledged as a means to maintain community order. And while unilateral force was discouraged by the rule, it wasn't eliminated.[139]

What happened to the international system following the establishment of the United Nations and Article 2(4) was the equivalent of what happened to a "Wild West" town in the 19th century when a new sheriff arrived. People were encouraged to follow the laws, put up their own guns, and rely on the force of the lawman.[140] But, in much the same way as what would happen if the Sheriff turned out to be incapable of maintaining law and order, the international system saw the United Nations as being ineffective at all policing and, therefore, returned to its own self-reliance on the use of force.[141]

Self-help, particularly in the cases of self-defense and in the cases of decolonization, was not uncommon.[142] Nor was it uncommon for cases of humanitarian intervention and intervention by the military instrument for elite replacement—Uganda, the Central African Republic, and Cambodia are illustrative of the later situation.[143] Reisman also sketches out cases for use of the military instrument in spheres of influence (specifically critical defense zones or CDZ's), treaty sanctioned interventions, gathering of evidence for international proceedings, and for international judgment enforcement. All of these later cases are determined by the particular facts in the case at hand, although the last one has little scholarly support.[144]

The conclusion is that some unilateral coercions are effectively treated as

134. 78 AM. SOC'Y INT'L L. PROC. 72-3. Sir Paul Scorn, the Governor-General, at that time, he asked for help, not an invasion.

135. *Id.* at 74.

136. 78 AM. SOC'Y INT'L L. PROC. 75.

137. *Id.* With a focus on the 19th Century and onward.

138. 78 AM. SOC'Y INT'L L. PROC. 76.

139. Reisman notes that there is a full acknowledgment of the indispensability of the use of force to maintain community order.

140. 78 AM. SOC'Y INT'L L. PROC. 77

141. The domestic analogy is often seen in international legal paradigms, including that of Michael Walzer.

142. The Corfu Channel Case is a case where self-help was claimed. *See* 1949 ICJ 4.

143. 78 AM. SOC'Y INT'L L. PROC. 79-81.

144. *Id.* at 83-84.

permissible or lawful, Article 2(4) notwithstanding.[145] The challenge for international lawyers is to find the criteria for a comprehensive set of guidelines for assessing lawfulness or permissibility of coercion in these settings.[146] Reisman suggests that a key and constant factor is found in asking whether a particular use of force—whatever its justification—enhances or undermines world order.[147] If it enhances world order, the next key question is whether it enhances the right of peoples to determine their own political destinies. That is the end for Reisman, and Article 2(4) is the means.[148]

In sum, the only control on coercion, at least impermissible coercion, is the clear conception of the licit community objectives for which coercion may be used. In other words, the basic and enduring values of contemporary world order.

Edward Gordon follows with a piece called Article 2(4) and Permissive Pragmatism."[149] Permissive pragmatism is a destructive trend among Western international lawyers, where what is lawful seems to be a function of the result one favors, rather than being a matter of compatibility with the prevailing rules of law.[150] A (recent) example of this approach is cited in the Kissinger Commission's Report on Central America (1983), which appeared to reach conclusions in a legal vacuum, oblivious to the fact that existing legal rules and treaty agreements required adherence.[151] Its focus was instead on U.S. court decisions favoring a less international perspective.[152] Permissive pragmatism is overcome only by recognition of these laws, rules, and obligations by all states and keeping faith with them in inter-state relations.[153] We need to look to the core meaning of the law to understand it.

Turning to Article 2(4), Gordon notes that even though it is ambiguous in important respects, even though it has been violated with disconcerting frequency and impunity, even though events subsequent to its adoption have shown it to be less than perfectly suited to contemporary affairs, nevertheless it contains a solid, inalienable core of objective meaning independent of the judgment of national government officials and eminently worth protecting and preserving.[154] The principled conduct of foreign relations requires championing the cause of Article 2(4), rather than dwelling upon its plasticity and overreaching idealism.[155]

It also requires a willingness to argue against disingenuous claims by

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145. *Id.* The real challenge is limiting those exceptions.

146. This criteria needs to go beyond the tradition ones of necessity, proportionality and discrimination.

147 78 AM. SOC'Y INT'L L. PROC. 85.

148. *Id.* at 86.

149. *Id.* at 87-8.

150. Gordon directs his comments on permissive pragmatism by referring to U.S. Ambassador to the U.N., Jean Kirkpatrick.

151. 78 AM. SOC'Y INT'L L. PROC. 89.

152. *Id.*

153. The concept of core meaning concept comes up clear later in this article, under Arend and Beck.

154. This absolutist view sees the Article as something beyond or more than a mere treaty element.

155. 78 AM. SOC'Y INT'L L. PROC. 90.

permissive pragmatists, like those who argue that Article 2(4) is not special or significant, it is just one of many articles in the Charter and, therefore, a mere incidental means to a particular set of goals—as opposed to what it really is—an objective rule of treaty law and, by now, general international law.[156]

Jordan Paust offers a comment on Article 2(4), noting that the restriction on the use of force is really a limited one.[157] The limitation affects only the territorial integrity of a state, the political independence of a state, and any other manner inconsistent with the Charter, but that it is not an all-inclusive prohibition.[158] Self-determination actions seem to be permitted; as do actions like evacuation of nationals—the rescue mission at Entebbe— and other actions which do not violate territorial integrity nor political independence but which may otherwise meet traditional norms or principles of necessity and proportionality.[159] Finally, humanitarian intervention appears justified by these rules.[160]

Nabil Elaraby's comment focuses on the nonuse of force.[161] He argues that the prohibition of Article 2(4) is an absolute one—the use of force must not be sanctioned under any circumstances.[162] The key to doing so is found in reviving the interest and faith of the international community in the dormant potentials that would no doubt accrue by introducing improvements in the available U.N. machinery.[163] A number of suggestions are presented including the development and institutionalization of peacekeeping, reconsidering the rule of unanimity in voting by the Security Council, and possible amendment of the U.N. Charter itself.[164]

Finally Robert Rosenstock's comment was essentially a response to several of the previous speakers.[165] He highlights that changes in the U.N. machinery, if a reasonable case could be made, were worth consideration, as well as other uses of force, which are not aggression, but rather fall in the domain of Articles 2(4) and 51.[166] Finally, he considers the case of Grenada and argues that it surely doesn't become another example of the demise of Article 2(4).[167]

The panel presentation concluded with a general discussion that included many distinguished commentators addressing overall topic comments and

156. *Id.* at 92.

157. 78 AM. SOC'Y INT'L L. PROC. 92-3.

158. So anything undertaken to maintain self-determination would appear to be allowed by Paust.

159. In other words, Article 2(4) may either allow these exceptions or at least not prohibit them.

160. Paust actually claims this supports the "human right to participate in armed revolution. Others, like Boyles, Falk, Nunes, and Weston suggest otherwise.

161. 78 AM. SOC'Y INT'L L. PROC. 94.

162. Elaraby adds, "its (Article 2(4) provisions should always be observed. No exceptions.

163. 78 AM. SOC'Y INT'L L. PROC. 95.

164. *Id.* at 96.

165. 78 AM. SOC'Y INT'L L. PROC. 97.

166. Rosenstock also offers the caution about analogizing too much from history.

167. Rosenstock also considers the role of the OECS in decision-making in Grenada and offers it as at least plausibly justified invasion and peacekeeping operation, opposed to another nail being driven into the coffin of Article 2(4).

questions, as well as the pertinent issues of the panel.[168]

HAS ARTICLE 2(4) LOST ITS LEGAL FORCE?

Oscar Schachter joined the fray in 1991, with a section from his book, *International Law in Theory and Practice*, where he posed the above highlighted question.[169] Or to put it another way, are the existing rules of force so vague and uncertain to allow states to offer a plausible legal justification for any use of force it chooses to exercise?[170]

He also posed a related question – in the absence of an authoritative body to decide conflicting positions objectively, must the rules, however clear their meaning, be regarded only as paper rules in that they may be disregarded or violated to a degree that renders them no more than nominal?[171]

Schachter argues in response to the second question, in sum, that the U.N. political organs—the Security Council and the General Assembly—provide an institutional mechanism for authoritative judgments on the use of force, but it is only under some circumstances that they can obtain the requisite authority and consequential behavior to endow their decisions with effective power.[172]

He goes on in his reply to the first question to say that Article 2(4) is really an all-inclusive prohibition against force.[173] In doing so, he follows up by rejecting the call for a revision of the Charter principles based on the arguments of special circumstances (consent, territorial claims, human rights, self-determination and national liberation, overthrow of repressive regimes, protection of life, and safeguarding legal rights), changed circumstances and state practice inconsistent with the declared rules.[174]

Schachter's position, in a nutshell, is that international law does not and should not legitimize the use of force across national lines except for self-defense (including collective self-defense) and enforcement measures ordered by the Security Council.[175] Neither human rights, democracy, nor self-determination are acceptable legal grounds for waging war, nor for that matter, are traditional just war causes or righting of wrongs. This conclusion is in accord with the U.N. Charter as it was originally understood and also in keeping with the present interpretation by the great majority of states.[176]

In responding to the question of whether article 2(4) has lost its legal force, Schachter considers several arguments, including:

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168. 78 AM. SOC'Y INT'L L. PROC. 100-7

169. Schachter, *supra* note 15, at 129-34.

170. *Id.* at 130.

171. *Id.* at 130-131.

172. *Id.*

173. *Id.* Schachter notes no state has argued that Article 2(4) is no longer in force.

174. *Id.* at 131.

175. This position might be construed as an absolutist one, where regardless of what else is happening, there rule is self-defense and U.N. collective action only, in terms of the use of force.

176. Schachter, *supra* note 15, at 106-111.

1) That the prohibition on force was part of the comprehensive agreement contained in the Charter, for maintaining international peace and security States would not have agreed to give up their unilateral recourse to force if the United Nations did not have enforcement powers (and an enforcement mechanism). Inasmuch as the United Nations does not, states should be released from their renouncement.[177]

a) Original intent of the parties (states) to the Charter[178] is plausible, but it does not follow that the parties intended the obligation to be conditioned on effective collective measures. It is not recorded in Charter discussions at San Francisco. Additionally, having an enforcement mechanism does not equal having an effective mechanism.[179] Nothing in the Charter or in general international law provides any grounds for implying an independent right to use force because the Security Council has failed to adopt collective measures.

b) It is incorrect to conclude that collective security has failed when legal rights have been infringed and no remedy, short of force, is available in a particular case.[180] UN enforcement measures were intended to maintain or restore international peace or security They were not meant to ensure compliance with the law or to bring about justice. It cannot be maintained that collective security has failed because it has not provided a remedy for a legal violation.[181]

c) The Article has been violated so many times that it has been nullified.[182] Three probable legal grounds provide for this claim, including: 1) The general principal of reciprocal observance: a state should not be bound by a rule that others flout or ignore; 2) *Rebus sic stantibus*: infringements of Article 2(4) have so changed the positions of states that any party may invoke the violations as a legal reason to disregard or suspend its obligations to refrain from force; and 3) violations are evidence of state practice sufficiently widespread to be taken as evidence of a general interpretation of the Charter and customary law.[183]

While there is some truth to these claims, even these legal grounds suffer from the fact that no state—however powerful or resentful—has argued that Article 2(4) should no longer be in force. Instead, violators have relied on exceptions or justifications contained within the rule itself, or more frequently, self-defense, under Article 51.[184]

There is a reluctance of states to abandon Article 2(4), for the basic reality is that a stable society of independent nations cannot exist if each is free to destroy

177. *Id.* at 129.

178. This is an argument that parallels the strict constructionalist's interpretation of constitutions in American legal history.

179. The domestic analogy comes to mind again with the clumsy constable. You can have a law enforcement officer but that does not mean you will have an effective one.

180. Maintenance or restoration of peace or security is not the equivalent of ensuring compliance with the law or brining about justice.

181. Certainly no other are of the law takes this view as a legitimate one.

182. Schachter, *supra* note 15, at 130.

183. *Id.*

184. Even recognized in the ICJ case of Nicaragua v. United States, 1986 ICJ 14.

the independence of the others. The legal constraint on the use of force reflects this reality Neither the failures of the United Nations, nor the violations of the Charter justify a conclusion that would allow states to wage war freely Infringements by some, under principles of reciprocity or changed circumstances, have not released all from a rule so fundamental for world order.[185]

A CHANGED LEGAL OBLIGATION: A SHIFT IN PARADIGMS?

In Anthony Arend and Robert Beck's piece, "International Law and the Recourse to Force: A Shift in Paradigms, the authors argue that a number of significant developments since World War II have challenged the validity of the U.N. Charter's paradigm.[186] This paradigm, defined as the paradigm for a contemporary notion of *jus ad bellum*, was composed of three elements—a legal obligation, institutions to enforce the obligation, and a value hierarchy that formed the philosophical basis for that obligation.[187] The failure of international institutions, the emergence of new values, and a new legal obligation have presented a paradigm shift—that of a post-Charter self-help paradigm.[188]

First, in the post-Charter period, international institutions have failed to deter or combat aggression.[189] The international community has faltered in its efforts to address this profound problem. Additionally, the international community has seen a shift from a focus on peace to that of justice.[190] This includes, as legitimate, claims to use force to promote self-determination, claims to resort to "just reprisals, and claims to use force to correct past "injustices."[191]

Finally, the legal obligation is changed. Scholars have been compelled to ask whether Article 2(4) is still good international law[192] and, is it still authoritative and controlling?[193] A review of scholarship and practice suggests three fundamental approaches to this question. The first has been labeled the "legalistic approach,"[194] the second the "core interpretist" approach,[195] and the third the "rejectionist" approach.[196]

After lengthy analysis, Arend and Beck conclude that of the three approaches,

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185. *Id.* at 131.

186. Anthony Arend & Robert Beck, *International Law and the Recourse to Force: A Shift in Paradigms, in* INTERNATIONAL LAW: CLASSIC AND CONTEMPORARY READINGS, 285-315 (2nd ed. 2003).

187. Arend and Beck flesh out these by associating these elements with 1) Article 2(4) (of the U.N. Charter), 2) Charter VII (of the U.N. Charter), and 3) the underlying value structure.

188. Arend & Beck, *supra* note 186, at 286-87.

189. These institutional problems of the veto, lack of formal mechanism for collective action, and lack of support for limited collective action.

190. The shift from peace to justice is what constitutes the shift in values here.

191. Arend and Beck note that at times, justice must take precedent over peace.

192. Putative norms, like Article 2(4), are only a rules of international law if authoritative and controlling.

193. Arend & Beck, *supra* note 186, at 288.

194. *Id.* at 288-90.

195. *Id.* at 290-92.

196. *Id.* at 292-93.

the "rejectionist" approach reflects most accurately the reality of the international system today.[197] They start, however, by considering the legalist approach, noting that while it recognizes that problems exist, adherents adhere to the basic belief that the principle enunciated by Article 2(4) is still good law.[198] Several points are stressed in their argument. First, the norm remains authoritative since no state has explicitly suggested that Article 2(4) is not good law.[199] Second, despite the problems of the article, it remains controlling in state behavior.[200] Finally, Article 2(4) must be understood as a treaty obligation for those states that have ratified the U.N. Charter, not just an obligation under customary international law.[201] Hence, the procedure for a normative charge is much more specific and defined: "states may not simply walk away from them."[202]

Clearly, there are problems with this approach. First, while it is true no state has explicitly declared Article 2(4) as not good law that fact alone does not mean the norm is authoritative. Other political reasons exist for not doing so. Yet, states ignore the rule in their own actions. While it still commands some legitimacy, it is not that required for a healthy law. Second, the argument advanced by the legalists is inconsistent with the realities of the international system. The norm has been violated frequently and with impunity in some of the most important cases of state interaction. Even legalists like Henkin and Gordon are forced to deal with a number of these incidents: Arab-Israel hostilities, India-Pakistan's clashes over the Kashmir, the Czech invasion by the Soviet Union, as well as Ethiopia-Somalia and Vietnam-Cambodia-China.[203] Finally, the legalist's use of the treaty-nature of Article 2(4) is problematic. Regardless of whether it is treaty law or customary international law, if a rule lacks authority and control, it is no longer authentic "international law." In the decentralized system that exists today, international law is constituted through state practice.[204]

The core interpretists argue that although the narrow, legalist interpretation of Article 2(4) no longer represents existing law, the "core" meaning of the Article can nevertheless be identified and it is still authoritative and controlling.[205] While the members of this school range in opinions as to what constitutes that core, they contend that the basic prohibition remains in place.[206]

Some believe that the Article 2(4) that the exceptions are only modified by authoritative interpretations confirmed in state practice, thus permitting uses of force as anticipatory self-defense, intervention to protect nationals, and

197. *Id.* at 288.

198. Professors Edward Gordon and Louis Henkin, for example, represent this position.

199. Arend and Beck note that despite this claim, Article 2(4) is not held in high regard.

200. Controlling for the most part; for example, most states are not using force as a rule.

201. The contrasting argument is that we look to practice and what we see is that it is not working as a treaty.

202. Arend & Beck, *supra* note 186, at 289.

203. The point made *supra* about increased incidents of war throughout the world.

204. *Id.* at 290.

205. Professor Alberto Coll is a representative of this camp.

206. Core interpretists allows for exceptions to the basic prohibition against the use of force.

humanitarian intervention.[207] Others take the core as being much smaller, including Alberto Coll, who suggests that "insofar as there is a remnant of a legal, as opposed to a moral, obligation left in Article 2(4), it is a good faith commitment to abstain from clear aggression that involves a disproportionate use of force and violates other principles of the Charter."[208]

For Coll, clear aggression would include the types of actions that the Germans and Japanese used to start World War II.[209]

Core interpretists argue for holding on to Article 2(4) for several reasons, including a belief that rejecting the norm entirely might be premature, given that states do refrain from certain uses of force.[210] Consequently, any rejection would actually contribute to the dissolution of whatever restraining influence that 2(4) still exerts.[211] Another reason is the symbolical nature of 2(4) and its service as an aspirational norm.[212] To do otherwise, would serve to reject this noble goal.

The problem here, critics note, is that holding on to Article 2(4) may be doing more harm than good to the international legal system.[213] Its restrictive use otherwise may serve to perpetrate a legal fiction that interferes with an accurate state practice.[214] Article 2(4) is more than a simple prohibition on the use of force for narrow purposes—it is supposed to prohibit all uses of force that were against territorial integrity or political independence of a state or otherwise inconsistent with the purposes of the United Nations.[215] In other words, the Article 2(4) prohibition was much broader than simply the "core." If only this small subset remains, than it does not seem appropriate to describe the law by reference to the full set.

Lastly, the rejectionist approach argues that Article 2(4) does not apply in any meaningful way nor constitute existing law.[216] The contention is that because authoritative state practice is so far removed from any reasonable interpretation of the meaning of Article 2(4), it is no longer reasonable to consider the provision "good law."[217] This follows Franck's position, first in his classic article (previously discussed) and later, in his *The Power of Legitimacy Among Nations*, where he reaffirmed the rejectionist understanding of Article 2(4), noting that the extensive body of international law forbidding the use of force is not predictive of

207. As long as the accepted practice can be shown or demonstrated to be an accepted interpretation of the Charter.

208. Arend & Beck, *supra* note 186, at 291.

209. For example, "clear aggression" would include the use of force to gain territory.

210. In other words, some prohibition or restraint is better than no prohibition or restraint.

211. Arend & Beck, *supra* note 186, at 291.

212. An aspirational goal is a noble goal worth pursuing.

213. The issue here centers around the idea the Article itself is larger than the core itself, including the notion of threats.

214. Arend & Beck, *supra* note 186, at 292.

215. *Id.*

216. In short, the difference here is one between what is normally meant by "theory" and "practice.

217. Franck is representative of this last school or approach.

the ways of the world.[218]

Franck analogizes Article 2(4) with the one-time U.S. Government mandated 55-mile per hour national speed limit.[219] While both rules possess "textual clarity," they, nevertheless, do not describe or predict with accuracy the actual behavior of the real world.[220]

While not having a large school of scholars in support of the position, Arend and Beck argue this position seems to offer the most accurate description of the contemporary *jus ad bellum*.[221] The legalists seem too far removed from the realities of the international system while the core interpretists seems to do little more than perpetuate a legal fiction.[222] Neither what states say nor what states do is reflected in anything other than the rejectionist approach.[223]

Arend and Beck go on to flesh out their post-Charter approach, which essentially involves modifying the current Charter to accommodate additional uses of lawful force including a broader interpretation of self-defense (including against armed attack, imminent attack, indirect aggression), covert action, support of rebels and against terrorists actions (as measured by factors such as the nature of support, the severity of the effect, and temporal duration), intervention to protect nationals, and force authorized by the Security Council.[224] All other uses of force are unlawful.[225]

There are several advantages to their proposal, Arend and Beck argue, including the elimination of some of the interpretative problems of the Charter framework, it addresses the changing nature of international conflict, the need for self-help for the protection of nationals, and the critical importance of a restrictive *jus ad bellum* for international order.[226]

RESHAPING THE UNITED NATIONS: MODIFYING THE NOTION OF THREATS TO PEACE.

Within the last year, the debate on the U.N. Charter and Article 2(4) has seen renewed rancor.[227] One suggestion by Anne-Marie Slaughter has been that following the U.S. victory in Iraq, there is an opportunity to reshape the United Nations.[228] By committing the United States to leading the world, rather than defying it, the Bush administration can make the United Nations a more effective

218. Arend & Beck, *supra* note 186, at 292.

219. *Id.* at 293.

220. *Id.*

221. *Id.*

222. Neither sees the reality of the current system.

223. Here is reality, argue Arend and Beck.

224. The argument is that while this might not reflect the most desirable regime, it does reflect the existing regime.

225. *Id.* at 302-7.

226. *Id.* at 307-8.

227. The recent dispute about the Iraqi war.

228. Anne-Marie Slaughter, WASH. POST, April 13, 2003, at B7.

protector of the international order.[229]

Slaughter accepts that the claim that the institutions of the post-World war II era are yet adapted to address the threats of the post-Cold War era.[230] The answer, however, is found in reform, not destruction of the institutions. Beyond working with the other members of the Security Council, the United States needs to redraw the lines of how the Security Council defines which threats to international security are sufficient to require the use of force.

The solution is to utilize a new approach—one which links the human rights side of the United Nations with its security side. In other words, the United Nations must formally link the kind of moral arguments presented against Saddam Hussein—arguments made outside of the Security Council—with the kind of arguments that it made for disarmament inside the Council.

What follows from Slaughter's analysis can be set forth as follows. If the Security Council were to adopt a resolution recognizing that the following set of conditions would constitute a threat to the peace sufficient to justify the use of force, including: 1) possession of weapons of mass destruction or a clear and convincing evidence of attempts to gain such weapons; 2) grave and systemic human rights abuses sufficient to demonstrate the absence of any internal constraints on government behavior; and 3) evidence of aggressive intent with regard to other nations. This cluster of actions sets a very high threshold for the use of force, but also acknowledges the reality of the world, with terrorists, WMD, and human rights violations.

The advantages of this type of resolution are that other nations would agree to it, since in the end, it makes all nations stronger and safer with the existence of robust international institutions. These institutions would have both the political will and the means to enforce their mandates. They also would serve to help the United States overcome mounting anti-Americanism in both Europe and the Middle East. Instead of seeking to restore the status quo at the United Nations, the United States should reinvent it.

As Slaughter notes, we now have the chance to reach out to other nations to strengthen and equip the United Nations to meet a new generation of global challenges. If we miss the chance, we and the world have a frightening amount to lose.[231]

ARTICLE 2(4) AFTER IRAQ.

In 2003, Tom Franck returned to the subject of the United Nations with his recent article, "What Happens Now? The United Nations After Iraq."[232] He recalls the conclusion of his original piece on Article 2(4):

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229. This rethinking will produce new rules and procedures for the United Nations.

230. Recognizing that the institutions need not be destroyed but rather simply reworked.

231. *Id.*

232. Tom Franck, *What Happens Now? The United Nations After Iraq*, 97 AM. J. INT'L L. 607 (2003)

> The failure of the U.N. Charter's normative system is tantamount to the inability of any rule, such as that set out in Article 2(4), in itself to have much control over the behavior of states. National self-interest, particularly the national self-interest of the super-Powers, has usually won out over treaty obligations. This is particularly characteristic of this age of pragmatic power politics. It is as if international law, always something of a cultural myth, has been demythologized. It seems this is not an age where men act by principles simply because that is what gentlemen ought to do. But living by power alone. .is a nerve-wracking and costly business.[233]

The major difference that Franck notes between now and then is that the demise of the Cold war has left a new form of unilateralism.[234] Additionally, in 1970, unlawful recourses to force were accompanied by a fig leaf of legal justification, which at least tacitly recognized the residual force of the requirement in Charter Article 2(4).[235] Now, the leaders of America no longer bother with such legal niceties. Instead, they boldly proclaim a policy that repudiates Article 2(4). The new principle seem derived from the Athenians at Melos: "the strong do what they can and the weak suffer what they must."[236]

The history of U.N. action since 1970 is sketched out in basically three parts: 1) the remaining Cold war normative balance of power era, which ended in 1989 with the collapse of both the Berlin Wall and later, the Soviet Union; 2) the Optimistic 1990's, when the international system seemed to be moving in the direction best expressed by the "Uniting for Peace" resolution at the United Nations; and 3) the relapse of 2003, where the United States in its invasion of Iraq, caused Article 2(4) to die again, perhaps for good.[237]

Franck analyzes the question of whether the Iraq invasion violated the U.N. Charter.[238] And despite arguments for self-defense against future use of WMD and previously sanctioned action by the Security Council, with continued reliance on Resolution 678, he concludes that indeed the invasion was illegal.[239] Even the positive after-affects do not change that assessment.[240]

Another question considered is that posed by Slaughter—can the invasion of Iraq serve as an opportunity to reform the Charter and make the law more realistic.[241] Franck acknowledges that the Charter can be revised—he argues elsewhere that the Charter as a quasi-constitutional instrument is capable of evolving through the practice of its principle organs.[242] Even the Charter text is subject to reinterpretation in practice, but as he sees it, the problem is not that

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233. *Id.*

234. *Id.* The post-Cold war model has evolved to this state of unilateralism.

235. *Id.* at 608.

236. Franck suggests that this American "might is right" point of view is really neo-Melian doctrine.

237. Franck, *supra* note 232, at 607-609.

238. *Id.* at 610.

239. The more sophisticated argument of self-defense is presented by the British side.

240. Franck, *supra* note 232, at 611-614.

241. *Id.* at 615.

242. *Id.*

one.[243] The nub of matter goes beyond the criterion for the use of force.[244] Instead it goes to who gets to decide what to do regarding the use of force.[245]

In essence, the Iraqi crisis was not primarily about what to do, but rather who decides what to do.[246] This action can best be seen as a repudiation of the central decision-making premise of the Charter system than as a genuine opening to reform.[247]

After reviewing the Bush Administration's new security strategy, which he finds problematic at best, Franck closes with a consideration of what can be done?[248] In sum, he suggests that international lawyers stand up for what it is they practice and protect—the rule of law—the rule of international law.[249] Franck also notes that the realists are probably right and in the present imbalance of power, the time for any positive and meaningful action is in the future.[250] International lawyers then should zealously guard their professional integrity for a time when it can again be used in the service of the common weal.[251]

CONCLUSION.

For the past thirty odd years, the question of whether Article 2(4) remains relevant or not has been subject to ongoing debate. This debate has been engaged in by both practioners and scholars. In fact, a recent series of popular articles in the *Wall Street Journal*, titled "The U.N.. Searching for Relevance, suggest this debate is not simply confined to the halls of the United Nations and academia; but rather, it is a concern for the citizenry of the United States and the broader citizens of the world.[252]

Among the central issues that bear further discussion and resolution are three primary issues. The first issue is the structure of the institutions themselves, to include the Charter with the provision of Articles 2(4) and 51, 52, and 53, as well as the Security Council itself. As noted here, for the Charter and its Articles to have any particular meaning, it is necessary for them to be reflective of the actual practices and aspirations of states.[253]

Some modification of the criteria for the use of force to capture the realities of the post 9-11 world is needed. As Slaughter and Franck suggest, terrorists, WMD,

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243. So it is not the reinterpretation that is problematic, but how it is interpreted.

244. *Id.* at 616.

245. International lawyers are Franck's claim and solution, both here and later.

246. Franck, *supra* note 232, at 616.

247. *Id.* at 617.

248. Yet, they ought not to take an aggressive or assertive role but rather they must wait for the appropriate moment to act, Franck says.

249. Franck, *supra* note 232, at 619-20.

250. *Id.*

251. *Id.* at 620.

252. *See* WALL ST. J. series titled, *The U.N.. Searching for Relevance*, on Oct. 1, 2003; Oct. 21, 2003; Dec. 16, 2003, and Dec. 19, 2003.

253. Interestingly, President Bush's recent remarks at the National Defense University focused on the role of failed states. *See* http://www.whitehouse.gov/news/releases/2004/02/20040211-4.html.

rogue states which engage in human rights violations systematically, and failed states are the new security threats of the 21st century.[254] For the Charter and the United Nations to remain engaged and relevant, it must be able to deal with those threats and that reality. Additionally, the changing nature of warfare will continue and the Charter needs to be able to address such concerns. We are not far removed from a world where information and computer systems can engage in direct attacks, across borders, which have at least as devastating effect on items like the financial markets, the electronic grid, and communications systems.

Second, the instruments are only as effective as they relate to the decision-makers. As Gordon and Franck note, the means of determining decisions is more important than whether the actions are right or wrong.[255] Consideration has to be given to modifications of the burdensome and unanimous system of the Security Council. The continued use of the present system does not reflect the real world —changes need to be undertaken.

How decisions are made, who makes them, how quickly they are made, and who they affect, are clearly concerns that transcend national self-interest or regional concerns. Bringing together complimentary, if occasionally competing, systems is key in decision-making too.

Lastly, a renewed commitment must be made to collective security action and collective self-defense. Cases like Afghanistan and Iraq were global, not simply U.S. concerns. Likewise, we see them in cases like Liberia, where a failed state presents problems for not only the evacuation of nationals but also for regional security and stability. The United Nations has proven itself capable of handling some actions better than others and similarly, the United States and the European Union, as well as Russia and China, can manage some things better than the United Nations.[256] Collective action will meld these actions into a more effective system for dealing with the issues of the use of force in a changing world.

254. *See* Slaughter, *supra* note 228, at B7; Franck, *supra* note 232, at 615.

255. Arend & Beck, *supra* note 186, at 289; *Franck, supra* note 232, at 611.

256. In terms of quick reaction forces, the U.S., Britain, and France have a distinct advantage in their force projection capabilities—putting boots on the ground quickly. The U.N. is better at some of the administrative and coordination efforts, like herding the NGO's, and some forms of peacekeeping.

AN EMERGING LEGAL PERSPECTIVE ON TRANSNATIONAL BUSINESS LAW: DEVELOPMENT LAW THEORY AND PRACTICE

Reviewed by Heather K. Beattie

RUMU SARKAR, TRANSNATIONAL BUSINESS LAW: A DEVELOPMENT LAW PERSPECTIVE, Kluwer Law International, The Hague, The Netherlands (2003); ISBN: 90-411-9921 7: 419 pp. (hardcover).

RUMU SARKAR, DEVELOPMENT LAW AND INTERNATIONAL FINANCE, Kluwer Law International, The Hague, The Netherlands (1999); ISBN: 90-411-9743-5; 275 pp. (paperback).

The field known as international business transactions (IBT) continues to play a critical role in relations between developing and developed countries. For this reason, Professor Rumu Sarkar's work in this area is unique and important. She deserves praise for her ability to take the enormous amount of information in the IBT field and apply it in a development context. In Ms. Sarkar's first book she outlines the basic legal and theoretical principles of development law and international finance. Her second work contains a more practical application of development law to the everyday international business environment. Both books outline the importance of international business and investment for the economies and societies of both developed and developing countries.

Ms. Sarkar's most recent work, *Transnational Business Law: A Development Perspective* is a text book intended to give concrete illustrations and guidance to beginning international practitioners and law students. She takes a development law approach because many cross-border (transnational) transactions take place in the developing world. Accordingly practicing attorneys ought to be familiar with the concerns of their host country counterparts regarding critical economic and political decisions. The fundamental starting point for any transaction should be a basic understanding of what each party hopes to gain in both a narrow and broad sense from the particular transaction so that both parties can benefit and advance.

The book is divided into three parts. Part I explains the conceptual framework. These first two chapters explain the essential elements of a contract for the sale of goods or services. An international contract of this sort will

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generally be governed by the United Nations Convention on the International Sale of Goods and Services (CISG) unless another source of law is stipulated or one of parties to the transaction is not a signatory to the convention.[1] Moreover, a contract usually includes which taxes will be paid, when and where delivery will be made, what warranties apply, and who bears risk of loss among other things. The International Chamber of Commerce (ICC) publishes "International Commercial Terms" referred to as INCOTERMS that define common terms used in the international context such as FOB vessel NYC[2] means the seller pays all charges until the goods are actually boarded on the transportation vessel. Then seller receives a clean bill of lading and title of the goods passes to the buyer, who assumes the risks of damage, loss, cost of insurance and transport to NYC. These standardized terms help prevent miscommunications between buyer and seller, but they must be specifically referenced in the contract.

The second half of Chapter 1 addresses letters of credit. There are many different types of letters of credit and they are common in IBT Ms. Sarkar includes annotated forms at the end of almost every chapter so that one can look at the form and refer to the text to explain the significance of each provision of the form. For example, at the end of Chapter 1 there is a sample international sale of goods contract and a sample irrevocable letter of credit. This functional approach is useful for any practitioner, especially those new to the field.

The second half of Part I discusses technology transfer and intellectual property rights. In the international sale of services the transfer of technology is a critical issue. Within the technology transfer area there are a number of sub-issues including whether the agreement is for a license, joint venture, sales agent, or distributor. These agreements are one of the most important for developing countries because of the potential they carry for increasing production of goods as well as increasing the ability of locals to work with advanced technology. Increasing productivity generally gives rise to increasing economic development.[3]

The remaining two parts of *Transnational Business Law* explain how to structure a cross-border business transaction. Part II includes managing issues of commercial risks such as: credit enhancement, loan guarantees, and debt issues. Ms. Sarkar explains how to negotiate the terms of a loan agreement as well as what principles of negotiating to use. The international financial framework is incorporated throughout the book. This framework incorporates the responsibilities of the International Monetary Fund (IMF), which is in charge of stabilizing currencies world-wide, and the International Bank for Reconstruction and Development (IBRD) also known as the World Bank, which is in charge of financing development projects world- wide. There are many regional development banks that nation-states will borrow from to finance their domestic projects. Ms. Sarkar includes examples of development projects and how they are

1. RUMU SARKAR, INTERNATIONAL BUSINESS LAW: A DEVELOPMENT LAW PERSPECTIVE 4-5 (2003).

2. *Id.* at 11.

3. Development in its narrowest sense means increasing per capita Gross National Product (GNP) for a country.

funded are at the end of the chapter.

Part III manages issues of non-commercial risks such as: political risks, investment risks, and risks of litigation. This part of the book is perhaps the most recognizably pertinent to a development analysis because of the need in developing countries for additional credit enhancement. For private investors the most important issue is whether the pertinent countries have a bilateral investment treaty (BITS). There are now hundreds of these treaties covering private investment overseas.[4] The second way private investors may be protected is by obtaining political risk insurance from such companies as the Overseas Private Investment Corporation (OPIC) or the Multilateral Investment Guarantee Agency (MIGA). These companies will provide insurance against the classic credit risks such as coups, war and political violence, nationalization and expropriation, and currency inconvertibility[5] Ms. Sarkar has a wonderfully useful comparison of the equity cover provided by OPIC and MIGA at the end of Chapter 6.

The second half of Part III covers information regarding the resolution of disputes. Ms. Sarkar addresses three possibilities for when "things fall apart."[6] First, mediation may be appropriate under the circumstances, particularly if the problem is an intellectual property issue. Second, arbitration is similar to litigation except the contracting parties may agree to the arbitrators, who are non-judicial and non-governmental. The parties also agree to the law that will be applied in their case. Most important is that arbitration awards under the New York Convention will be recognized almost anywhere[7] whereas judgments from a country's domestic courts will not generally be recognized in another country. International litigation can be costly and confusing so the key is to negotiate for alternative dispute resolution prior to signing the final agreement. One common forum is the International Centre for the Settlement of Investment Disputes (ICSID), which is part of the World Bank Group. ICSID is governed by its own rules and procedures.[8]

In sum, Rumu Sarkar's text book takes a clinical teaching approach to a field that is generally taught by using either case book method or a form-based/protocol supplement method. It is a refreshing methodology to actively incorporate a development law perspective into an international corporate cultural that generally leaves such issues beneath the surface.

Ms. Sarkar's first book, *Development Law and International Finance* lays the theoretical groundwork for understanding cross-border transactions. The book is full of interesting historical and legal underpinnings of economic development. The book's functioning premise is that most frameworks for cross-border transactions fundamentally do not have compatible legal infrastructures, cultural beliefs on which both parties may rely, or similar economic principles. Economic

4. RUMU SARKAR, INTERNATIONAL BUSINESS LAW 237 (2003).
5. *Id.* at 235-36.
6. *Id.* at 349.
7. As long as the countries are both signatories to the NYC.
8. *Id.* at 361.

development is its narrowest sense is defined as raising per capita standards of living. However, development occurs socially, legally as well as in the economic sphere.

Part I explores the Rule of Law programs addressing theoretical principles and development law principles. Rule of Law programs aim to systematize legal changes in a country including constitutional principles, substantive principles, and institutional frameworks. Ms. Sarkar uses a definition of development law that emphasizes interdisciplinary international corporate principles overlaid with economic, political, sociological, and historical issues. The reason practitioners should be aware of this perspective is because out of 180 countries in the world more than 120 are considered developing.[9]

Part II, entitled Structural Legal Reform, focuses heavily on nation-state macroeconomic reform. It begins with an overview of international borrowing including the role of the state in financing its development by borrowing from private commercial entities and public multilateral banks (IMF or IBRD). This borrowing has given rise to serious debt crisis and the restructuring of debt loans to include structural adjustment policies. These policies have come under severe criticism in recent years because of the focus on cutting state spending at all levels to improve the government's fiscal deficit and because the policies encourage privatization of former state owned enterprises (SOEs). These policies have been generally successful in keeping inflation low and providing economic stabilization. However, the "human cost" has been born by the sections of society least able to afford it, namely women, children, and the disabled. The policies have increased unemployment rates, lowered wages, and severely reduced social services.[10]

Part III discusses a human right to development. Ms. Sarkar cites the Universal Declaration of Human Rights for this proposition and further explores the individual's relation to the state.[11] Correctly, Ms. Sarkar observes the increasing gap between developed and developing countries. She analyzes what a right to development means and how it has worked in various countries and finds that the right to development exists, but countries must actively shape this right to give it real force in international law.[12] The book suggests a rule of law program that will integrate local needs and cultures to an international principle of development.

Ms. Sarkar's unique perspective is a welcome one in the international business transactions field. The theory and practice outlined in her two books are a meld of human development and economic reality applied to transnational business law.

9. Rumu Sarkar, Development Law and International Finance 1 (1999).
10. *Id.* at 104-5.
11. *Id.* at 213.
12. *Id.* at 249.