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# THE FUTURE UNDER INTERNATIONAL LAW OF THE RESPONSIBILITY TO PROTECT AFTER LIBYA AND SYRIA

*Ved P. Nanda*\*\*

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## INTRODUCTION

The United Nations (U.N.) Security Council’s paralysis, caused by the Russian and Chinese veto of resolutions addressing the Syrian crisis, calls into question the international community’s commitment to act collectively “in a timely and decisive manner” through the Security Council to protect

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\* Ved P. Nanda [John Evans Distinguished University Professor, University of Denver; Thompson G. Marsh Professor of Law and Director of the International & Comparative Legal Studies Program, University of Denver Sturm College of Law. This is an adapted version of the keynote address given at the “Modern Global Revolution” symposium presented by the Michigan State International Law Review on February 16-17, 2012. I would like to gratefully acknowledge the invaluable assistance of Joan Policastri, Foreign, International, and Comparative Law Librarian, Sturm College of Law, and Katharine Nanda, Esq., and to thank Dean Marty Katz and the College of Law for the summer research grant that supported this work.

the populations from mass atrocity crimes, including crimes against humanity.<sup>1</sup>

Several reports, including one each in the latter half of 2011 by the United Nations High Commissioner for Human Rights,<sup>2</sup> the U.N. Human Rights Council (HRC),<sup>3</sup> and the U.N. Committee Against Torture,<sup>4</sup> and one each by the HRC (February 22, 2012)<sup>5</sup> and Amnesty International (AI) (August 2012),<sup>6</sup> affirmed allegations that government forces and militias have committed gross human rights violations that are widespread and systematic, amounting to crimes against humanity with the apparent knowledge and consent of those at the highest level of the Syrian government.<sup>7</sup>

To illustrate, the fact-finding mission established by the Office of the United Nations High Commissioner for Human Rights analyzed first-hand information obtained through interviews conducted with victims and witnesses of murder and disappearances, torture, and persecution, and found patterns of human rights violations that may amount to crimes against humanity.<sup>8</sup> The first report of the Independent International Commission of Inquiry, submitted in November 2011, stated:

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1. This was the commitment undertaken by the heads of state and government gathered at the U.N. World Summit in New York in September 2005. 2005 World Summit Outcome, G.A. Res. 60/1, ¶139, U.N. Doc. A/RES/60/1 (Sept. 16, 2005) [hereinafter World Summit Outcome] (the atrocity crimes to which R2P applies include genocide, war crimes, and ethnic cleansing, along with crimes against humanity and their incitement).

2. U.N. Human Rights Council, Report of the United Nations High Commissioner for Human Rights on the Situation of Human Rights in the Syrian Arab Republic, A/HRC/18/53 (Sept. 15, 2011) [hereinafter A/HRC/18/53].

3. U.N. Human Rights Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, A/HRC/S-17/2/Add.1 (Nov. 23, 2011) [hereinafter A/HRC/S-17/2/Add.1].

4. U.N. Human Rights Office of the High Commissioner for Human Rights, Syria: UN Committee Against Torture Concerned About Gross and Widespread Rights Violations (Nov. 25, 2011) (reporting that the U.N. Committee Against Torture expressed alarm on November 25, 2011, that “prompt, thorough, and impartial investigations ha[d] not been undertaken” despite reports of massive human rights violations. It “requested the Government of Syria to provide it with a special report by 9 March 2012 . . .”).

5. U.N. Human Rights Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, A/HRC/19/69 (Feb. 22, 2012) [hereinafter Inquiry on the Syrian Arab Republic, 2012].

6. ALL-OUT REPRESSION: PURGING DISSENT IN ALEPPO, SYRIA, AMNESTY INT’L (2012), available at <http://www.amnestyusa.org/research/reports/all-out-repression-purging-dissent-in-aleppo-syria> [hereinafter ALL-OUT REPRESSION].

7. Appalled at the “indiscriminate and possibly deliberate . . . killing . . . in the area of Homs in Syria” in late May 2012, the U.N. High Commissioner for Human Rights said that these acts “may amount to crimes against humanity or other forms of international crime.” U.N. Human Rights Office of the High Commissioner for Human Rights, Syria: Pillay Says El Houleh Killings May Amount to International Crimes (May 27, 2012) (quoting Navi Pillay, U.N. High Commissioner for Human Rights).

8. A/HRC/18/53, *supra* note 2, at 3-4, 20.

The substantial body of evidence gathered by the commission indicates that these gross violations of human rights have been committed by Syrian military and security force since the beginning of the protests in March 2011. The commission is gravely concerned that crimes against humanity have been committed in different locations in the Syrian Arab Republic during the period under review.<sup>9</sup>

The second Commission report stated that the government had “manifestly failed in its responsibility to protect its people. Since November 2011, its forces have committed more widespread, systematic and gross human rights violations.”<sup>10</sup>

The AI report of August 2012 detailed a wide range of state-directed, systematic violations of human rights, including the deliberate targeting of peaceful protesters, hunting-down of injured protesters, torture, targeting of medics providing emergency treatment to the wounded, arbitrary arrests, and disappearances in Syria’s largest and most populous city, Aleppo.<sup>11</sup> The report, which was based on AI’s field research in and around Aleppo in late May 2012, concluded that the Syrian government was responsible for systematic violations in Aleppo amounting to crimes against humanity:

The cases and patterns of abuses investigated in this report, together with the gross and widespread human rights abuses documented by Amnesty International over the past 18 months in other parts of the country, constitute a body of evidence that Syrian government forces and state-armed militias have been responsible for crimes against humanity and war crimes.<sup>12</sup>

Because the commitment to protect the populations from serious human rights violations, including crimes against humanity and war crimes, constitutes the core of the Responsibility to Protect (R2P) principle adopted by the world’s leaders at the September 2005 U.N. World Summit,<sup>13</sup> the obvious question arises: what is the future of R2P? This inquiry is especially pertinent because after the invocation and application of R2P in Libya, which resulted in the North Atlantic Treaty Organization’s (NATO) intervention in 2011 leading to the overthrow of Muammar Gadhafi, Secretary-General Ban Ki-moon stated on January 18, 2012:

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9. A/HRC/S-17/2/Add.1, *supra* note 3, at 1.

10. A/HRC/19/69, *supra* note 5.

11. ALL-OUT REPRESSION, *supra* note 6, at 10-12, 18-20, 24-26.

12. *Id.* at 8. See also Written Statement, Amnesty Int’l, No More Impunity for Crimes Against Humanity in Syria (Dec. 2, 2011), available at <http://www.amnesty.org/en/library/asset/MDE24/083/2011/en/5ca30b30-247e-41c6-ba8c-4ec4a2b9d8fd/mde240832011en.pdf>.

13. See Ved P. Nanda, *From Paralysis in Rwanda to Bold Moves in Libya: Emergence of the “Responsibility to Protect” Norm Under International Law—Is the International Community Ready for It?*, 34 Hous. J. Int’l. L. 1, 39-45 (2011) [hereinafter *Paralysis in Rwanda*].

Today we mark the first decade in the life of the responsibility to protect. There will be many more, for we can now say with confidence that this fundamental principle of human protection is here to stay. . . .

In 2011, history took a turn for the better. The responsibility to protect came of age; The principle was tested as never before. The results were uneven, but at the end of the day, tens of thousands of lives were saved. We gave hope to people long oppressed. In Libya, Côte d'Ivoire, South Sudan, Yemen and Syria, by our words and actions, we demonstrated that human protection is a defining purpose of the United Nations in the twenty-first century.

We also learned important lessons. For one, we have learned that this Organization cannot stand on the sidelines when challenged to take preventive action.<sup>14</sup>

When the Secretary-General spoke, the U.N. was already facing a test in Syria. Since then, more than nine months have passed and Syria continues to burn, with the spiral of violence still on the rise. Day after day we hear reports of the carnage as innocent men, women, and children are tortured and killed. According to media reports, as of the beginning of September 2012, the death toll in Syria had reportedly already surpassed 18,000.<sup>15</sup>

After Libya, the R2P glow quickly faded. Silence at the U.N. has been accompanied by lack of an effective response by the international community. Hence, this question is valid: "Will R2P rhetoric suffer the same fate as the 'never again' slogan in the aftermath of the Holocaust?" This article is a response to that inquiry. Part II provides an historical context leading to the birth of R2P. This is followed in Part III by a review of the NATO action in Libya, and in Part IV, the Syrian crisis. Part V examines Brazil's proposal to supplement R2P with RWP (responsibility while protecting) and explores the means to implement and operationalize R2P. Part VI is the concluding section.

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14. U.N. Secretary General, *'Responsibility to Protect' Came of Age in 2011, Secretary-General Tells Conference, Stressing Need to Prevent Conflict Before it Breaks Out*, U.N. Doc. SG/SM/14068 (Jan. 18, 2012).

15. *Timely and Decisive Response Vital to Uphold 'Responsibility to Protect'-UN Officials*, U.N. NEWS CENTRE, <http://www.un.org/apps/news/story.asp?NewsID=42806&Cr=responsibility+to+protect&Cr1=#.UFPmdU8kWaI> ("The Secretary-General pointed to the immense human cost of failing to protect the population of Syria, where more than 18,000 people, mostly civilians, have died since the uprising against President Bashar al-Assad began 18 months ago."); *See also Syria Crisis: Death Toll Tops 17,000, Says Opposition Group*, HUFFINGTON POST WORLD (July 7, 2012), [http://www.huffingtonpost.com/2012/07/09/syria-crisis-death-toll-17000\\_n\\_1658708.html](http://www.huffingtonpost.com/2012/07/09/syria-crisis-death-toll-17000_n_1658708.html).

## I. THE GENESIS OF THE “RESPONSIBILITY TO PROTECT” PRINCIPLE AND ITS EVOLUTION

As the Secretary-General marked “the first decade in the life of the responsibility to protect,” he was implicitly referring to the December 2001 report of the International Commission on Intervention and State Sovereignty (ICISS), entitled *The Responsibility to Protect*,<sup>16</sup> which was most influential in giving the concept its final shape. It is worth noting that the Commission’s initiative was in response to the call of then—U.N. Secretary-General Kofi Annan in his Millennium Report to the General Assembly in April 2000, for member states to “unite in the pursuit of more effective policies, to stop organized mass murder and egregious violations of human rights.”<sup>17</sup>

The tragedies of Rwanda and Srebrenica, which had happened on Kofi Annan’s watch, were the precursors to his call. Humanitarian intervention as a possible response to such tragedies had come under severe criticism for its potential abuse.<sup>18</sup> Annan acknowledged the criticism as he stated: “[I]f humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica—to gross and systematic violations of human rights that affect every precept of our common humanity?”<sup>19</sup>

The ICISS’s response to this challenge was to shift the debate from the “right of humanitarian intervention” or “right to intervene,” to the

16. INT’L COMM’N ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT (2001), available at <http://responsibilitytoprotect.org/ICISS%20Report.pdf>. [hereinafter ICISS Report].

17. The Secretary-General’s Millennium Report, *We the Peoples: The Role of the United Nations in the 21st Century*, 47, U.N. Doc. A/54/2000 (April 3, 2000), [www.un.org/millennium/sg/report/ch3.pdf](http://www.un.org/millennium/sg/report/ch3.pdf). See also Press Release, Secretary General, ‘We the Peoples: The Role of the United Nations in the 21st Century,’ to General Assembly, U.N. Press Release GA/9704 (Apr. 3, 2000). See generally *Paralysis in Rwanda*, *supra* note 13 (discussing the development of the R2P concept and its invocations in Libya).

18. For discussion of humanitarian intervention, see generally 21 SEAN D. MURPHY, HUMANITARIAN INTERVENTION: THE UNITED NATIONS IN AN EVOLVING WORLD ORDER (Burns H. Weston et al. eds., 1996); FERNANDO R. TESÓN, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY (2d ed. 1997); Matthew C. Cooper, *A Note to States Defending Humanitarian Intervention: Examining Viable Arguments Before the International Court of Justice*, 40 DENV. J. INT’L L. & POL’Y 167 (2011); James A.R. Nafziger, *Humanitarian Intervention in a Community of Power Part II*, 22 DENV. J. INT’L L. & POL’Y 219 (1994); Ved P. Nanda et. al., *Tragedies in Somalia, Yugoslavia, Haiti, Rwanda and Liberia-Revisiting the Validity of Humanitarian Intervention under International Law-Part II*, 26 DENV. J. INT’L L. & POL’Y 827 (1998); Jide Nzelibe, *Courting Genocide: The Unintended Effects of Humanitarian Intervention*, 97 CALIF. L. REV. 1171 (2009); W. Michael Reisman, *Unilateral Action and the Transformations of the World Constitutive Process: The Special Problem of Humanitarian Intervention*, 11 EUR. J. INT’L L. 3 (2000); Thomas G. Weiss, *The Sunset of Humanitarian Intervention? Responsibility to Protect in a Unipolar Era*, 35 SECURITY DIALOGUE 135 (2004).

19. ICISS Report, *supra* note 16, at 2.

“responsibility to protect,” which meant a focus on the point of view of those seeking or needing support instead of those who may be considering intervention.<sup>20</sup> It must, however, be acknowledged that in the mid-1990s Francis Deng, then Special Representative on Internally Displaced Persons and later the Special Adviser for the Prevention of Genocide, and his colleagues at the Brookings Institution had already defined sovereignty not simply as a right but as a responsibility.<sup>21</sup> And as several international legal instruments have mandated, sovereignty is not without obligations.<sup>22</sup>

The ICISS’s “responsibility to protect” concept comprises three distinct responsibilities: the responsibility to prevent,<sup>23</sup> the responsibility to react (which in extreme cases may include military intervention),<sup>24</sup> and the responsibility to rebuild after military intervention.<sup>25</sup> The responsibility to prevent focuses on the importance of early warning mechanisms and conflict prevention, and on the use of diplomatic, economic, and military means to contain a conflict before it escalates. The responsibility to react applies when a state is either unable or unwilling to protect its citizens from massive human rights violations occurring in the state. The Commission proposed a “just cause” threshold for such intervention to be “serious and irreparable harm” to human beings, such as large scale “loss of life,” or large scale ethnic cleansing.<sup>26</sup> It also proposed four precautionary principles to guide the use of force once this threshold has been reached: 1) right intention to “halt or avert human suffering”;<sup>27</sup> 2) last resort after all diplomatic means have been explored; 3) proportional means;<sup>28</sup> and 4) reasonable prospect of success in ending the suffering so that “the

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20. *Id.* ¶ 2.29.

21. FRANCIS M. DENG ET AL., *SOVEREIGNTY AS RESPONSIBILITY: CONFLICT MANAGEMENT IN AFRICA* (1996); *See also* Francis M. Deng, *Frontiers of Sovereignty: A Framework of Protection, Assistance, and Development for the Internally Displaced*, 8 *LEIDEN J. INT’L L.* 249 (1995).

22. *See, e.g.*, Convention on the Prevention and Punishment of the Crime of Genocide, art. 1, Dec. 9, 1948, 102 Stat 3045, 78 U.N.T.S. 277 (obligating states to “prevent and punish” the crime of genocide). *See also* Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), U.N. Doc. A/RES/8082 (Oct. 24, 1970) (listing, along with the principle of sovereign equality of States, the duty of States to fulfill in good faith their international obligations); International Law Commission, Responsibility of States for Internationally Wrongful Acts, G.A. Res 56/83, 53rd Sess., Jan. 28, 2002, arts. 40, 41, U.N. Doc. A/RES/56/83 (Dec. 12, 2001) (calling for a positive duty of a State to cooperate to bring to an end any serious breaches of a peremptory norm of general international law).

23. ICISS Report, *supra* note 16, ¶¶ 3.1.43.

24. *Id.* ¶¶ 4.1-.43.

25. *Id.* ¶¶ 5.1-.31.

26. *Id.* ¶¶ 4.18-.19, 4.32-.33.

27. *Id.* ¶ 4.33.

28. *Id.* ¶ 4.39



consequences of action [are] not likely to be worse than the consequences of inaction.”<sup>29</sup>

The ICISS report identified the U.N. Security Council as the right authority under the U.N. Charter to authorize military intervention.<sup>30</sup> Addressing the veto issue, the Commission said that the five permanent members of the Security Council should agree not to use the veto where their vital state interests are not at stake, assuming there is majority support for such action.<sup>31</sup>

The report offered alternative options if the Security Council is unable to act: an emergency special session of the General Assembly under the “Uniting for Peace” resolution,<sup>32</sup> or action of regional organizations “subject to their seeking subsequent authorization from the Security Council.”<sup>33</sup> The report cautions the Security Council that if the Council fails to live up to its responsibility, single states or coalitions might take action.<sup>34</sup>

The next stage in the evolutionary process was the December 2004 Report of the High-Level Panel on Threats, Challenges and Change, established by Secretary-General Kofi Annan.<sup>35</sup> The Panel endorsed a “collective international responsibility to protect,” which it said was an “emerging norm,” while supporting the ICISS report’s recommendation that the Security Council is the proper U.N. body to authorize military intervention as a last resort “in the event of genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent.”<sup>36</sup> The Panel, however, did not discuss any alternative to the Security Council taking action, although it did urge the permanent members to refrain from “use of the veto in cases of genocide and large-scale human rights abuses.”<sup>37</sup>

The Panel also endorsed the ICISS report’s “just cause” threshold as well as its precautionary principles, while renaming the basic criteria of legitimacy—seriousness of threat, proper purpose, last resort, proper means,

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29. ICISS Report, *supra* note 16. at XII, ¶ 4.41.

30. *Id.* ¶¶ 6.13-6.15.

31. *Id.* ¶¶ 8.28-8.30.

32. *Id.* ¶¶ 6.29-6.30; Uniting for Peace, G.A. Res. 377 (V), U.N. Doc. A/1775 (Nov. 3, 1950).

33. ICISS Report, *supra* note 16, ¶¶ 6.31-6.35.

34. *Id.* ¶ 6.39.

35. See generally High-Level Panel on Threats, Challenges, and Change, U.N. Secretary-General, Report of the High-Level Panel on Threats, Challenges and Change: A More Secure World: Our Shared Responsibility, U.N. Doc. A/59/565 (Dec. 2, 2004).

36. *Id.* ¶ 203.

37. *Id.* ¶ 256.

and balance of consequences.<sup>38</sup> Kofi Annan accepted the Panel's recommendation in his March 2005 report.<sup>39</sup>

Finally, in September 2005, the U.N. World Summit of Heads of State and Government considered the Secretary-General's report and, while endorsing each state's "responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity," added that: "[t]his responsibility entails the prevention of such crimes."<sup>40</sup> The Summit further resolved:

The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means . . . to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, . . . on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.<sup>41</sup>

A comparison of the commitments undertaken by the 2005 World Summit with the recommendations in the ICISS report shows several differences between the two documents. The World Summit commitments are restrictive. First, the scope of the responsibility to protect is limited in the Outcome Document to genocide, war crimes, ethnic cleansing, and crimes against humanity, while the ICISS report encompassed "large scale loss of life" or "large scale ethnic cleansing." Second, the scope of possible collective action is limited in light of the Outcome Document's rather vague wording regarding the states' obligation when genocide and other atrocity crimes are committed—they are "prepared to act" in a timely manner "on a case-by-case basis." Third, there is no reference in the Outcome Document to the role of the General Assembly or the possibility of action without the Security Council's authorization. And fourth, the Outcome Document drops the ICISS's suggested guidelines on the use of force—the "just cause" threshold and the precautionary principles.

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38. *Id.* ¶ 207.

39. *See generally* U.N. Secretary-General, In Larger Freedom: Towards Development, Security and Human Rights for All, U.N. Doc. A/59/2005, (Mar. 21, 2005).

40. World Summit Outcome, *supra* note 1, ¶¶ 138-39.

41. *Id.* ¶ 139. For the commitments compared here between the World Summit Outcome Document principles and the ICISS report, see *id.* ¶¶ 139 and *supra* note 16, ¶¶ 4.18-.19, 4.32-.33, respectively. *See also* U.N. Secretary-General, Implementing the Responsibility to Protect: Rep. of the Secretary-General, U.N. Doc. A/63/677 (Jan. 12, 2009) (articulating R2P's three-pillar framework) [hereinafter *Implementing the Responsibility to Protect*].

## II. THE APPLICATION OF THE RESPONSIBILITY TO PROTECT IN LIBYA

The uprisings that toppled Hosni Mubarak in Egypt and Zine el-Abidine ben Ali in Tunisia did not spare Libya. In response to protests and demonstrations, which began in February 2011, the Muammar Qaddafi regime used force to suppress dissent.<sup>42</sup> The U.N. Secretary-General was outraged at reports that government troops had fired at demonstrators from aircraft, and called for an immediate end to the violence on February 21, 2011.<sup>43</sup> The following day, the Security Council issued a statement on the Libyan situation in which the members “expressed grave concern, condemned the violence” and repression against the civilians and demonstrators, and called upon the Libyan Government to “meet its responsibility to protect its population.”<sup>44</sup> Four days later, in response to the reports about the regime’s use of foreign mercenaries, detention and torture of the opposition, shooting of peaceful demonstrators, and indiscriminate killing, the Secretary-General called upon the Security Council to take concrete action.<sup>45</sup>

Expressing grave concern at the Libyan situation, the U.N. Security Council condemned the violence and use of force against civilians in Resolution 1970, which it adopted on February 26, 2011.<sup>46</sup> Prior to the adoption of this resolution, several U.N. officials had also condemned the serious violations of human rights in Libya. These included the U.N. High Commissioner for Human Rights, Navi Pillay, who denounced “the use of live ammunition . . . against peaceful protesters in Libya”<sup>47</sup> and called for an

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42. *See generally* Int’l Coal. for the Responsibility to Protect, *The Crisis in Libya*, RESPONSIBILITYTOPROTECT.ORG, <http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-libya> (last visited Sept. 2012).

43. Press Release, Secretary-General, Outraged Secretary-General Calls for Immediate End to Violence in Libya, U.N. Press Release SG/SM/13408 AFR/2119 (Feb. 22, 2011).

44. Press Release, Security Council, Security Council Press Statement on Libya, U.N. Press Release SC/10180 AFR/2120 (Feb. 22, 2011).

45. Press Release, Security Council, Fundamental Issues of Peace, Security at Stake, Secretary-General Warns as He Briefs Security Council on Situation in Libya, U.N. Press Release SC/10185 (Feb. 25, 2011); Press Release, Secretary-General, Secretary-General Tells Security Council Time to Consider Concrete Action in Libya, as Loss of Time Means More Loss of Lives, U.N. Press Release SG/SM/13418-SC/10186-AFR/2124 (Feb. 25, 2011).

46. *See* S.C. Res. 1970 (2011), U.N. Doc. S/RES/1970 (Feb. 26, 2011) [hereinafter U.N. Doc. S.C. Res. 1970].

47. U.N. Office of the High Comm’r for Human Rights, Pillay Denounces Violence by Security Forces in Libya, Bahrain and Other Countries in Middle East and North Africa (Feb. 18, 2011), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=10738&LangID=E>.

international inquiry into the violence,<sup>48</sup> and a group of U.N. Human Rights experts “who warned . . . that the gross violations of human rights committed by the government of Libya could amount to ‘crimes against humanity.’”<sup>49</sup>

The U.N. Human Rights Council adopted a resolution on February 25, 2011, strongly condemning “the gross and systematic human rights violations committed in Libya, including indiscriminate armed attacks against civilians, extrajudicial killings, arbitrary arrests, detention and torture of peaceful demonstrators, some of which may also amount to crimes against humanity.”<sup>50</sup> Under the resolution the Council established an independent international commission of inquiry to investigate the alleged human rights violations, and requested the Commission “to establish the facts and circumstances of such violations and of the crimes perpetrated and, where possible to identify those responsible . . . [so that] those individuals responsible are held accountable.”<sup>51</sup> The Council also recommended to the General Assembly to suspend Libya’s membership in the Human Rights Council,<sup>52</sup> which the General Assembly did on March 1, 2011.<sup>53</sup>

The Arab League, the African Union, and the Secretary General of the Organization of the Islamic Conference also condemned the violations of human rights and international human rights law being committed in Libya, which the Security Council welcomed in the preamble of Resolution 1970.<sup>54</sup>

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48. U.N. Office of the High Comm’r for Human Rights, Pillay Calls for International Inquiry into Libyan Violence and Justice for Victims (Feb. 22, 2011), <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10743&LangID=E>

49. U.N. Office of the High Comm’r for Human Rights, Libya: “Stop the Massacre”—UN Experts (Feb. 22, 2011), <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10747&LangID=E>

50. Human Rights Council Resolution 15/1, Situation of Human Rights in the Libyan Arab Jamahiriya, 15th Spec. Sess., U.N. Doc. A/HRC/RES/S-15/1 (Feb. 25, 2011) [hereinafter U.N. Doc. A/HRC/RES/S-15/1].

51. *Id.* ¶ 11. *See also* U.N. Office of the High Comm’r for Human Rights, Council Holds Interactive Dialogue with Commission of Inquiry on Alleged Human Rights Violations in Libya (June 9, 2011), <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11131&LANGID=E> (finding by the Commission on behalf of the Commission’s chair, Professor Cherif Bassiouni, that the government forces and their supporters had committed serious violations of international law, including murder, torture, persecution, and enforced disappearance, and presented it to the Human Rights Council meeting, and that these violations constituted “crimes against humanity” under customary international law, and as defined in the International Criminal Court’s statute, as well as committing serious violations of international humanitarian law, amounting to war crimes); *See also* Human Rights Council, Report of the International Commission of Inquiry to Investigate all Alleged Violations of International Law in the Libyan Arab Jamahiriya, U.N. Doc. A/HRC/17/44, 17th Sess. (June 1, 2011).

52. U.N. Doc. A/HRC/RES/S-15/1, *supra* note 50, ¶ 14.

53. Suspension of the Rights of Membership of the Libyan Arab Jamahiriya in the Human Rights Council, G.A. Res. 65/265, ¶ 1, U.N. Doc. A/RES/65/265 (Mar. 3, 2011).

54. U.N. Doc S.C. Res. 1970, *supra* note 46, at pmbl.

It welcomed the Human Rights Council's decision regarding the establishment of an independent international commission of inquiry,<sup>55</sup> and specifically invoked "the Libyan authorities' responsibility to protect its population."<sup>56</sup>

The Security Council deplored "the gross and systematic violation of human rights," expressed "deep concern at the death of civilians," rejected "unequivocally the incitement to hostility and violence against the civilian population made from the highest level of the Libyan government,"<sup>57</sup> demanded an immediate end to the violence, and urged the Libyan authorities to act "with the utmost restraint, respect human rights and international humanitarian law."<sup>58</sup> It also decided to refer the Libyan situation to the International Criminal Court<sup>59</sup> and imposed sanctions against Libya, including an arms embargo,<sup>60</sup> travel ban against named government officials,<sup>61</sup> and an asset freeze.<sup>62</sup> The Security Council established a new sanctions committee<sup>63</sup> and decided to remain actively seized of the matter.<sup>64</sup>

The Libyan government remained defiant, violence was on the rise, and there were calls for a no-fly zone and international action to protect civilians. To illustrate, in his statement to the General Assembly on March 1, the U.N. Secretary-General commented on the "reports that Government forces have fired indiscriminately on peaceful protesters," and reminded the General Assembly that "[o]ur collective challenge will be to provide real protection for the people of Libya."<sup>65</sup>

On the same day, the African Commission on Human and Peoples' Rights called on "the responsibility of the African Union, the Peace and Security Council of the African Union, and the International Community to take all the necessary political and legal measures for the protection of the

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* ¶ 2(a).

59. *Id.* ¶¶ 4-8. *See also* Press Release, International Criminal Court, Pre-Trial Chamber I Issues Three Warrants of Arrest for Muammar Gaddafi, Saif Al-Islam Gaddafi, and Abdullah al-Senussi (June 27, 2011), <http://www.icc-cpi.int/NR/exeres/D07229DE-4E3D-45BC-8CB1-F5DAF8370218.htm>. (reporting that the International Criminal Court issued warrants of arrest for Gaddafi, one of his sons, and Libya's Intelligence Chief on murder and persecution charges through the state apparatus and Security Forces which constituted crimes against humanity).

60. U.N. Doc. S.C. Res. 1970, *supra* note 46, ¶¶ 9-14.

61. *Id.* ¶15, Annex I.

62. *Id.* ¶¶ 17-22, Annex II.

63. *Id.* ¶ 24.

64. *Id.* ¶ 28.

65. Press Release, Secretary-General, United Nations Response To Violence Against Civilians in Libya Sends Strong Message; There is 'No Impunity' For Crimes Against Humanity, Secretary-General Says, U.N. Press Release, para. 11, SG/SM/13425, GA/11051, AFR/2130 (Mar. 1, 2011). *Id.* at para. 26.

Libyan population.”<sup>66</sup> The Secretary General of the Organization of the Islamic Conference (OIC), Professor Ekmeleddin Ihsanoglu, announced (on March 8) that the OIC “aligned with those calling for a no-fly zone over Libya with a view to protecting civilians from air strikes [, and] called on the Security Council to assume its responsibility in this regard.”<sup>67</sup> On March 10 the European Parliament adopted a resolution stressing “that the EU and its Member States must honour their Responsibility to Protect, in order to save Libyan civilians from large-scale armed attacks,” and calling on “the High Representative and the Member States to stand ready for a UNSC decision on further measures, including the possibility of a no-fly zone aimed at preventing the regime from targeting the civilian population . . . .”<sup>68</sup>

On March 12, “[t]he Arab League called on the UN Security Council [ ] to immediately impose a no-fly zone over Libya and announced its recognition of the rebel movement as that country’s legitimate government.”<sup>69</sup> Two days later, the Permanent Observer of the League of Arab States to the United Nations addressed a letter to the President of the U.N. Security Council informing him about the Council of the League’s decision “[t]o call upon the Security Council, in view of the deterioration in the situation in Libya, to shoulder its responsibility and take the measures necessary to immediately impose a no-fly zone on Libyan military aircraft . . . .”<sup>70</sup> The six Arab Gulf Countries also supported the imposition of a no-fly zone over Libya to protect civilians from attacks by the Libyan regime.<sup>71</sup>

On March 17, the Security Council adopted Resolution 1973,<sup>72</sup> which authorized member states “to take all necessary measures . . . to protect

66. African Comm’n on Human and Peoples’ Rights, *Resolution on the Human Rights Situation in the Great Socialist Peoples’ Libyan Arab Jamahiriya*, Res. 181 (Mar. 1, 2011), <http://www.achpr.org/sessions/9th-eo/resolutions/181/>.

67. *Ihsanoglu Support No-Fly Decision at Oic Meeting on Libya, Calls for an Islamic Humanitarian Programme in and Outside Libya*, ORG. OF ISLAMIC COOPERATION (Aug. 3, 2011), [http://www.oic/oci.org/topic\\_print.asp?t\\_id=5031](http://www.oic/oci.org/topic_print.asp?t_id=5031).

68. Resolution of 10 March 2011 on the Southern Neighbourhood, and Libya in particular, EUR. PARL. DOC. PV P7\_TA(2011)0095 (Mar. 10, 2011), ¶10, available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0095+0+DOC+XML+V0//EN>.

69. Richard Leiby & Muhammad Mansour, *Arab League Asks U.N. for No-Fly Zone Over Libya*, WASH. POST, Mar. 12, 2011, [http://www.washingtonpost.com/world/arab-league-asks-un-for-no-fly-zone-over-libya/2011/03/12/ABoie0R\\_print.html](http://www.washingtonpost.com/world/arab-league-asks-un-for-no-fly-zone-over-libya/2011/03/12/ABoie0R_print.html).

70. U.N. Security Council, Letter dated Mar. 14, 2011 from the Permanent Observer of the League of Arab States to the United Nations addressed to the President of the Security Council, para. 1, U.N. Doc. S/2011/137 (Mar. 15, 2011).

71. *GCC Supports No-Fly Zone Over Libya, Call for Urgent Arab Summit*, GOING GLOBAL EAST MEETS WEST—ARCHIVES (Mar. 8, 2011), <http://articlesofinterest-kelley.blogspot.com/2011/03/gcc-supports-no-fly-zone-over-libya.html>.

72. S.C. Res. 1973, U.N. Doc. S/RES/1973, (Mar. 17, 2011) <http://www.un.org/News/Press/docs/2011/sc10200.doc.htm#Resolution> [hereinafter U.N. Doc. S.C. Res. 1973].

civilians and civilian populated areas under threat of attack in [Libya], including Benghazi, while excluding a foreign occupation force of any form on any part of Libyan territory.”<sup>73</sup> At that time, Paul Williams and Colleen Popkin observed that “the world witnessed a brief moment of legal and moral clarity.”<sup>74</sup>

The Security Council did indeed take a bold step by reiterating the Libyan authorities’ responsibility to protect the Libyan population, reaffirming the primary responsibility of the parties to armed conflicts “to take all feasible steps to ensure the protection of civilians,”<sup>75</sup> and, as noted earlier, “[a]uthoriz[ing] Member States . . . to take all necessary measures . . . to protect civilians . . . .”<sup>76</sup> The Libyan situation called for such measures, for Gaddafi had earlier called the protesters “cockroaches” and promised to track them down and kill them, “house by house”—reminiscent of the language used by those perpetrating the Rwandan massacre—and had pledged “no mercy” to those who did not surrender as his forces were on the outskirts of Benghazi on March 17.<sup>77</sup> The Security Council established a no-fly zone<sup>78</sup> and further strengthened the sanctions imposed by Resolution 1970.<sup>79</sup>

Pursuant to the Security Council’s authorization, a coalition of western states intervened militarily in Libya with the U.S. undertaking an air campaign against Gaddafi’s forces and NATO assuming responsibility for enforcing the arms embargo and no-fly zone. Commencing in March and continuing until October 2011, NATO carried out military attacks in Libya. President Barack Obama offered the rationale for NATO’s intervention on March 28:

Qaddafi declared he would show “no mercy” to his own people. He compared them to rats, and threatened to go door to door to inflict punishment. We knew that if we . . . waited one more day, Benghazi, a city

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73. *Id.* ¶ 4.

74. Paul R. Williams & Colleen (Betsy) Popken, *North Africa and the Mideast: To Where?: Security Council Resolution 1973 on Libya: A Moment of Legal and Moral Clarity*, 44 CASE W. RES. J. INT’L L. 225, 225 (2011) [hereinafter Williams & Popken].

75. U.N. Doc. S.C. Res. 1973, *supra* note 72, pmb1.

76. *Id.* ¶ 4.

77. See, e.g., Kareem Fahim & David D. Kirkpatrick, *Qaddafi’s Grip on the Capital Tightens as Revolt Grows*, N.Y. TIMES (Feb. 22, 2011), [http://www.nytimes.com/2011/02/23/world/africa/23libya.html?\\_r=1&pagewanted=all](http://www.nytimes.com/2011/02/23/world/africa/23libya.html?_r=1&pagewanted=all) (quoting Col. Muammar el-Qaddafi); *Responsibility to Protect: The Lessons of Libya*, ECONOMIST, May 19, 2011, at 67, available at <http://www.economist.com/node/18709571>; Jon Lee Anderson, *Letter from Libya: Sons of the Revolution: Can a Ragtag Civilian Army Defeat a Dictator?* NEW YORKER (May 9, 2011), [http://www.newyorker.com/reporting/2011/05/09/110509fa\\_fact\\_anderson](http://www.newyorker.com/reporting/2011/05/09/110509fa_fact_anderson).

78. U.N. Doc. S.C. Res. 1973, *supra* note 72, ¶¶ 6-12.

79. *Id.* ¶¶ 13-21, Annex I, Annex II. (strengthening the arms embargo, ban on flying, and asset freeze).

nearly the size of Charlotte, could suffer a massacre that would have reverberated across the region and stained the conscience of the world.<sup>80</sup>

After seven months of military operations by NATO, the Gaddafi regime fell and his 42-year rule came to an end; eventually he was captured and died at the hands of rebels on October 20, 2011.<sup>81</sup> A week later the U.N. ended its Libya military mandate,<sup>82</sup> and NATO announced it was ending its military operations on October 31.<sup>83</sup>

As the Syrian government continued killing civilians and the Security Council took no action, Williams and Popkin, who applauded a “moment of legal and moral clarity” when the Security Council passed Resolution 1973 concerning Libya, later acknowledged that “[t]his moment of legal and moral clarity may have already passed.”<sup>84</sup> As I study the Syrian crisis, I will discuss this quandary.

### III. THE CRISIS IN SYRIA

#### A. Human Rights Violations in Syria Amounted to Crimes Against Humanity and War Crimes

On the heels of the R2P triumph in Libya, protests and nonviolent demonstrations in Syria, which began in mid-March 2011, were met with extreme violence and brutal repression by government forces to crush the opposition.<sup>85</sup> This repression led to defections from the army, acquisition of

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80. President Barack Obama, Remarks by the President in Address to the Nation on Libya at National Defense University (Mar. 28, 2011), available at <http://www.whitehouse.gov/photos-and-video/video/2011/03/28/president-obama-s-speech-libya>.

81. Kareem Fahim, Anthony Shadid, & Rick Gladstone, *Violent End to an Era as Qaddafi Dies in Libya*, N.Y. TIMES, Oct. 20, 2011, at 1.

82. Kim Sengupta, *Security Fears as UN Ends Libya Military Mandate: NTC Urges Continuation of NATO Operations to Secure Border and Counter Loyalist Attacks*, INDEP. (London), Oct. 28, 2011.

83. Richard Norton-Taylor, *Nato Ends Military Operations in Libya*, GUARDIAN (London), Oct. 31, 2011.

84. Williams & Popken, *supra* note 74, at 225, n.1.

85. For concise reports on Syria's continued state violence against civilians, see generally Global Ctr. for the Responsibility to Protect, *Current Crisis: Mass Atrocity Crimes are Occurring and Urgent Action is Needed: Syria* GLOBALR2P.ORG (Jan. 10, 2012), [http://www.globalr2p.org/media/pdf/R2P\\_MonitorMarch2012.pdf](http://www.globalr2p.org/media/pdf/R2P_MonitorMarch2012.pdf) [hereinafter R2P MONITOR, January 2012]; Global Ctr. for the Responsibility to Protect, *Current Crisis: Mass Atrocity Crimes are Occurring and Urgent Action is Needed: Syria* GLOBALR2P.ORG (Mar. 15, 2012), [http://www.globalr2p.org/media/pdf/R2P\\_MonitorMarch2012.pdf](http://www.globalr2p.org/media/pdf/R2P_MonitorMarch2012.pdf) [hereinafter R2P MONITOR, March 2012]; Global Ctr. for the Responsibility to Protect, *Current Crisis: Mass Atrocity Crimes are Occurring and Urgent Action is Needed: Syria* GLOBALR2P.ORG (May 15, 2012), [http://www.globalr2p.org/media/pdf/R2P\\_MonitorMay2012\\_Final.pdf](http://www.globalr2p.org/media/pdf/R2P_MonitorMay2012_Final.pdf) [hereinafter R2P MONITOR, May 2012]; Global Ctr. for the Responsibility to Protect, *Current Crisis: Mass Atrocity Crimes are Occurring and Urgent Action is Needed: Syria*



weapons from other countries by the opposition, and the start of an armed uprising aimed at toppling the regime of Bashar al-Assad. This eventually turned into a civil war. The protracted conflict between a regime under siege and a fractured opposition—with Iran and Russia supporting Assad and Saudi Arabia and Qatar, among others, supplying arms to the rebels—galvanized the sectarian divide between Alawites and Sunnis, with both sides receiving support from abroad; created unease among the Syrian Christian community; and stirred regional unrest and fear of instability.

Although the international community was outraged at reports of civilians being massacred in several places, the use of children as human shields by the army and militia, and the humanitarian catastrophe in Syria, the U.N.'s inaction was palpable. Russia and China repeatedly blocked efforts to get U.N. authority for tougher sanctions and stronger measures against the Syrian regime to stop the ongoing slaughter and humanitarian catastrophe.

The Assad regime's atrocities continued unabated. To illustrate, on July 27, 2012, the U.N. High Commissioner for Human Rights expressed deep alarm at the increased threat to civilians in Syria and noted a discernible pattern of actions by government forces as they tried to clear areas they claimed were occupied by opposition forces:

Typically, during the initial stages, after a village or urban district has been surrounded, water, electricity and food supplies are cut. This is followed by intense shelling and bombardment by a variety of weaponry, increasingly with air support from attack helicopters and now reportedly even jet aircraft. Then tanks move in, followed by ground forces who proceed door-to-door and reportedly often summarily execute people they suspect of being opposition fighters, although sometimes they detain them . . . . The bodies of those executed or otherwise killed are then sometimes burned or taken away.<sup>86</sup>

She added: "While such conclusions can only ultimately be reached in a court of law, it is my belief, on the basis of evidence gathered from various credible sources, that crimes against humanity and war crimes have been, and continue to be, committed in Syria."<sup>87</sup> She "was also concerned by reports of killings of unarmed prisoners and use of excessive force by authorities reacting to unrest in two prisons."<sup>88</sup>

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GLOBALR2P.ORG (July 15, 2012), [http://globalr2p.org/media/pdf/R2P\\_Monitor\\_July2012.pdf](http://globalr2p.org/media/pdf/R2P_Monitor_July2012.pdf) [hereinafter R2P MONITOR, July 2012].

86. U.N. Office of the High Commissioner for Human Rights, *Pillay Warns of Consequences Under International Law as Syria Conflict Escalates* (July 27, 2012), <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12393&LangID=E> (quoting Navi Pillay, U.N. High Commissioner for Human Rights).

87. *Id.*

88. *Id.*

In July 2012, Human Rights Watch reported a pattern of torture in detention centers run by Syrian intelligence agencies, indicating the regime's policy of torture and ill-treatment.<sup>89</sup> Based on 200 interviews with former detainees from twenty-seven detention centers, the report states: "Since the beginning of anti-government protests in March 2011, Syrian authorities have subjected tens of thousands of people to arbitrary arrests, unlawful detentions, and forced disappearances, ill-treatment, and torture, using an extensive network of detention facilities, an archipelago of torture centers, scattered throughout Syria."<sup>90</sup>

In response to the events in Syria, the UN Human Rights Council called upon the United Nations High Commissioner for Human Rights to appoint a fact-finding mission to investigate all alleged violations of international human rights law in Syria since March 2011.<sup>91</sup> On August 22, 2011, the Council considered the report of the fact-finding mission at its 17th Special Session and, having expressed "profound concern about its finding, including that there were patterns of human rights violations that may amount to crimes against humanity," it "decide[d] to dispatch urgently an independent international commission of inquiry . . . to investigate all alleged violations of international human rights law [in Syria] since March 2011."<sup>92</sup>

The Commission submitted its first report on November 23, 2011,<sup>93</sup> its second report on February 22, 2012,<sup>94</sup> and an oral update on June 26, 2012.<sup>95</sup> In another report on August 16, 2012, the Commission asserted that

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89. HUMAN RIGHTS WATCH, TORTURE ARCHIPELAGO: ARBITRARY ARRESTS, TORTURE AND ENFORCED DISAPPEARANCES IN SYRIA'S UNDERGROUND PRISONS SINCE MARCH 2011 79 (2012).

90. *Id.* at 1.

91. The Human Rights Council "express[ed] deep regret at the death of hundreds of people in connection with the recent and ongoing political protests in the Syrian Arab Republic, and grave concern at alleged deliberate killings, arrests and instances of torture of peaceful protesters by the Syrian authorities." Human Rights Council Res. S-16/1, The Current Human Rights Situation in the Syrian Arab Republic in the Context of Recent Events, 16th Spec. Sess., Apr. 29, 2011, U.N. GAOR, A/HRC/RES/S-16/1, at 1, ¶ 7 (Apr. 29, 2011).

92. Human Rights Council Res. S-17/2, Rep. of the Human Rights Counsel on its 17th Special Session, 17th Spec. Sess., Aug. 22, 2011, U.N. Doc. A/HRC/S-17/2, ¶¶ 2, 13 [hereinafter U.N. Doc. A/HRC/S-17/2].

93. Human Rights Council, Rep. of the Indep. Int'l Comm'n of Inquiry on the Syrian Arab Republic, 17th Sess., U.N. Doc. A/HRC/S-17/2/Add.1 (Nov. 23 2011) [hereinafter U.N. Doc. A/HRC/S-17/2/Add.1].

94. Human Rights Council, Rep. of the Indep. Int'l Comm'n of Inquiry on the Syrian Arab Republic, 19th Sess., U.N. Doc. A/HRC/19/69 (Feb. 22, 2012) [hereinafter U.N. Doc. A/HRC/19/69]; *See also* Press Release, U.N. Commission of Inquiry on Syria, Press Conference by Commission of Inquiry on Syria (Mar. 23, 2011) [http://www.un.org/News/briefings/docs/2012/120323\\_Syria.doc.htm](http://www.un.org/News/briefings/docs/2012/120323_Syria.doc.htm).

95. Human Rights Council, Oral Update of the Indep. Int'l Comm'n of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/20/CRP.1 (June 26, 2012) [hereinafter U.N. Doc. A/HRC/20/CRP.1].

both the Syrian government and the opposition had used “brutal tactics.”<sup>96</sup> However, it charged that government forces had been responsible for war crimes including murder, extrajudicial killings and torture, and gross violations of international human rights including unlawful killing, attacks against civilians, and acts of sexual violence. These crimes were committed in line with State policy, with indications of the involvement at the highest levels of the Government, as well as security and armed forces.<sup>97</sup>

The Commission faced a major challenge in its inability to visit Syria, despite repeated requests.<sup>98</sup> This lack of physical access to the country significantly hampered its investigation and its ability to fulfill its mandate. Although its chairperson did visit Damascus, the Commission had to collect firsthand accounts from people who had left the country. It also met with regional organizations, NGOs, and many individuals. The Commission’s methodology consisted of interviews in the field and electronically, via Skype or telephone, with witnesses and victims located inside the country; it conducted a total of 1,062 interviews from the time of its establishment in September 2011 through August 2012.

As its standard of proof, the Commission sought to obtain a reliable body of evidence that was consistent with other information, and thus the incidents reported were based on two or more consistent and reliable witness accounts, often further supported by additional corroborating evidence.<sup>99</sup> According to the Commission, a total of 7,928 people had been killed as of July 9, 2012; NGO reports ranged from 17,000 to 22,000, but the Commission was unable to confirm these figures.<sup>100</sup>

Based upon the substantial body of evidence the Commission gathered, it concluded in the first (November 2011) report that the Syrian military and security forces had committed gross violations of human rights. It expressed grave concern that

[c]rimes against humanity of murder, torture, rape or other forms of sexual violence of comparable gravity, imprisonment or other severe deprivation of liberty, enforced disappearances of persons and other inhumane acts of

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96. Human Rights Council, Rep. of the Indep. Int’l Comm’n of Inquiry on the Syrian Arab Republic, 21st Sess., U.N. Doc A/HRC/21/50 (Aug. 16, 2012) [hereinafter U.N. Doc A/HRC/21/50].

97. *Syrian Government and Opposition Forces Responsible for War Crimes- UN Panel*, UNITED NATIONS NEWS CENTRE (Aug. 15, 2012), <http://www.un.org/apps/news/story.asp?NewsID=42687&Cr=syria&Cr1=&Kw1=civil&Kw2=syria&Kw3=conflict#>.

98. For the reports of the Commission from which the information in this paragraph is obtained, see U.N. Docs. A/HRC/S-17/2/Add.1, *supra* note 93; A/HRC/19/69, *supra* note 94; and A/HRC/21/50, *supra* note 96.

99. U.N. Doc A/HRC/19/69, *supra* note 94, ¶ 10.

100. U.N. Doc. A/HRC/21/50, *supra* note 96, ¶¶ 38-40.

a similar character have occurred in different locations in the country since March 2011 . . . .<sup>101</sup>

Using a similar methodology as in the first report, the Commission concluded in its second report in February 2012:

The Government has manifestly failed in its responsibility to protect the population; its forces have committed widespread, systematic and gross human rights violations, amounting to crimes against humanity, with the apparent knowledge and consent of the highest levels of the State. Anti-Government armed groups have also committed abuses, although not comparable in scale and organization with those carried out by the State.<sup>102</sup>

The Commission added that the crimes against humanity and other gross human rights violations it had documented had been committed within a system of impunity.<sup>103</sup>

On June 14, Francis Deng and Edward Luck, then Special Advisers to the U.N. Secretary-General on the prevention of genocide and the responsibility to protect, respectively, issued a statement highlighting “the Syrian government’s manifest failure to protect its population.”<sup>104</sup> They urged “the U.N. Security Council to consider the request of the High Commissioner on Human Rights to refer the Syrian situation to the International Criminal Court.”<sup>105</sup>

In its oral update of June 26, the Commission reported on its special inquiry into the alleged killings at Al-Houla. As it was unable to visit the site of the killing, its report was based on interviews with witnesses either in person or, if they had fled the country, via telephone/Skype. The Commission found the perpetrators to be “*Shabbiha* or other local [pro-Government] militia from neighbouring villages,” and concluded that it had

[r]easonable grounds to believe that Government forces and *Shabbiha* have perpetrated unlawful killings, arbitrary arrests and detention and torture and other forms of ill-treatment . . . . Particularly affected are children . . . . interviews conducted by the Commission indicated that Government forces and *Shabbiha* have committed acts of sexual violence against men, women and children during the reporting period.<sup>106</sup>

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101. U.N. Doc. A/HRC/S-17/2/Add.1, *supra* note 93, ¶ 108.

102. U.N. Doc A/HRC/19/69, *supra* note 94, ¶ 126.

103. *Id.* ¶ 127.

104. Press Release, Statement of the Special Advisers of the Secretary-General on the Prevention of Genocide and the Responsibility to Protect on the Situation in Syria- New York, (June 14, 2012), *available at* <http://www.un.org/apps/news/infocus/Syria/press.asp?sID=44>.

105. *Id.*

106. U.N. Doc. A/HRC/20/CRP.1, *supra* note 95, ¶¶ 48, 106.

In its report dated, August 15, 2012, the Commission found that armed violence had increased in intensity and spread to new areas and, based upon “the intensity and duration of the conflict, combined with the increased organization capabilities of anti-government armed groups, “the Syrian conflict had met the legal threshold for a non-international armed conflict.<sup>107</sup> Thus, in its assessment of the actions of the parties to the hostilities, the Commission applied both international humanitarian law and international human rights law.<sup>108</sup>

The Commission found “reasonable grounds to believe that Government forces and the *Shabbiha* committed crimes against humanity, war crimes and violations of international human rights law and international humanitarian law.”<sup>109</sup> It also found reasonable grounds to believe that anti-Government armed groups had also violated human rights law and committed war crimes. The Commission underscored that it

[b]elieves that the large-scale operations during which the most serious violations were committed were conducted with the knowledge, or at the behest, of the highest levels of Government. Responsibility therefore rests with those who either ordered or planned the acts or, in the case of those in effective command and control, those who failed to prevent or punish the perpetrators. The consistent identification of the *Shabbiha* perpetrators of many of the crimes does not relieve the Government of its responsibility, as international law recognizes the responsibility of States that commit violations through proxies.<sup>110</sup>

Among NGOs, the Global Center for the Responsibility to Protect (Global R2P) reported on January 10, 2012, that “State violence against civilians in Syria constitutes ongoing crimes against humanity by the Syrian Arab Republic.”<sup>111</sup> It stated that since the beginning of the March 12 mass protest movement in Syria,

Syrian security forces have used tanks, warships and heavy weapons against centers of protest. The security forces have also indiscriminately fired live ammunition to disperse and terrorize civilian protesters. Since March massacres have been perpetrated against civilians in Damascus [and six more cities, including Homs].

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107. U.N. Doc A/HRC/21/50, *supra* note 96, Summary; *See also How is the Term “Armed Conflict” Defined in International Humanitarian Law?*, ICRC.ORG (Mar. 2008), <http://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf>.

108. U.N. Doc A/HRC/21/50, *supra* note 96, at 1.

109. *Id.* ¶ 145.

110. *Id.* ¶ 147.

111. R2P MONITOR, January 2012, *supra* note 85, at 2.

Crimes against humanity perpetrated by the Syrian government continue to pose a grave threat to civilians.<sup>112</sup>

Subsequently, in its July 2012 report, Global R2P asserted that “security forces and allied ‘shabiha’ militias have been intensifying their attacks [massacring civilians, using] helicopter gunships and tanks.”<sup>113</sup>

### B. The Response at the United Nations

At the United Nations the grave concern with the Syrian situation was accompanied by exploring all possible means to bring the conflict to an end and to ensure the protection of the population. Hence, in addition to the active engagement of the High Commissioner for Human Rights and the Human Rights Council, there were ongoing deliberations by members of both the Security Council and the General Assembly. As mentioned earlier, Russia and China stubbornly resisted any attempt by the Security Council to take strong measures against the Syrian government.

To briefly recapitulate, on August 3, 2011, a Security Council Presidential Statement condemned “the widespread violations of human rights and the use of force against civilians by the Syrian authorities.”<sup>114</sup> The Council adopted this Statement by consensus, with only Lebanon “disassociat[ing] itself from the statement.”<sup>115</sup> On October 4, 2011, after months of negotiations, a European-sponsored Security Council draft resolution<sup>116</sup> containing sanctions against Syria including travel bans and an arms embargo, was defeated after receiving nine affirmative votes but with China and Russia vetoing, while South Africa, India, Brazil, and Lebanon abstained.<sup>117</sup> The U.S. Representative to the U.N., Susan Rice, walked out after the vote, saying that “opposition to the resolution was a ‘cheap ruse by those who would rather sell arms to the Syrian regime than stand with the Syrian people.’”<sup>118</sup>

Then, as discussed earlier, on August 22, the U.N. Human Rights Council resolved to dispatch its Independent International Commission of Inquiry to Syria to investigate all alleged human rights violations since

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112. *Id.*

113. R2P MONITOR, July 2012, *supra* note 85, at 2.

114. Press Release, Security Council, Security Council, Security Council, in Statement, Condemns Syrian Authorities for ‘Widespread Violations of Human Rights, Use of Force against Civilians,’ U.N. Press Release SC/10352 (Aug. 3, 2011).

115. U.N. SCOR, 6598th mtg. at 2-3, U.N. Doc. S/PV.6598 (Aug. 3, 2011).

116. S.C. Res., U.N. Doc. S/2011/612 (Oct. 4, 2011).

117. Press Release, Security Council, Security Council Fails to Adopt Draft Resolution Condemning Syria’s Crackdown on Anti-Government Protestors, Owing to Veto by Russian Federation, China, U.N. Press Release SC/10403 (Oct. 4, 2011) [hereinafter U.N. Press Release SC/10403].

118. *China and Russia Veto UN Resolution Condemning Syria*, BBC NEWS (Oct. 5, 2011), <http://www.bbc.co.uk/news/world-middle-east-15177114>.

March 2011, in the Syrian Arab Republic, “to establish the facts and circumstances that may amount to such violations and of the crimes perpetrated and, where possible, to identify those responsible with a view of ensuring that perpetrators of violations, including those that may constitute crimes against humanity, are held accountable . . . .”<sup>119</sup> On November 2, there was a bit of hope when the Syrian government agreed to an Arab League peace plan to end the fighting,<sup>120</sup> but the hope was short-lived.<sup>121</sup>

On December 19, the General Assembly agreed to a resolution urging Syria to implement the Arab League plan of action “in its entirety,” including cooperating with the HRC’s commission of inquiry.<sup>122</sup> Resolution 66/176 “[s]trongly condemn[ed] the continued grave and systematic human rights violations by the Syrian authorities, such as arbitrary executions, excessive use of force and the persecution and killing of protesters and human rights defenders, arbitrary detention, enforced disappearances, torture and ill-treatment of detainees, including children . . . .”<sup>123</sup>

The next attempt to take action in the Security Council came on February 4, 2012, following the bloody siege of the city of Homs in which some 217 to 260 people were killed. The strongly worded draft resolution called for President Assad to step down and for stringent sanctions against the Assad regime. The resolution condemned the ongoing violence and called upon the Syrian government to uphold its commitments under an Arab League plan that it had signed in November. On this occasion, none of the members abstained, but China and Russia again cast vetoes.<sup>124</sup>

Subsequently, on February 16, the General Assembly overwhelmingly adopted another resolution, again

[s]trongly condemn[ing] the continued widespread and systematic violations of human rights and fundamental freedoms by the Syrian authorities, such as the use of force against civilians, arbitrary executions, the killing and persecution of protestors, human rights defenders and journalists, arbitrary detention, enforced disappearances, interference with

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119. Human Rights Council, Rep. of the Indep. Intl’l Comm. of Inquiry on the Syrian Arab Republic, 17th Spec. Sess., *supra* note 93, ¶ 113, ¶¶ 2, 13, U.N. Doc. A/HRC/S-17/2/Add.1 (Nov. 23, 11) [hereinafter U.N. Doc. A/HRC/S-17/2/Add.1].

120. *See generally* U.N. Secretary General, Secretary-General Hopes Syria Will Carry out Arab League Plan to End Crisis (Nov. 2, 2011), <http://www.un.org/apps/news/story.asp?NewsID=40292&Cr=syria&Cr1=&Kw1=arab+league&Kw2=syria+&Kw3=peace>.

121. *See generally* Death Toll Passes 3,500 as Syrian Crackdown Continues, Says UN Human Rights Office (Nov. 8, 2011), <http://www.un.org/apps/news/story.asp?NewsID=40326&Cr=syria&Cr1=&Kw1=arab+league&Kw2=syria+&Kw3=peace>.

122. G.A. Res. 66/176, ¶ 3, U.N. Doc. A/RES/66/176 (Feb. 23, 2012) [hereinafter U.N. Doc. A/RES/66/176]; *See* U.N. Secretary-General, General Assembly Urges Syria to Implement Arab League Plan to End Violence (Dec. 19, 2011), <http://www.un.org/apps/news/story.asp?NewsID=40782&Cr=syria&Cr1=&Kw1=general+assembly&Kw2=syria&Kw3=resolution>.

123. U.N. Doc. A/RES/66/176, *supra* note 122, ¶ 1.

124. S.C. Res., U.N. Doc. S/2012/77 (Feb. 4, 2012).

access to medical treatment, torture, sexual violence, and ill-treatment, including against children.<sup>125</sup>

A week later, on February 23, the Secretary General and the League of Arab States announced their appointment of Kofi Annan as a Joint Special Envoy on Syria.<sup>126</sup> This move was enthusiastically endorsed by the Security Council,<sup>127</sup> which

expressed its full support for [his] efforts . . . to bring an immediate end to all violence and human rights violations, secure humanitarian access, and facilitate a Syrian-led political transition to a democratic, plural political system, in which citizens are equal regardless of their affiliations or ethnicities or beliefs . . . .<sup>128</sup>

On March 26, the Syrian government accepted Kofi Annan's six-point proposal.<sup>129</sup> However, implementation again seemed unattainable. On April 4, 2012, the Security Council unanimously adopted Resolution 2042,<sup>130</sup> authorizing a team of up to thirty unarmed military observers "to liaise with the parties and to begin reporting on the implementation of a full cessation of armed violence in all its forms by all parties." The resolution noted the Syrian government's commitment to implement a ceasefire as of April 10, which the parties at that time apparently intended to observe, and underlined the urgency of full implementation of Kofi Annan's proposed six-point plan.<sup>131</sup>

The Syrian government, through its representative, pledged to support Mr. Annan's mission as long as it respected Syria's sovereignty, saying, "The time for violence is gone . . . the time for stewardship over us is gone

125. G.A. Res. 66/253, ¶ 2, U.N. Doc. A/RES/66/253 (Feb. 21, 2012) [hereinafter U.N. Doc. A/Res/66/253].

126. U.N. Secretary General, Syria: UN and Arab League Appoint Joint Envoy to Deal With Crisis (Feb. 23, 2012), <http://www.un.org/apps/news/story.asp?NewsID=41346&Cr=syria&Cr1=&Kw1=annan&Kw2=arab+league&Kw3=join>.

127. U.N. Doc. A/Res/66/253, *supra* note 125, ¶ 11.

128. U.N. Security Council, In Presidential Statement, Security Council Gives Full Support to Efforts of Joint Special Envoy of United Nations, Arab League to End Violence in Syria (Mar. 21, 2012), <http://www.un.org/News/Press/docs/2012/sc10583.doc.htm>. *See also* U.N. Secretary-General, Security Council Calls for Implementation of Six-Point Plan to End Crisis in Syria (Mar. 21, 2012), <http://www.un.org/apps/news/story.asp?NewsID=41598&Cr=syria&Cr1=>

129. *See* U.N. Secretary-General, Syrian Government Accepts UN-Arab League Envoy's Six-Point Plan to End Crisis (Mar. 27, 2012), <http://www.un.org/apps/news/story.asp?NewsID=41646&Cr=Syria&Cr1=&Kw1=six%2Dpoint+plan&Kw2=annan&Kw3=syria>.

130. S.C. Res. 2042, ¶ 7, U.N. Doc. S/RES/2042 (Apr. 14, 2012) [hereinafter U.N. Doc. S/RES/2042].

131. *See* U.N. Doc. A/RES/66/176, *supra* note 122, at 1.



as well.”<sup>132</sup> The Council stated that once the cessation of violence was sustained it would immediately establish a U.N. supervision mission in Syria to monitor all relevant aspects of the Annan plan. The parties to the six-point proposal, set forth in an annex to the resolution, agreed to

- work in an “inclusive Syrian-led political process to address the legitimate aspirations and concerns of the Syrian people”;
- stop the fighting through a U.N. supervised cessation of armed violence to protect civilians and stabilize the country, in which the government would stop moving troops into population centers and begin a pullback of military concentrations in those areas , and also work to cease armed violence, with U.N. supervision; the opposition would similarly stop fighting and work toward cessation of armed violence, with U.N. supervision;
- ensure access for provision of humanitarian assistance, including a daily two-hour pause for humanitarian access;
- “intensify the pace and scale of release of arbitrarily detained persons”;
- allow freedom of movement for journalists in the country; and
- “respect freedom of association and the right to demonstrate peacefully as legally guaranteed.”<sup>133</sup>

But the fighting did not cease.<sup>134</sup> Instead, it very soon escalated, and, as it was apparent that the called-for cessation of armed violence was “clearly incomplete,”<sup>135</sup> the Security Council’s action again became urgent. On April 21, the Council unanimously adopted Resolution 2043, establishing a ninety-day U.N. Supervision Mission to monitor the ceasefire and implementation of Resolution 2042 and deploying 300 unarmed military observers.<sup>136</sup>

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132. Press Release, Security Council, Security Council Unanimously Adopts Resolution 2042 (2012), Authorizing Advance Team to Monitor Ceasefire in Syria: Syria’s Representative Pledges Support for Mission, Stresses Sovereignty, U.N. Press Release SC/10609 (Apr. 14, 2012) (quoting Syria’s representative).

133. S.C. Res. 2042, *supra* note 130, Annex, Six Point Proposal of the Joint Special Envoy of the United Nations and the League of Arab States.

134. See, e.g., U.N. News Centre, *UN-Arab League envoy presses for ceasefire in Syria*, April 10, 2012, <http://www.un.org/apps/news/story.asp?NewsID=41735&Cr=syria&Cr1=&Kw1=syria&Kw2=ceasefire&Kw3=security+council>.

135. S.C. Res. 2043, at 2, U.N. Doc. S/RES/2043 (Apr. 21, 2012).

136. *Id.*

However, all efforts were unavailing. On July 19, yet another Security Council resolution calling for sanctions on Damascus was vetoed by China and Russia.<sup>137</sup> The Council's inaction was widely criticized.<sup>138</sup> In an August 3 resolution, the General Assembly expressed its "deep concern at the lack of progress towards implementation of the six-point plan, and deplor[ed] the failure of the Security Council to agree on measures to ensure the compliance of Syrian authorities with its decisions."<sup>139</sup> The resolution, which was passed by 133 in favor, twelve against, and thirty-one abstentions,<sup>140</sup> encouraged the Security Council to consider appropriate measures to hold accountable those responsible for human rights violations, including those that may amount to crimes against humanity.<sup>141</sup> The resolution reiterated the General Assembly's call for "an inclusive Syrian-led political transition to a democratic, pluralistic political system"<sup>142</sup>

In the face of what must have appeared a hopeless situation, Kofi Annan resigned as Joint Envoy on August 2, 2012, with very critical words for the Security Council's inability to exercise its authority to save the lives of innocent victims in Syria.<sup>143</sup> The Secretary-General announced that he and the Arab League had agreed upon Lakhdar Brahimi for Annan's replacement as Joint Envoy on August 17.<sup>144</sup>

137. See U.N. Secretary-General, Security Council fails to adopt resolution on Syria (Jul. 19, 2012), <http://www.un.org/apps/news/story.asp?NewsID=42513&Cr=Syria&Cr1=&Kw1=syria+&Kw2=security+council&Kw3=resolution>; U.S. Permanent Representative to the United Nations, U.S. Mission to the United Nations, Explanation of Vote by Ambassador Susan E. Rice, U.S. Permanent Representative to the United Nations, at a Security Council Session on Syria, July 19, 2012 (July 19, 2012), <http://usun.state.gov/briefing/statements/195246.htm>; Michelle Nichols, *Russia, China Veto Syria Resolution From UN Security Council*, HUFFINGTON POST (July 19, 2012), [http://www.huffingtonpost.com/2012/07/19/russia-china-syria\\_n\\_1686172.html](http://www.huffingtonpost.com/2012/07/19/russia-china-syria_n_1686172.html).

138. See, e.g., Amnesty Int'l, *Syria: Security Council Vote Will Embolden Violators*, AMNESTY.ORG, (July 19, 2012), <http://www.amnesty.org/en/news/syria-security-council-vote-fails-address-grave-human-rights-violations-2012-07-19>; José Luis Díaz, *The Security Council's Syria Shame*, CNN.com (Aug. 2, 2012), <http://globalpublicsquare.blogs.cnn.com/2012/08/02/the-security-councils-syria-shame/>.

139. G.A. Res. 66/253 B, at 2, U.N. Doc. A/RES/66/253 B (July 31, 2012) [hereinafter U.N. Doc. A/RES/66/253 B].

140. See Press Release, U.N. Dept. of Public Info., General Assembly, in Resolution, Demands All in Syria "Immediately and Visibly" Commit to Ending Violence That Secretary-General Says is Ripping Country Apart, U.N. Press Release GA/11266 (Aug. 3, 2012); See also Howard LaFranchi, *Syria: UN Security Council Inaction Earns Reprimand From General Assembly*, CHRISTIAN SCIENCE MONITOR (Aug. 2, 2012), <http://www.csmonitor.com/USA/Foreign-Policy/2012/0802/Syria-UN-Security-Council-inaction-earns-reprimand-from-General-earns-reprimand-from-General-Assembly>.

141. U.N. Doc. A/RES/66/253 B, *supra* note 139, ¶¶ 8-9.

142. *Id.* ¶ 16.

143. See, e.g., Rick Gladstone, *Resigning as Envoy to Syria, Annan Casts Wide Blame*, N.Y. TIMES, Aug. 2, 2012, available at [http://www.nytimes.com/2012/08/03/world/middleeast/annan-resigns-as-syria-peace-envoy.html?\\_r=1&pagewanted=all](http://www.nytimes.com/2012/08/03/world/middleeast/annan-resigns-as-syria-peace-envoy.html?_r=1&pagewanted=all).

144. See, e.g., Rick Gladstone, *Veteran Algerian Statesman to Succeed Annan as Special Syrian Envoy*, N.Y. TIMES, Aug. 18, 2012, available at

### C. Regional Response

Arab inter-governmental organizations have been at the forefront of the effort to address the conflict in Syria. The Arab Parliament, an eighty-eight-member advisory committee of lawmakers from the forty-four-member nations of the Arab League, called for monitors to leave Syria as their presence provided an imprimatur for the actions of the Syrian government. The Speaker of the Parliament called this a “clear violation of the Arab League protocol which is to protect the Syrian people.” He added, “We are seeing an increase in violence, more people are being killed including children . . . and all this in the presence of Arab League monitors, which has angered the Arab people.”<sup>145</sup>

The Arab League suspended Syria and imposed tough economic sanctions to isolate Syria from the rest of the membership in November 2011 after the Assad government accepted a peace plan,<sup>146</sup> but then blatantly ignored the plan and invaded Homs.<sup>147</sup> On August 15, the Organization of Islamic Cooperation (OIC) suspended Syria from membership in the organization, which represents 1.5 billion Muslims, because of “strong concern over the massacres and the inhumane acts that are being committed against the Syrian people.”<sup>148</sup>

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[http://www.nytimes.com/2012/08/18/world/middleeast/lakhdar-brahimi-algerian-statesman-to-succeed-kofi-annan-as-special-syrian-envoy.html?\\_r=1](http://www.nytimes.com/2012/08/18/world/middleeast/lakhdar-brahimi-algerian-statesman-to-succeed-kofi-annan-as-special-syrian-envoy.html?_r=1).

145. AFP, *Syria Activists Heap Criticism on Arab Monitors*, Tribune.com (Jan. 2, 2012), <http://tribune.com.pk/story/315415/syria-activists-heap-criticism-on-arab-monitors/> (quoting Salemal Diqbassi, Arab Parliament speaker), AFP, *Syria Activists Heap Criticism on Arab Monitors*, THE EXPRESS TRIBUNE.COM, (Jan. 2, 2012), <http://tribune.com.pk/story/315415/syria-activists-heap-criticism-on-arab-monitors/>.

146. See generally Neil MacFarquhar & Nada Bakri, *Arab League Says Syria Accepts Its Plan for Talks; Protesters Are Skeptical*, N.Y. TIMES, (Nov. 2, 2011), <http://www.nytimes.com/2011/11/03/world/middleeast/arab-league-says-syria-accepts-plan-for-talks.html>.

147. See *Times Topics: Arab League*, N.Y. TIMES, [http://topics.nytimes.com/topics/reference/timestopics/organizations/a/arab\\_league/index.html](http://topics.nytimes.com/topics/reference/timestopics/organizations/a/arab_league/index.html) (last updated Feb. 13, 2012).

148. See Salma Abdelaziz, Nick Paton-Walsh & Joe Sterling, *Organization of Islamic Cooperation Suspends Syria*, CNN, <http://www.cnn.com/2012/08/15/world/meast/syria-unrest/index.html> (last visited Aug. 15, 2012).

#### D. Sanctions against Syria<sup>149</sup>

Numerous states and regional organizations imposed diplomatic and economic sanctions on Syria during the course of its deadly war against its people. A number of states closed their embassies in Damascus and/or expelled the representatives of Syria. Also, many states and regional organizations imposed economic sanctions.

#### E. Nongovernmental Organizations' (NGOs) Response

NGOs have been equally frustrated in their efforts to make any meaningful inroads in protecting the Syrian population, but their work has been critical, nonetheless, in raising awareness of the ongoing Syrian crisis, as well as in monitoring the violations and providing humanitarian aid. The contributions of a selected few organizations are noted here.

After all of the efforts on the intergovernmental scale had clearly failed to halt the violence in Syria, and as the Syrian government's bloody repression drew ever greater and more organized resistance, on August 4, 2012, the International Committee for the Red Cross, which is responsible for the Geneva Conventions and their application in conflicts, characterized the situation as a "non-international armed conflict," or civil war.<sup>150</sup> Thus, it announced that henceforth all parties were subject to international humanitarian law:

Under international humanitarian law, the parties to the conflict must at all times distinguish between civilians and persons directly participating in hostilities. Attacks may be directed only against military objectives—

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149. See generally *Timeline of International Response to the Situation in Syria*, [http://www.globalr2p.org/media/pdf/Timeline\\_of\\_International\\_Response\\_to\\_Syria.pdf](http://www.globalr2p.org/media/pdf/Timeline_of_International_Response_to_Syria.pdf) (last visited Sept. 24, 2012); see also Carol J. Williams, *Sanctions Against Syria Hurting, Assad Regime Concedes*, L.A. TIMES, (May 23, 2012), [http://latimesblogs.latimes.com/world\\_now/2012/05/syria-sanctions-hurting.html](http://latimesblogs.latimes.com/world_now/2012/05/syria-sanctions-hurting.html); U.S. Dep't of the Treasury, Resource Center, *Syria Sanctions*, <http://www.treasury.gov/resource-center/sanctions/Programs/pages/syria.aspx> (last visited Aug. 24, 2012); *Swiss Target More Syrian Firms and Individuals*, Swissinfo.ch, (Aug. 14, 2012), [http://www.swissinfo.ch/eng/politics/foreign\\_affairs/Swiss\\_target\\_more\\_Syrian\\_firms\\_and\\_individuals.html?cid=33311532](http://www.swissinfo.ch/eng/politics/foreign_affairs/Swiss_target_more_Syrian_firms_and_individuals.html?cid=33311532); Laurence Norman, *EU Nations Reach Deal on New Syria Sanctions*, WSJ.COM, (July 19, 2012), <http://online.wsj.com/article/SB10000872396390444097904577537221674487292.html>.

150. Int'l Comm. of the Red Cross, News Release, *Syria: ICRC Urges Full Respect for International Humanitarian Law*, (Aug. 4, 2012, <http://www.icrc.org/eng/resources/documents/news-release/2012/syria-news-2012-07-31.htm> [hereinafter Red Cross News Release]. See *Syria in Civil War*, BBC NEWS, (Jul. 15, 2012, 2:08 PM), <http://www.bbc.co.uk/news/world-middle-east-18849362>; Geetha Pillai, *Syria Conflict Declared Civil War by Red Cross*, INTERNATIONAL BUSINESS TIMES, (July 16, 2012, 5:56 AM), <http://www.ibtimes.co.uk/articles/363225/20120716/syria-conflict-civil-war-red-cross-geneva.htm>.

never against civilians, or against civilian structures such as homes, schools or places of worship.<sup>151</sup>

This development is important in establishing the threshold for findings of international crimes committed in the course of the repression.

Within Syria, the Syrian Arab Red Crescent has had a major role in providing relief, but has been greatly hampered by the logistics of the war and competing political pressures.<sup>152</sup> On the international level, organizations concerned with human rights in Syria include Amnesty International, Human Rights Watch (HRW), the International Coalition for Responsibility to Protect (ICR2P), and the Global Center for the Responsibility to Protect (GCR2P).

Amnesty International has been extremely effective in bringing to light the egregious human rights violations occurring in the Syrian conflict, including issuing major reports such as *Deadly Reprisals*<sup>153</sup> and *All-Out Repression*.<sup>154</sup> Similarly, Human Rights Watch, ICR2P, and GCR2P have been actively monitoring the situation and issuing comprehensive reports and recommendations.<sup>155</sup>

#### IV. SUPPLEMENTING RESPONSIBILITY TO PROTECT WITH RESPONSIBILITY WHILE PROTECTING

Secretary-General Ban Ki-moon's 2009 report, *Implementing the Responsibility to Protect*,<sup>156</sup> is a seminal document in which he elaborated on the concept and further clarified it, especially highlighting its three pillars.<sup>157</sup> Pillar one states the primary responsibility of each state to protect

151. Red Cross News Release, *supra* note 150. (quoting Robert Mardini, ICRC Head of Operations for the Near and Middle East).

152. See, e.g., Integrated Reg'l Info. Networks (IRIN), *Principles or Pragmatism? Negotiating Access in Syria*, IRIN NEWS (June 8, 2012), <http://www.unhcr.org/refworld/docid/4fd72b982.html>; IRIN, *Syrian Red Crescent Fighting Perceptions of Partiality*, IRIN NEWS (Mar. 29, 2012), <http://www.irinnews.org/Report/95204/Analysis-Syrian-Red-Crescent-fighting-perceptions-of-partiality>.

153. AMNESTY INT'L, DEADLY REPRISALS: DELIBERATE KILLINGS AND OTHER ABUSES BY SYRIA'S ARMED FORCES (2012), available at <http://www.amnesty.org/en/library/asset/MDE24/041/2012/en/30416985-883b-4e67-b386-0df14a79f694/mde240412012en.pdf>.

154. Amnesty International, *All-Out Repression*, *supra* note 6.

155. See, e.g., Human Rights Watch (HRW), *UN: Human Rights Monitors Still Needed in Syria*, (Aug. 14, 2012), <http://www.hrw.org/news/2012/08/14/un-human-rights-monitors-still-needed-syria>; Ole Solvang, *Tracking Down Torture in Syria*, CNN Opinion, (Jul. 3, 2012), [http://articles.cnn.com/2012-07-03/opinion/opinion\\_solvang-syria-torture\\_1\\_syria-observers-journalists?\\_s=PM:OPINION](http://articles.cnn.com/2012-07-03/opinion/opinion_solvang-syria-torture_1_syria-observers-journalists?_s=PM:OPINION); HRW, *Torture Archipelago*, *supra* note 89; HRW, *Syria: Rights, Accountability Key to Transition Plan*, (Jun. 30, 2012), <http://www.hrw.org/news/2012/06/30/syria-rights-accountability-key-transition-plan>. For the websites of ICR2P and GCR2P, see [responsibilitytoprotect.org](http://responsibilitytoprotect.org) and [globalr2p.org](http://globalr2p.org), respectively.

156. *Implementing the Responsibility to Protect*, *supra* note 41.

157. See generally *id.*, ¶¶ 11-66.

its population from genocide, war crimes, ethnic cleansing, and crimes against humanity.<sup>158</sup> The second pillar states the international community's commitment to provide assistance to states in capacity building so that they can protect their populations from these crimes.<sup>159</sup> And pillar three articulates the international community's responsibility to take "timely and decisive" action to prevent and halt these crimes when a state is "manifestly failing" to protect the population.<sup>160</sup> A range of options for such action, both non-coercive and coercive, is available under Chapters VI, VII, and VIII of the U.N. Charter.<sup>161</sup> The document also provides for the General Assembly to be proactive, as provided under Charter Articles 10-14 and under the "Uniting for Peace" resolution.<sup>162</sup>

The Secretary-General emphasized the narrow scope of the Responsibility to Protect as limited to the four specified crimes. He recounted the impressive developments in Africa in redefining sovereignty, noting the Constitutive Act of the African Union, under which the Union has the right "to intervene in a Member State pursuant to a decision of the Assembly in respect to grave circumstances, namely: war crimes, genocide, and crimes against humanity."<sup>163</sup>

The General Assembly considered the Secretary-General's report, deliberating over a period of three days<sup>164</sup> — informal interactive dialogue on July 23<sup>165</sup> and two days of debate on July 24<sup>166</sup> and 28<sup>167</sup> — and adopted the resolution *The Responsibility to Protect* on September 14, 2009.<sup>168</sup> The resolution recalled the 2005 World Summit Outcome and took note of the report of the Secretary-General and of the "timely and productive"

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158. *Id.*, ¶¶ 11(c), 12-27.

159. *Id.*, ¶¶ 11(c), 28-48.

160. *Id.*, ¶¶ 11(c), 49-66.

161. *Id.*, ¶¶ 11(c).

162. *Id.*

163. Org. of African Unity [OAU], *The Constitutive Act*, art. 4 ¶ h, OAU Doc., [http://www.au2002.gov.za/docs/key\\_oau/au\\_act.htm](http://www.au2002.gov.za/docs/key_oau/au_act.htm) (last visited Sept. 24, 2012).

164. Press Release, Gen. Assembly, Delegates Weigh Legal Merits of Responsibility to Protect Concept as General Assembly Concludes Debate, U.N. Press Release GA/10850 (July 28, 2009).

165. Press Release, Gen. Assembly, Delegates Seek to End Global Paralysis in Face of Atrocities as General Assembly Holds Interactive Dialogue on Responsibility to Protect, U.N. Press Release GA/10847 (July 23, 2009).

166. Press Release, Gen. Assembly, More than 40 Delegates Express Strong Skepticism, Full Support as General Assembly Continues Debate on Responsibility to Protect, U.N. Press Release GA/10849 (July 24, 2009).

167. Press Release, Gen. Assembly, Delegates Weigh Legal Merits of Responsibility to Protect Concept as General Assembly Concludes Debates, U.N. Press Release GA/10850, (July 28, 2009).

168. G.A. Res. 63/308, U.N. Doc. A/RES/63/308 (Oct. 7, 2009); *See Articles and Op-Eds From the General Assembly Debate on RtoP*, ICRTOP <http://responsibilitytoprotect.org/index.php/component/content/article/136-latest-news/2498-articles-and-op-eds-from-the-general-assembly-debate-on-rtop> (last updated Aug. 27, 2012) (providing links to the press reports of the conversation on R2P).

deliberation in the General Assembly on the subject.<sup>169</sup> In its operative part, the General Assembly decided “to continue its consideration of the responsibility to protect.”<sup>170</sup>

Pursuant to that decision, the General Assembly discussed R2P in an informal interactive dialogue in August 2010.<sup>171</sup> Preceding the dialogue, the Secretary-General submitted a report, “Early Warning, Assessment and the Responsibility to Protect.”<sup>172</sup> In this report, he noted the UN’s weakness in its insufficient focus on early warning and risk analysis and the lack of sufficient information sharing during the Rwanda and Srebrenica tragedies.<sup>173</sup> He referred to several gaps in “providing the timely information and assessment needed to implement the Responsibility to Protect in a balanced, responsible, rigorous manner.”<sup>174</sup>

The Secretary-General underscored the importance of early engagement for understanding a given situation, which is equally important to framing strategies for either prevention or response. The report emphasized the need for well-informed action. Thus, [g]etting the right assessment—both of the situation on the ground and of the policy options available to the United Nations and to its regional and subregional partners—is essential for the effective, credible and sustainable implementation of the responsibility to protect and for fulfilling the commitments made by the Heads of State and Government at the 2005 World Summit.<sup>175</sup>

The Secretary-General suggested that the Assembly discuss in its next interactive dialogue in 2011 the role of regional organizations in implementing the responsibility to protect.<sup>176</sup>

In the General Assembly’s informal dialogue there was overall support for the R2P, although a few states remained critical.<sup>177</sup> The General Assembly also welcomed the Secretary-General’s suggestion that the next

169. *Id.*

170. G.A. Res. 63/308, *supra* note 168, ¶ 2.

171. See *GA Dialogue on Early Warning, Assessment and the Responsibility to Protect*, INTERNATIONAL COALITION FOR RESPONSIBILITY TO PROTECT (Aug. 2010), <http://www.responsibilitytoprotect.org/ICRtoP%20Report%20of%20EW%20dialogue%20on%209%20August%202010%20FINAL.pdf>; *Responsibility to Protect: Support Grows in GA but Detractors Remain Implacable*, INTERNATIONAL SERVICE FOR HUMAN RIGHTS, <http://www.ishr.ch/archive-general-assembly/865-responsibility-to-protect-support-grows-but-detractors-remain-implacable> (last updated Aug. 24, 2010) [hereinafter *Responsibility to Protect: Support Grows in GA but Detractors Remain Implacable*].

172. U.N. Secretary-General, *Early Warning, Assessment and the Responsibility to Protect: Rep. of the Secretary-General*, U.N. Doc. A/64/864 (July 14, 2010) [hereinafter U.N. Doc. A/64/864].

173. *Id.* ¶ 7.

174. *Id.* ¶ 10.

175. *Id.* ¶ 19.

176. *Id.* ¶ 14.

177. *Responsibility to Protect: Support Grows in GA but Detractors Remain Implacable*, *supra* note 171.

interactive dialogue focus on the role of regional organizations in implementing R2P.<sup>178</sup>

The next informal interactive dialogue took place on July 12, 2011.<sup>179</sup> The Secretary-General presented a report on June 27, 2011, entitled “The Role of Regional and Sub-Regional Arrangements in Implementing the Responsibility to Protect.”<sup>180</sup> In his report, the Secretary General highlighted the partnership and collaboration between the U.N. Secretariat, on the one hand, and the regional organizations on the other. He noted the ongoing contacts between his special advisers on the prevention of genocide and on the responsibility to protect, and regional groups on both thematic issues and specific country situations.<sup>181</sup> Addressing the General Assembly on July 12, the Secretary-General acknowledged that the record on atrocity prevention is still mixed and anticipated that dialogue would “open a sustained cross-regional conversation on lessons learned and practical experiences.”<sup>182</sup>

The next interactive dialogue took place on September 5, 2012, on the third pillar—collective, timely, and decisive response when a state is “manifestly unwilling to protect its population.”<sup>183</sup> As in the past, prior to the Assembly meeting, the Secretary-General presented his report on July 25, entitled “Responsibility to protect: timely and decisive response.”<sup>184</sup>

The timing was critical for the discussion of the third pillar, as the complexity of the Syrian situation had presented a dilemma for invocation and application of R2P. Unquestionably, the Syrian government has the responsibility to protect its population, which, as the first pillar mandates, is an affirmation of each state’s duty under international law. As to the second pillar, the international community’s assistance to states to develop local capacities to protect populations from atrocity crimes, the rapid pace of events in Syria made such assistance impossible. Every initiative of the

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178. *Id.*

179. *Interactive Dialogue of the UN General Assembly on the Role of Regional and Sub-Regional Arrangements in Implementing the Responsibility to Protect*, INTERNATIONAL COALITION FOR THE RESPONSIBILITY TO PROTECT (Aug. 2011), [http://www.responsibilitytoprotect.org/ICRtoP%20Report%20on%20RIGOGA%20dialogue%20on%20RtoP%20FINAL\(1\).pdf](http://www.responsibilitytoprotect.org/ICRtoP%20Report%20on%20RIGOGA%20dialogue%20on%20RtoP%20FINAL(1).pdf).

180. U.N. Secretary-General, *The Role of Regional and Subregional Arrangements in Implementing the Responsibility to Protect: Rep. of the Secretary-General*, U.N. Doc. A/65/877-S/2011/393 (June 28, 2011).

181. *Id.* ¶ 30.

182. Press Release, U.N. Secretary-General, History of Atrocity Crimes is Not One of Acting Too Boldly, But of Doing Too Little, Too Late, Secretary-General Tells General Assembly, U.N. Press Release SG/SM/13700 GA/11113 (July 12, 2011).

183. See Press Release, General Assembly, World Not Fulfilling “Never Again” Vow, Secretary-General Tells General Assembly Meeting on Responsibility to Protect; Use of Force Must Be Last Resort, Says President Before Panel Discussion, U.N. Press Release GA/11270 (Sept. 5, 2012) [hereinafter U.N. Press Release GA/11270].

184. General Assembly, *Report of the Secretary-General, Responsibility to Protect: Timely and Decisive Response*, U.N. Doc. A/66/874-S/2012/578, July 25, 2012.



international community was either ignored or rebuffed by the Assad government. And protests against the government were brutally repressed by the Assad regime, which led to the use of violence by the opposition, as well.

As the preceding discussion has shown, state-directed crimes against humanity and war crimes were committed in Syria and continue as of the time of this writing. The national authorities have manifestly failed to protect their population from atrocities and intense violence, which has resulted in high casualties; they indeed have been the primary perpetrators of these crimes. Vetoes by China and Russia in the Security Council did not permit the invocation and application of R2P, so neither effective non-coercive nor coercive measures could be taken by the international community. However, even if the Security Council could reach a consensus on taking effective non-coercive measures against the Assad regime in order to compel the security forces and militia to halt their excessive violence, assuming that the Syrian government did not halt its brutal repression, it is doubtful that there could be agreement on collective military intervention.

Although there is a stronger case for the use of the third pillar of R2P in Syria than there was in Libya, and there is a moral imperative to react when such egregious violations of human rights occur the situation in Syria is complex. The army is strong and well trained, extremists have reportedly joined the ranks of the rebels, and the opposition lacks unity. Minorities are apprehensive about possible persecution under a new regime, and there is a likelihood that in light of the inflammatory regional setting, a military intervention might trigger regional instability. Furthermore, a nuanced approach under R2P is called for, because R2P may not be invoked unless there are reasonable prospects of success in protecting the lives and well-being of people, so that the situation is made better for them rather than worse. Coupled with this complexity in Syria there were concerns about NATO having exceeded the Security Council's mandate in its implementation of Resolution 1973 by focusing on regime change in Libya rather than on protection of the people.<sup>185</sup>

This was the situation after the second Russian and Chinese veto in the Security Council on October 4, 2011,<sup>186</sup> that the Permanent Representative of Brazil, Maria Luiza Ribeiro Viotti, presented to the Secretary General a concept note, entitled *Responsibility while protecting: Elements for the development and promotion of a concept*,<sup>187</sup> for circulation to member

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185. The Russian and Chinese vetoes of the Security Council resolution on Syria on October 4, 2011, and the abstention by the other BRICS (Brazil, India, and South Africa, as non-rotating members on the Security Council) were apparently in part due to a backlash against NATO's intervention in Libya, purportedly to protect the civilian population there, but apparently aimed at bringing about a regime change. See *supra* note 117.

186. *Id.*

187. U.N. Permanent Rep. of Brazil, *Annex to the Letter dated 9 November 2011 from the Permanent Representative of Brazil to the United Nations addressed to the Secretary-*

states. The note stressed the “painful consequences” of past interventions—aggravation of existing conflicts, increased incidence both of terrorism and vulnerability of civilian populations, and new cycles of violence— and a “growing perception” that R2P might be misused for purposes such as regime change.<sup>188</sup>

RWP highlights prevention as “always the best policy”<sup>189</sup> and the use of force as a measure of last resort,<sup>190</sup> always to be authorized by the Security Council under Chapter VII, or “in exceptional circumstances, by the General Assembly, in line with” the Uniting for Peace Resolution.<sup>191</sup> Force must meet the standard of proportionality and not exceed the mandate conferred by the Security Council or the General Assembly, nor “generate more harm than it was authorized to prevent.”<sup>192</sup>

In addition the concept paper calls for the three pillars to strictly follow “political subordination and chronological sequencing.” The emphasis on sequencing is to distinguish between collective responsibility in the application of non-coercive measures and collective security, where there is a threat or situation of violence against civilians that is characterized as a threat to international peace and security.<sup>193</sup> It also proposes the creation of a monitoring and assessment system to review the use of force as it evolves.<sup>194</sup>

RWP, which is aimed at ensuring strict regulation of R2P, supplements R2P by adding new principles and procedures. It suggests specific criteria which the Security Council must consider before authorizing the use of force: force must be a measure of last resort, it must meet the test of proportionality, and it must not cause “more harm than it was authorized to prevent.”<sup>195</sup> These criteria are similar to those recommended by the International Commission on Intervention and State Sovereignty (ICISS) discussed earlier, which form the basis of R2P.<sup>196</sup> RWP also calls for enhanced Security Council procedures for monitoring and assessing the interpretation and implementation of the Council’s resolution authorizing the use of force.

RWP’s focus on prevention is a reaffirmation of R2P’s pillar one. And its suggested criteria on the use of force are helpful supplements to R2P. But the proposed chronological sequencing of R2P’s three-pillar framework

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*General*, U.N. Doc. A/66/551-S/2011/701 (Nov. 11, 2011) [hereinafter U.N. Doc. A/66/551-S/2011/701].

188. *Id.* ¶¶ 9-10.

189. *Id.* ¶11(a).

190. *Id.* ¶ 7.

191. *Id.* ¶11(c).

192. *Id.* ¶¶11(d)-(f).

193. U.N. Doc. A/66/551-S/2011/701, *supra* note 187, ¶ 6.

194. *Id.* ¶ 11(h).

195. A/66/551-S/2011/701, *supra* note 187, ¶¶ 7, 11.

196. *See supra* notes 23-34 and accompanying text.

is a departure from the 2005 World Summit Outcome and from Secretary-General Ban Ki-moon's 2009 articulation of a three-pillar framework.<sup>197</sup> At the U.N. Informal Discussion on RWP of February 21, 2012, the International Coalition for the Responsibility to Protect (ICR2P) emphatically made this point:

The Secretary-General never called for the chronological sequencing of the pillars but rather established them together as representative of the full scope and range of measures necessary to protect. Every crisis situation is unique and requires a response according to the circumstances and needs of the population. All actors must have the full range of tools available when operating to prevent or halt crimes under RtoP. Restructuring the three-pillar framework would risk creating a system for prevention and reaction that fails to consider the particular elements of a crisis. Furthermore, the chronological sequencing of the three pillars would risk impeding timely and decisive action by limiting the array and flexibility of measures available and establishing required actions to be taken regardless of the needs of those under threat of mass atrocities. It is in this regard, that ICRtoP strongly believes that the conceptual foundation of the Responsibility to Protect must not be renegotiated.<sup>198</sup>

The distinction between collective responsibility, which can be exercised through non-coercive measures, and collective security, requiring the Security Council's characterization as a threat to international peace and security, also raises concerns as it goes beyond the language of paragraph 139 of the Summit Outcome,<sup>199</sup> which explicitly refers to Chapter VII for the taking of collective action in the exercise of R2P. The ICR2P has again aptly stated that "genocide, war crimes, crimes against humanity and ethnic cleansing are by definition and under international law threats to international peace and security, thus requiring Member States and the UN to take preventive and reactive measures when faced with the threat of these crimes."<sup>200</sup>

It is in light of the Syrian crisis and Brazil's RWP initiative that we should consider the Secretary-General's July 2012 report and the General Assembly's informal interactive dialogue of September 2012. In his report, Secretary-General Ban Ki-moon provided an historical context for the genesis of the R2P concept and its development within the United Nations since its 2005 adoption. The report noted the three-pillar framework and

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197. See *supra* text accompanying note 41.

198. Megan Schmidt, *Informal Discussion on "Responsibility while Protecting" ICRtoP* (Feb. 21, 2012), <http://www.responsibilitytoprotect.org/ICRtoP%2021%20Feb%20RwP.pdf> [hereinafter Schmidt].

199. See World Summit Outcome, *supra* note 1, ¶ 138.

200. Schmidt, *supra* note 198, ¶ 5.

asserted that these pillars “are not sequential and are of equal importance; without all three the concept would be incomplete.”<sup>201</sup>

The Secretary-General emphasized the broad range of measures available under the third pillar of R2P, which articulates the member states’ responsibility to respond collectively in a timely and decisive manner when a state is manifestly failing to protect its population.<sup>202</sup> While R2P emphasizes prevention, the report suggests that one should not draw too sharp a distinction between prevention and response, for

[p]revention and response must be seen as closely connected. Early prevention should address structural factors that affect a state’s capacity both to prevent and to respond to the four specified crimes and violations. The Office of my two Special Advisers has developed an “analysis framework” that identifies factors that can be used to assess the risk of these crimes and violations. Further work could be done to develop and sharpen response tools to address each risk factor.<sup>203</sup>

In discussing the connections between prevention and response, the Secretary-General noted that the first two pillars of R2P are generally associated with prevention and the third pillar with response. But “[t]he dividing lines are . . . not so clear in practice, as action under either pillar one or two may include elements of both prevention and response.”<sup>204</sup>

The report addressed the issue of sequence by stating that there is an interactive and mutually supportive relationship between the three pillars. It emphasized that:

[p]illars are not sequenced. The question should therefore never be under what circumstances the responsibility to protect “applies”. This wrongly implies that there are situations where states do not have a responsibility to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. It is clear that every state has an inherent responsibility to protect. The question we confront is one of how best to achieve the goals of RtoP in different circumstances.<sup>205</sup>

The report stated that U.N. peacekeeping missions are implemented under pillar two and therefore should be distinguished from action under pillar three because, “[w]hile the work of peacekeepers may contribute to the achievement of R2P goals, the two concepts of the responsibility to protect and the protection of civilians have separate and distinct prerequisites and objectives.”<sup>206</sup>

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201. See U.N. Doc. A/66/874-S/2012/578, *supra* note 184, ¶ 2.

202. *Id.* ¶ 3.

203. *Id.* ¶ 7.

204. *Id.* ¶¶ 11-12.

205. *Id.* ¶ 13.

206. *Id.* ¶ 16.

The report reiterates that “[r]esponsibility is an ally of sovereignty, in that collective action by the international community is not called for where a State fully discharges its sovereign responsibility to protect.”<sup>207</sup> The Secretary-General also set forth five lessons learned from experience to date: 1) R2P should be applied consistently and uniformly, but as each situation is distinct, the methods and tools used should differ according to each situation; 2) it is essential that principles are applied consistently both in utterances and implementation so that international responses do not lead to charges of double standards and selectivity; 3) experience has shown the need to understand how the three pillars relate to and reinforce each other; 4) an effective and integrated strategy to protect populations is likely to include elements of both prevention and response; and 5) prevention and response measures are most effective when the United Nations works in tandem with its regional partners.<sup>208</sup>

The report discusses at length both non-coercive and coercive tools available for implementation under Chapters VI, VII, and VIII<sup>209</sup> of the U.N. Charter to help protect populations from the four specified crimes and violations. These include mediation and preventive diplomacy, public advocacy, fact-finding missions and commissions of inquiry, monitoring and observer missions, the International Criminal Court, and finally, when diplomatic and other peaceful means fail, “timely and decisive” collective action is called for under Chapter VII.<sup>210</sup> In concluding this section, the report emphasized that

[t]here is room for Member States to think and act more strategically. Measures, especially those under Chapters VI and VII of the Charter, should be applied as early as possible. While military enforcement must remain part of the toolbox, our primary aim should be to respond early and effectively in non-coercive ways and thereby reduce the need for force. . . . Strengthening modes of collaboration between the national, the regional and the international levels in this regard continues to be necessary.<sup>211</sup>

While reemphasizing that “[t]he integrity and credibility of the concept depends upon its full, faithful and consistent application,”<sup>212</sup> the report referred to those at the international, regional, national, and local levels who have obligations to protect their populations and those who must respond under pillar three in implementing R2P.<sup>213</sup> It specifically noted the role of the Human Rights Council, the ten U.N. treaty bodies of human rights

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207. U.N. Doc. A/66/874-S/2012/578, *supra* note 184, ¶ 18.

208. *See id.* ¶ 20.

209. *Id.* ¶¶ 21-37.

210. *Id.* ¶¶ 23-31.

211. *Id.* ¶ 37.

212. *Id.* ¶ 38.

213. U.N. Doc. A/66/874-S/2012/578, *supra* note 184, ¶¶ 38-48.

conventions, the Office of the High Commissioner of Human Rights, the U.N. Children's Fund, and the Office of the High Commissioner for Refugees, along with individual and regional and sub regional organizations. It also noted the role of humanitarian organizations, national and international civil society organizations, private companies and businesses, and individuals.

The report concluded this section by stating that the international community's response to these atrocity crimes "is most effective when actions are tailored to individual circumstances and calibrated appropriately."<sup>214</sup> It emphasized that in all situations, "we must not lose sight of our common goal—the protection of populations from genocide, war crimes, ethnic cleansing and crimes against humanity—and we must focus on finding a common viable strategy for achieving it."<sup>215</sup>

The Secretary-General welcomed the Brazilian initiative on "responsibility while protecting," stating that it had "received considerable attention from Member States as the international community has sought to refine and apply the concept" in light of the Libyan intervention.<sup>216</sup> With the expanded use of the concept as it has been invoked in several situations, the report noted the need to understand how to operationalize the concept "in a manner that is responsible, sustainable and effective,"<sup>217</sup> and also the importance of conducting early warning and assessment "fairly, prudently and professionally, without political interference or double standards."<sup>218</sup>

While observing that in essence the "responsibility while protecting" calls for "doing the right thing, in the right place, at the right time and for the right reasons," the report focused on the need for assessment because "[a]n early and flexible response strategy requires dynamic assessment, focusing on trends and developments, not just the latest headlines."<sup>219</sup>

On the Libyan crisis the report observed that the Security Council action under Chapter VII was authorized after most member states had concluded that peaceful measures had proved inadequate. But it acknowledged that some member states are concerned that non-coercive measures were not given adequate time to take effect, and that the implementation of Security Council Resolution 1973 exceeded the Council's mandate.<sup>220</sup> Thus, going forward, these concerns must be taken into account and the Security Council must continue to respond flexibly, as it has a wide degree of latitude to decide on the appropriate course of action.<sup>221</sup>

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214. *Id.* ¶ 48.

215. *Id.*

216. *Id.* ¶ 50.

217. *Id.* ¶ 49.

218. *Id.* ¶ 51.

219. U.N. Doc. A/66/874-S/2012/578, *supra* note 184, ¶ 53.

220. *Id.* ¶ 54.

221. *Id.*

Acknowledging that civilian lives were lost during the air campaign notwithstanding NATO's focus on minimizing civilian casualties, the report emphasized the importance of military actors "taking all possible precautions to avoid situations that place civilians at risk."<sup>222</sup> It reiterated the Secretary-General's preference for prevention in implementing R2P, which requires non-forcible measures. However, it emphasized that coercive measures should neither be left out of the protection strategy nor set aside for use only after all other measures have been applied and found to be inadequate. Thus, the report favored an early and flexible response, taking into consideration all the tools available under Chapters VI, VII, and VIII of the U.N. Charter, and tailoring each circumstance to each situation to ensure the protection of populations.<sup>223</sup>

While observing that the application of the third pillar will sometimes entail difficult choices, the report cautioned:

Disagreements about the past must not stand in the way of our determination to protect populations in the present. Nor should Heads of State and Government lose sight of the commitment made to act in accordance with the responsibility to protect. The initiative on "responsibility while protecting" provides a useful pathway for continuing dialogue about ways of bridging different perspectives and forging strategies for timely and decisive responses to crimes and violations relating to RtoP. Suggestions for improving decision-making in such circumstances and reviewing implementation are useful catalysts for further discussion.<sup>224</sup>

In conclusion the report noted that, while the concept has been widely accepted and has been invoked by the Security Council and the General Assembly, controversy persists on aspects of implementation, especially on the use of coercive measures to protect populations.<sup>225</sup> Thus it stressed the need to employ all the coercive and non-coercive measures at an early stage to ensure prevention and to reduce the need for more coercive action to protect populations, but it reiterated, "Inaction is not an option."<sup>226</sup> The Secretary-General called for continued dialogue on the responsibility to protect in the General Assembly.<sup>227</sup>

In his remarks on September 5, 2012, to the General Assembly's Informal Interactive Dialogue on the responsibility to protect,<sup>228</sup> the

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222. *Id.* ¶ 55.

223. *Id.* ¶ 56.

224. *Id.* ¶ 58.

225. U.N. Doc. A/66/874-S/2012/578, *supra* note 184, ¶ 59.

226. *Id.*

227. *Id.* ¶ 61.

228. U.N. Secretary-General, Secretary-General's Remarks to General Assembly Informal Interactive Dialogue on "The Responsibility to Protect: Timely and Decisive Response" (Sept. 5, 2012), <http://www.un.org/sg/statements/index.asp?nid=6271>.

Secretary-General said, “‘Never again’ is the oft-heard cry. But I am haunted by the fear that we do not live up to this call.”<sup>229</sup> Noting that the R2P is a concept whose time has come, he emphasized that it reaffirms “sovereignty as a positive responsibility” for governments to protect their populations.<sup>230</sup>

Addressing the concerns related to selectivity in invoking the concept and the loss of innocent lives in military operations undertaken to protect populations, coupled with disagreements on both the oversight of implementation methods and the interpretation of Security Council resolutions, he said that “fears of its possible misuse should not inhibit its use in the face of incitement and grave violence”<sup>231</sup>

The Secretary-General noted that the Security Council had explicitly referred to the concept of Responsibility to Protect in its resolutions on Libya and Yemen. Also, the General Assembly, the Human Rights Committee, and the High Commissioner for Human Rights, had referred to R2P in Côte d’Ivoire, Guinea, Kyrgyzstan, Libya, South Sudan, Sudan, Syria, Yemen, and the Democratic Republic of the Congo. He stated that there have been successes with the Responsibility to Protect, but also that concerns have been expressed about missions exceeding the intent and mandate of the resolutions on which they were based. He stressed that, notwithstanding concerns and disagreements about the past, we must move forward, for “we cannot stand by while populations fall victim to these grave crimes and violations.”<sup>232</sup>

Following the Secretary-General’s address, deliberations in the General Assembly found a general consensus on the primacy of the preventive aspects of R2P.<sup>233</sup> The representative of Germany, however, emphasized the equality of all three pillars, which precludes an “either/or approach” regarding prevention and more coercive action, as well as a strict sequencing of measures under each pillar.<sup>234</sup> He said that Germany had set up the structures to implement the second pillar by establishing an inter-ministerial working group for civil crisis prevention and early warning, as well as an adjunct advisory council, and was in the process of appointing a national focal point for R2P.<sup>235</sup>

The representative of the European Union to the United Nations emphasized that the three pillars are “parallel and finely balanced” and thus

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229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

233. U.N. Press Release GA/11270, *supra* note 183.

234. The Permanent Mission of Germany to the U.N., New York, Statement by Ambassador Berger at the 4th Informal Interactive Dialogue on the Responsibility to Protect (Sept. 5, 2012), [http://www.new-york-un.diplo.de/Vertretung/newyorkvn/en/\\_\\_pr/speeches-statements/2012/20120906-berger-ga-r2p.html](http://www.new-york-un.diplo.de/Vertretung/newyorkvn/en/__pr/speeches-statements/2012/20120906-berger-ga-r2p.html).

235. *Id.*



there cannot be “a prioritization of action under one pillar over another or a chronological sequencing between them.”<sup>236</sup> Among other participants, the representative of Brazil noted that its RWP initiative could make a contribution to the debate, as it provides 1) a set of guidelines for the Security Council to take into account before mandating any military force, and 2) an enhanced monitoring and review process that Council members could use to “discuss mandates during the implementation process.”<sup>237</sup>

The South African representative expressed concern that “international intervention might be used” in order to “effect regime change by those with political agendas,” and warned that the Security Council mandate not be the “pretense for operating beyond international law.”<sup>238</sup> The representative of Singapore called for moving beyond “the mantra that the three pillars were ‘equally important’ . . . ‘mutually reinforcing,’ and ‘supportive,’” for, while member states would have no problem with supporting pillars one and two, it is pillar three which is a fundamental principle behind the R2P concept and on which attention must be focused.<sup>239</sup> Reflecting on the intervention in Libya, he said that while the Security Council intervention was seen by many as a “vindication” of R2P, there remain “deep concerns” over the action.<sup>240</sup> He added, “How R2P was invoked to justify Council action on Libya has cast a long shadow, resulting in the current impasse over Syria. Arguably, what happened to Libya has not only not helped the long-term development of R2P, but may have done it damage.”<sup>241</sup>

The Singapore representative criticized the Permanent Members of the Security Council for not agreeing to the “recommendation that they consider refraining from using the veto to block Council action aimed at preventing or ending genocide, war crimes and crimes against humanity.”<sup>242</sup> He echoed one of the “lessons learn[ed]” mentioned by the Secretary-General in his report -- that R2P principles must be applied consistently in rhetoric and implementation so as to avoid the “accusations of double standards and selectivity.”<sup>243</sup> “The representative of Malaysia also emphasized that the biggest challenge continued to be “the selectivity and

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236. E.U. Statement by Ioannis Vrailis, Deputy Head of Delegation, Chargé d’Affaires, Delegation of the European Union to the United Nations, to the U.N. General Assembly, Report of the Secretary-General on the Responsibility to Protect (Sept. 5, 2012), available at [http://www.edu-un.europa.eu/articles/en/article\\_12549\\_en.htm](http://www.edu-un.europa.eu/articles/en/article_12549_en.htm).

237. U.N. Press Release GA/11270, *supra* note 183.

238. *Id.*

239. Permanent Rep. of Singapore to the U.N., Statement by Ambassador Albert Chua, Permanent Representative of Singapore to the United Nations, at the Informal Interactive Dialogue on the Responsibility to Protect (R2P) ¶ 4 (Sept. 5, 2012), <http://globalr2p.org/media/files/singapore-statement-2012.pdf>

240. *Id.* ¶ 6.

241. *Id.* ¶ 6.

242. *Id.* ¶ 10.

243. *Id.* ¶ 13.

double standards practiced” in implementing R2P.<sup>244</sup> A few representatives, including those from India and Russia, challenged the Secretary-General’s statement that there should be no sequencing.<sup>245</sup>

#### V. OPERATIONALIZING THE RESPONSIBILITY TO PROTECT

The preceding discussion raises more questions than it answers. The deliberations in the General Assembly since 2009 have demonstrated consensus on what Secretary-General Ban calls “pillar one,” and which Heads of State and Government had accepted at the World Summit in paragraph 138 of the Summit Outcome Document, *viz.*, that “[e]ach individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity,” including their incitement, which “entails the prevention of such crime . . . through appropriate and necessary means.”<sup>246</sup> Thus, there is no situation in which a state does not have the primary responsibility to protect its population.

Similarly, no state questions in principle what Ban calls the second pillar: that the international community should “encourage and help States to exercise this responsibility,”<sup>247</sup> and that there is a commitment “to helping States build capacity to protect their populations from [these atrocity crimes] and . . . assisting those which are under stress before crises and conflicts break out.”<sup>248</sup> The term “appropriate and necessary” must mean that the state itself is seeking help to exercise this responsibility and to build capacity to protect its population from these crimes.

Also, the Summit Outcome calls on the U.N. to establish an early warning capability and for states to support the U.N. in accomplishing this goal.<sup>249</sup> The Secretary-General has already focused his attention on early warning, which was the theme of his 2010 Report.<sup>250</sup> Thus, what the appropriate measures are and how to reach agreement on them are important questions here.

The underlying purpose of the second pillar is to prevent the perpetration of these crimes. For if preventive diplomacy and using all the measures listed in Article 33 of the U.N. Charter for peaceful settlement of disputes were to succeed, there would be no need for the use of force.

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244. Permanent Rep. of Malaysia to the U.N., Statement by H.E. Ambassador Hussein Haniff, Permanent Representative of Malaysia to the United Nations on “Responsibility to Protect” at the Interactive Dialogue at CR4 (NLB) of the United Nations New York ¶ 4 (Sept. 5, 2012), <http://globalr2p.org/media/pdf/Malaysia2012Statement.pdf>.

245. U.N. Press Release GA/11270, *supra* note 183.

246. World Summit Outcome, *supra* note 1, ¶ 138.

247. *Id.*

248. *Id.* ¶ 139.

249. *Id.* ¶ 138.

250. U.N. Doc. A/64/864, *supra* note 172.

The critical question that remains unresolved relates to the implementation of what Secretary-General Ban calls “pillar three”: collective military action in a “timely and decisive manner” and on a “case by case basis” when peaceful means are inadequate and “national authorities are manifestly failing to protect their populations” from the specified crimes.<sup>251</sup> A prerequisite is that Chapter VI and Chapter VIII measures either have been exhausted or are inapplicable. Currently, there are no guidelines and the action is, of course, left to the Security Council, where decision-making ends up in the hands of the fifteen members, uncontrolled by any guidelines or constraints. Consequently, we need criteria or guidelines to determine whether an armed response is appropriate, as a last resort.

It follows that for the operationalization of R2P we need common standards and criteria to govern the use of force, that is, to decide whether, based upon the information received, the situation warrants the invocation and application of the third pillar. Thus the pertinent question is what standards and principles will help us measure and analyze the information to determine whether the third pillar is applicable.

Following the tragedies in Northern Iraq, Somalia, Yugoslavia, Haiti, Rwanda, and Liberia, I suggested in a 1992 article that for an intervention to be valid on humanitarian grounds it must meet the criteria of necessity, proportionality, purpose, and maximization of the best outcomes.<sup>252</sup> On the criterion of necessity, the suggestion was “the existence of gross, persistent, and systematic violations of human rights which are likely to result in massive loss of life in any country.” Those criteria and the ICISS suggestions regarding the “just cause” threshold and precautionary principles<sup>253</sup> also present a useful starting point for deliberations on the responsibility to protect at the UN, with active participation of the Secretary-General’s special adviser on the prevention of genocide and the civil society. The Brazilian initiative is indeed a useful tool in this context.

## CONCLUSION

Syria has tested the responsibility to protect. The three pillars articulated by Secretary-General Ban Ki-moon offer a wide range of actions by the international community to prevent and halt mass atrocities. The main contention is on when and how to apply the third pillar. For that to be

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251. World Summit Outcome, *supra* note 1, ¶ 139.

252. Ved P. Nanda, *Tragedies in Northern Iraq, Liberia, Yugoslavia, and Haiti—Revisiting the Validity of Humanitarian Intervention Under International Law—Part I*, 20 DENV. J. INT’L L. & POL’Y 305, 330 (1992). *See also* Ved P. Nanda et al., *Tragedies in Somalia, Yugoslavia, Haiti, Rwanda and Liberia—Revisiting the Validity of Humanitarian Intervention Under International Law—Part II*, 26 DENV. J. INT’L L. & POL’Y 827, 827-28 (1998).

253. *See supra* notes 26-29 and accompanying text.

operational the need for common standards and principles is evident. The U.N. General Assembly and Security Council must set standards for evaluating the risks, determining the urgency of the situation and concluding whether a state is actually “manifestly failing” to meet its responsibility to protect. The challenge is to find the common ground to set such standards, notwithstanding the reality that without political will and cooperation among the permanent members of the Security Council no action is possible at the United Nations.

# THE AFRICAN UNION, THE RESPONSIBILITY TO PROTECT AND CONFLICT IN SUDAN’S DARFUR REGION

*George Klay Kieh, Jr.<sup>1</sup>*

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## INTRODUCTION

The “tugs and pulls” of the post-colonial state-building projects have resulted in conflicts in several African states. In some cases, these conflicts have degenerated into violence. As a result, an environment of anarchy has often provided the propitious conditions for the commission of vitriolic human rights violations by various antagonists, including governments. For example, during the Ugandan civil war (1986-2010), the two Liberian civil wars (1989-1997 and 1999-2003), the Sierra Leonean civil war (1991-2002), and the Congolese civil wars (1997-1999, 1999-2003, 2003-2006), war crimes and crimes against humanity were committed, including heinous acts such as the terrorizing of civilians, mass killings, the violation of personal dignity, including sexual violence against women, cruel treatment

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and looting.<sup>2</sup> Similarly, during the Rwandan civil war (1990-1994), *genocidaires*<sup>3</sup> operating under the banner of the government and various militias, especially the Interhamwe,<sup>4</sup> committed various genocidal acts that resulted in the death of over 800,000 people.<sup>5</sup>

Importantly, the commission of these atrocities and the resultant complex humanitarian crises in these various conflicts generated debates in Africa and throughout the international community regarding the appropriate responses. Accordingly, in some cases, the Organization of African Unity (OAU), sub-regional organizations such as the Economic Community of West African States (ECOWAS) and the United Nations responded with peacemaking and peacekeeping operations as remedial measures.<sup>6</sup> However, in other cases, such as Rwanda, the OAU and the international community sat on the sidelines, amidst the commission of acts of genocide. In short, as Garth Evans and Mohamed Sahnoun observe, “The international community . . . repeatedly made a mess of handling the many demands that were made for ‘humanitarian interventions:’ coercive action against a state to protect people within its borders from suffering grave harm.”<sup>7</sup>

Clearly, state sovereignty has been a major impediment to the African regional and sub-regional organizations, as well as the U.N.’s robust military intervention in conflicts in which war crimes, crimes against humanity, and genocide were committed. Tom Kabau provides an excellent summation of the state sovereignty lacuna thus: “Forceful intervention for humanitarian purposes has been problematic due to the principles of state sovereignty and non-intervention. The traditional conceptualization of

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2. See generally HUMAN RIGHTS WATCH, WORLD REPORT (1989-2012) (providing a comprehensive discussion of various human rights violations that were committed during some of the violent conflicts in Africa).

3. The *genocidaire* is a French word that is used to generally describe those who commit genocide. The term gained currency during the Rwandan genocide in 1994 in which about one million people were killed. For the application of the term in the Rwandan case, see Elizabeth Barad, “Rwanda’s Mother and Son Genocidaires,” Pambazuka News, Issue 547, September 15, 2011.

4. The Interhamwe (meaning “those who strike as one”) was the principal Hutu-based militia that was accused of bearing the greatest responsibility for the 1994 Rwandan genocide. For a discussion of the roots of the genocide and the Interhamwe’s role in it, see *Rwanda: A Brief History of the Country*, UNITED NATIONS (Feb. 5, 2013, 2:15 p.m.), <http://www.un.org/en/preventgenocide/rwanda/education/rwandagenocide.shtml>.

5. See MAHMOOD MAMDANI, WHEN VICTIMS BECOME KILLERS: COLONIALISM, NATIVISM, AND THE GENOCIDE IN RWANDA, (2012) (for a discussion of the Rwandan genocide).

6. See DEALING WITH CONFLICTS IN AFRICA: THE UNITED NATIONS AND REGIONAL ORGANIZATIONS (Jane Boulden ed. 2005) (for an examination of some of the peacemaking and peacekeeping efforts undertaken by African regional and sub-regional organizations and the United Nations).

7. Garth Evans & Mohamed Sahnoun, *The Responsibility to Protect*, 81 FOREIGN AFF. 99, 99 (2002).

sovereignty was an effective shield for a state in respect of its domestic affairs, despite its misconduct or atrocities towards its citizenry.<sup>8</sup>

Interestingly, in 2002, the African Union (AU), the successor to the moribund OAU, initiated what amounted to a “sea change” in the conceptualization of state sovereignty in Africa by adding a “responsibility dimension.” That is, while retaining the conception of state sovereignty as a right, the AU also added the dimension that sovereignty imposes responsibility on states as well, especially the requirement that they protect their citizens from heinous acts such as war crimes, crimes against humanity and genocide.<sup>9</sup> Moreover, the AU asserted its legal right to circumscribe the sovereignty of a member state, if the latter failed to perform its “responsibility to protect” function.<sup>10</sup>

Against this background, the violent conflict in Sudan’s Darfur region, especially its attendant commission of genocide, war crimes, and crimes against humanity provided a “litmus test” for the AU’s responsibility to protect framework.<sup>11</sup> In this vein, the purpose of this article is two-fold. First, the article will assess the application of the African Union’s (AU) responsibility to protect norm to the conflict in Sudan’s Darfur Region. This entails an examination of the methods the AU has used and their resulting impact on the implementation of the organization’s responsibility to protect norm. Second, based on the assessment of the application of the AU’s responsibility to protect norm, the study will proffer some suggestions for strengthening the capacity of the AU to implement its responsibility to protect norm. In order to address the research problem, the article is divided into five major parts. The first section probes the origins and the major contours of the AU’s responsibility to protect regime. Next, the article examines the travails of the conflict in Sudan’s Darfur region for the ostensible purpose of determining whether the atrocities committed are covered acts that would necessitate the application of the norm of the responsibility to protect. Third, the study deciphers the application of the AU’s responsibility to protect norm to the conflict in Sudan’s Darfur Region. Fourth, the study offers some suggestions for helping to strengthen the AU’s capacity to implement its responsibility to protect regime. Finally, in the concluding section, the article discusses the major findings regarding the failure of the AU to apply its responsibility to protect norm to the civil conflict in Sudan’s Darfur region.

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8. Tom Kabau, *The Responsibility to Protect and the Role of Regional Organizations: An Appraisal of the African Union’s Interventions*, 4 GOETTINGEN J. INT’L L. 49, 51-52 (2012).

9. See Constitutive Act of the African Union art. 4(h) (July 11, 2002), OAU Doc. CAB/LEG/23.15, available at <http://www.africa-union.org>.

10. See Stephanie Hanson, *The African Union*, COUNCIL ON FOREIGN RELATIONS, (Feb. 5, 2013), <http://www.cfr.org/africa/african-union/p11616>.

11. See Emma McClean, *The Responsibility to Protect: The Role of International Human Rights Law*, 13 J. CONFLICT & SEC. L. 123, 142 (2008).

I. THE EMERGING AFRICAN UNION'S RESPONSIBILITY TO PROTECT  
REGIME: AN OVERVIEW

A. Origins

The emerging African Union's responsibility to protect regime has its roots in the dismal failure of both the Organization of African Unity (OAU), its predecessor, and the larger international community to undertake much needed robust military interventions in the continent's worst humanitarian crises (such as the 1994 Rwandan genocide, the Great Lakes region, the Democratic Republic of the Congo (DRC), and the Mano River Basin Region of West Africa).<sup>12</sup> Several major factors accounted for this. On the African side, the OAU was hamstrung by its absolutist conception of the state sovereignty doctrine. And this provided a "firewall" for governments that committed atrocities against their own citizens from being held accountable. The other major conundrums included: the prevalence of authoritarianism and its associated culture of impunity; the solidarity between and among the continent's various ruling classes that led them to defend and protect one another; the lack of political will; and the myriad of institutional and operational weaknesses, including the lack of a security architecture.

In terms of the broader international community, the primacy of national interests shaped and conditioned the attitudes of the dominant powers toward humanitarian crises in Africa. For example, during the Rwandan genocide, then American President Bill Clinton made it clear that the United States could neither support nor undertake either a robust multilateral or unilateral military intervention because it had no economic or strategic interest in Rwanda.<sup>13</sup>

Against this backdrop, the AU determined that it had the primary responsibility (within the ambit of the U.N. Charter) to maintain regional peace and security. Accordingly, it became imperative to design the modalities for a security architecture that would facilitate the performance of this important responsibility. Moreover, the AU recognized that it could not rely on the dominant powers in the international system to deal with threats to peace and stability, since these global suzerains are driven primarily by the imperatives of their national interests, rather than humanitarianism. Said Djinnit, the then AU's Commissioner for Peace and Security articulated the rationale for Africa's new system of "self-help" thus: "No more, never again. Africans cannot . . . watch the tragedies

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12. See Tim Murithi, *The Responsibility to Protect, As Enshrined in Article 4 of the Constitutive Act of the African Union*, 16 AFR. SEC. REV. 14, 16 (2008); Paul Williams, *From Non-Intervention to Non-Indifference: The Origins and Development of the African Union's Security Culture*, 106 AFR. AFFAIRS 253 (2007).

13. Rory Carroll, *U.S. Chose to Ignore Rwandan Genocide*, THE GUARDIAN (Mar. 31, 2004, 10:59 EST), <http://www.guardian.co.uk/world/2004/mar/31/usa.rwanda>.



developing in the continent and say it is the U.N.'s responsibility or somebody else's responsibility. We have moved from the concept of non-interference to non-indifference. We cannot as Africans remain indifferent to the tragedy of our people."<sup>14</sup>

### B. The Contours

During its formation, the AU incorporated the "responsibility to protect" as a legal norm in its Charter, thereby making the organization's Constitutive Act the first international treaty to recognize the right on the part of an international organization to intervene for humanitarian protection purposes.<sup>15</sup> The legal basis for the AU's "responsibility to protect" regime is found in Article 4, Section h of the organization's Charter: "[T]he right of the [African] Union to intervene in a [m]ember [s]tate pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide, and crimes against humanity."<sup>16</sup> Implicit in these provisions is the understanding that sovereignty is conditional and defined in terms of a state's capacity and willingness to protect its citizens.<sup>17</sup> The Constitutive Act acknowledges that a state has the principal responsibility for protecting its citizens.<sup>18</sup>

"Operationally, like the emergent U.N.-based global "responsibility to protect framework," the AU's regime is anchored on three major pillars: the member states' responsibility to protect; continental and other international assistance; and timely and decisive response. The case of the responsibility to protect, first and foremost, is a matter of state responsibility, because prevention begins at home, and the protection of populations is a defining attribute of sovereignty and statehood."<sup>19</sup> Specifically, the state's responsibilities include the protection of its population from genocide, war crimes and crimes against humanity. The continental and international assistance, along with the capacity-building element, is based on the premise that member countries would be assisted and encouraged to fulfill their responsibility to protect. This would entail assistance with building the capacity to protect the populations of member states from genocide, war crimes, and crimes against humanity. In addition, assistance would be

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14. KRISTINA POWELL, *THE AFRICAN UNION'S EMERGING PEACE AND SECURITY REGIME: OPPORTUNITIES AND CHALLENGES FOR DELIVERING ON THE RESPONSIBILITY TO PROTECT 4* (2005) (quoting Ambassador Said Djinnit, Statement on the African Union's Responsibility to Protect Framework (June 24, 2004)).

15. *See id.*

16. *See* Constitutive Act of the African Union art. 4(h) (July 11, 2002), OAU Doc. CAB/LEG/23.15, available at <http://www.africa-union.org>.

17. POWELL, *supra* note 14, at 11.

18. *Id.* at 11-12.

19. U.N. Secretary General, *Report on the Implementation of the Responsibility to Protect*, ¶ 14, U.N. Doc. A/63/677 (Jan. 12, 2009) [hereinafter *Implementation*].

provided to member states that are under stress before crises and conflicts arise.<sup>20</sup> The timely and decisive response pillar is based on the AU's "responsibility to use appropriate diplomatic, humanitarian, and other peaceful means in accordance with Chapters VI and VIII of the U.N. Charter, to help protect populations from genocide, war crimes, and crimes against humanity."<sup>21</sup> However, as Article 4, Section 1 of the AU Charter stipulates, the organization may use military force "should peaceful means be inadequate, and state authorities are manifestly failing to protect their populations from genocide, war crimes and crimes against humanity (plus ethnic cleansing, which is a part of the U.N.'s responsibility to protect norm)."<sup>22</sup>

## II. THE CONFLICT IN SUDAN'S DARFUR REGION

The civil war in Darfur commenced in February 2003, just as the larger Sudanese civil war that pitted the "north against the south" was winding down.<sup>23</sup> The war was triggered by the armed attacks launched by the Sudan Liberation Movement Army (SLM/A) and the Justice and Equality Movement (JEM) against Sudanese government offices, police, and military bases.<sup>24</sup> In turn, the attacks "provoked an indiscriminately violent response from the Sudanese government, led by President Omar Hassan al-Bashir."<sup>25</sup>

Broadly, the war and its resulting genocide, crimes against humanity, and war crimes were caused by a confluence of factors. In spite of the huge revenues, which the Sudanese government earned from the sale of the country's oil, the Darfur region remains one of the most underdeveloped sections of the country.<sup>26</sup> This is evidenced by the prevalence of abject mass poverty, unemployment and malaise.<sup>27</sup> Another factor is that the Darfur region is marginalized in the Sudanese political system. One of the major manifestations of this marginalization is the absence of effective channels through which Darfur is can participate in Sudanese politics. To make matters worse, the government's authoritarian proclivities militate against such participation.<sup>28</sup> This led to some of the non-Arab ethnic groups

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20. See G.A. Res. 60/1, ¶ 139, U.N. Doc. A/RES/60/1 (Oct. 24, 2005).

21. *Id.*

22. See *Implementation*, *supra* note 19, at ¶ 49.

23. See UNMIS Background, UNITED STATES MISSION IN SUDAN, (Feb. 4, 2013), [www.un.org/en/peacekeeping/missions/unmis/background.shtml](http://www.un.org/en/peacekeeping/missions/unmis/background.shtml).

24. ADAM JONES, GENOCIDE: A COMPREHENSIVE INTRODUCTION 371 (2d ed. 2011).

25. *Id.*

26. See Jennifer L. DeMaio, *Is War Contagious? The Transnationalization of Conflict in Darfur?* 11(4) AFRICAN STUDIES QUARTERLY 30, 31 (2010), <http://www.africa.ufl.edu/asq/v11/v11i4a2.htm>.

27. *Id.*

28. *Id.*

challenging authoritarian rule in the Sudan.<sup>29</sup> Furthermore, there are ethnic conflicts between the various Arab ethnic groups, on the one hand, and the non-Arab ethnic groups, on the other. These conflicts have found expression in disputes over land and land use. The supremacist ideology of the Arab ethnic groups has exacerbated the existing conflicts by, among other things, injecting the “superior-inferior myth,” and thus seeking to establish the hegemony of the Arab ethnic groups in the Sudanese polity.<sup>30</sup>

Infuriated by the military insurgency initially mounted by the two Darfur-based armed groups, the Sudanese government launched massive counter-offenses that involved the military and the use of the Janjaweed or “devils on horseback,” an Arab militia that was organized and is supported by the Sudanese government.<sup>31</sup> Significantly, the Sudanese government then made the determination that the conflict provided propitious conditions for its troops and the Janjaweed militia to commit genocidal acts, as well as war crimes and crimes against humanity. For example, there were, and continue to be, the genocidal massacres of adult male non-combatants from the various non-Arab ethnic groups, especially the Fur, Massalit, and Zaghawa.<sup>32</sup> In addition, rapes are committed against women from the non-Arab ethnic groups on a large scale. Similarly, the members of the non-Arab ethnic groups were subjected to forced migration and starvation.<sup>33</sup> As the Public International Law and Policy Group laments, “Government and Janjaweed forces destroyed everything that made life possible. Food that could be carried away was; the rest was burned. Animals that could be taken away were; the rest were killed. The simple straw buildings that served as clinics and schools were destroyed . . . .”<sup>34</sup>

In addition, the Sudanese military continues to perpetrate various heinous acts against the non-Arab ethnic groups in Darfur, including “bombings from airplanes; and along with the Janjaweed the use of automatic weapons fire, stabbings, the torching of people, the poisoning of wells, and chasing the victim population out into forbidding deserts without water or food.”<sup>35</sup> By early 2012, about 300,000 people had died; approximately 1.9 million people were internally displaced in camps inside

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29. Salih Booker & Ann-Louise Colgan, *Genocide in Darfur*, THE NATION (July 12, 2004), <http://www.thenation.com/article/genocide-darfur#>.

30. See Joseph C. Ebegbulem, *Nigeria and Conflict Resolution in Africa: The Darfur Experience*, 3(2) TRANSCIENCE, 18, 19 (2012), available at [http://www2.hu-berlin.de/transcience/Vol3\\_Issue2\\_2012\\_17\\_23.pdf](http://www2.hu-berlin.de/transcience/Vol3_Issue2_2012_17_23.pdf).

31. *Genocide in Darfur*, UNITED HUMAN RIGHTS COUNCIL (June 1, 2012), <http://www.unitedhumanrights.org/genocide/genocide-in-sudan.htm>. For a discussion of some of the genocidal acts that have been committed by the Janjaweed, see *Sudan's Shadowy Arab Militia*, BBC NEWS, (April 10, 2004), <http://news.bbc.co.uk/2/hi/africa/3613953.stm>.

32. JONES, *supra* note 24, at 372.

33. *Id.*

34. *Id.*

35. See Samuel Totten, *The Darfur Genocide*, in THE GENOCIDE STUDIES READER 195 (Samuel Totten & Paul Bartrop eds., 2009).

Darfur; while more than 250,000 others are refugees in various neighboring countries.<sup>36</sup>

Based on the evidence, the Sudanese government continues to perpetrate genocidal acts, war crimes, and crimes against humanity against the members of various non-Arab ethnic groups. Specifically, the actions of the Sudanese government meet the thresholds for genocide established under the International Convention for the Prevention and Punishment of Genocide. According to Article 2 of the Convention, “genocide means any of the following acts committed with intent to destroy in whole or in part, a national, ethnical, racial or religious group as such:<sup>37</sup>

- a) Killing members of the group;
- b) Causing serious bodily or mental harm to members of the group;
- c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or part;
- d) Imposing measures intended to prevent births within the group;
- e) Forcibly transferring children of the group to another group.<sup>38</sup>

For example, there is evidence of genocidal intent. The case in point is that of Musa Hilal, one of the leaders of the Janjaweed militia, who “wrote in August 2004 to a regional commander, “citing orders from President Bashir himself”: “[y]ou are informed that directives have been issued . . . to change the demography of Darfur and empty its African tribes.”<sup>39</sup> Also, various non-Arab ethnic groups are the targets and victims of the Sudanese government perpetrated mass killings. The purpose of these mass killings is to destroy these non-Arab ethnic groups in whole.<sup>40</sup> As for the commission of war crimes and crimes against humanity, the evidence was reflected in the fact that in 2008 the U.N. Security Council, through Resolution 1593, referred the mass killings and other atrocities being committed in Darfur to the prosecutor of the International Criminal Court (ICC).<sup>41</sup> Subsequently, the prosecutor of the ICC requested that President Omar Hassan al-Bashir

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36. *Darfur Conflict: Peace Elusive in War-Torn Region*, ALERTNET (Feb. 16, 2012), <http://www.trust.org/alertnet/crisis-centre/crisis/Darfur-conflict>; Donald A. Ranard, *Refugees from Darfur: Their Background and Resettlement Needs*, CULTURAL ORIENTATION CENTER (June 2011), [http://www.cal.org/co/pdf/files/backgrounder\\_darfuri.pdf](http://www.cal.org/co/pdf/files/backgrounder_darfuri.pdf).

37. Convention on the Prevention and Punishment of Genocide, Dec. 9, 1948.

38. *Id.*

39. JONES, *supra* note 24, at 371-72.

40. *Id.*

41. See S.C. Res. 1593, ¶ 1, U.N. Doc. S/RES/1593 (Mar. 31, 2005).

be charged with genocide.<sup>42</sup> But, the judges did not oblige.<sup>43</sup> Instead, President Bashir was charged with the commission of war crimes and crimes against humanity.<sup>44</sup>

### III. THE APPLICATION OF THE AFRICAN UNION'S RESPONSIBILITY TO PROTECT NORM TO THE DARFUR CONFLICT

By the time the AU intervened in the Darfur conflict in 2004, there was widespread commission of genocidal acts, as well as war crimes and crimes against humanity by the Sudanese government troops and the Janjaweed.<sup>45</sup> Thus, based on the phase of the conflict, and pursuant to the provisions of the AU's responsibility to protect regime, the AU should have used military force to stop the commission of these heinous crimes. Instead, the AU decided to commence its intervention with peacemaking.<sup>46</sup> This further suggested that the AU was mistakenly treating the conflict in Darfur as a traditional civil war involving the Sudanese government and armed resistance groups.

The first major peace agreement the AU mediated was the Humanitarian Ceasefire Agreement, which was signed in Ndjamena, Chad, in April 2004, between the Sudanese government and the armed resistance groups.<sup>47</sup> Two years later, in Abuja, Nigeria, the AU mediated the Darfur Peace Agreement between the Sudanese government and a faction of the Sudan Liberation Army (SLA) led by Minni Minnawi.<sup>48</sup> Originally, the AU intended to mediate a broader and comprehensive peace agreement involving the Sudanese government and all of the armed resistance groups. But, all of the armed resistance groups, with the exception of Minnawi's faction and the free wings factions of the SLA, refused to participate.<sup>49</sup> The adverse effects of the lack of a broader peace accord became evident when shortly after the signing of the Darfur Peace Agreement, "the various . . . armed resistance groups [began] to fight each other., and the situation deteriorated into a military, political and diplomatic conundrum."<sup>50</sup>

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42. See Marlise Simons & Neil MacFarquher, *Court Issues Arrest Warrant for Sudan's Leader*, N.Y. TIMES, (Mar. 4, 2009), <http://www.nytimes.com/2009/03/05/world/africa/05court.html>.

43. *Id.*

44. *Id.*

45. See Scott Straus, *Darfur and the Genocide Debate*, FOREIGN AFFAIRS, (Jan./Feb. 2005), <http://www.foreignaffairs.com/articles/60434/scott-straus/darfur-and-the-genocide-debate>.

46. Tim Murithi, *The African Union's Foray into Peacekeeping: Lessons from the Hybrid Mission in Darfur*, 14 J. PEACE, CONFLICT & DEVELOPMENT 1, 9 (2009).

47. *Id.*

48. *Id.* at 10.

49. *Id.* at 11.

50. *Id.*

In spite of the precarious security situation in Darfur, the AU took its second major misstep by deploying a peacekeeping force, rather than a military interventionist one, to stop the Sudanese government troops and the Janjaweed, from continuing to commit acts of genocide, war crimes, and crimes against humanity. Again, by making the decision to deploy a peacekeeping force, the AU once again re-affirmed its belief that the Darfur conflict was a traditional civil war. Thus, peacekeeping was seen as necessary to help create an enabling environment for continual peacemaking and the eventual end of the war. By employing the use of the classical peacekeeping method, the AU was constrained by several factors: 1) the imperative of getting the consent of the Sudanese government; 2) the requirement that the peacekeepers would be neutral; and 3) that the peacekeepers would only use force in self-defense.<sup>51</sup> Thus, in 2005, the AU deployed the African Union Mission I (AMIS) in Darfur, which consisted of 150 military observers. The mandate limited the peacekeeping force to the following:

- 1) To monitor and verify ceasefire violations;<sup>52</sup>
- 2) To protect civilians under imminent threat;<sup>53</sup>
- 3) Undertake confidence-building measures among the parties to the conflict;<sup>54</sup>
- 4) Facilitate the delivery of humanitarian assistance;<sup>55</sup>
- 5) Assist internally displaced persons.<sup>56</sup>

In essence, the primary mandate of AMIS I was to monitor a crumbling ceasefire that was being violated consistently by the Sudanese government and the various armed resistance groups. As John Prendergast observed, “The initial idea of operations for the AU force was deeply flawed from the outset . . . [B]y authorizing a mandate that only was focused on cease-fire observation rather than the protection of civilians, it minimized the objective of the force and rendered it largely irrelevant.”<sup>57</sup> Thus, in effect, the peacekeeping force’s mandate left the primary responsibility for the

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51. See generally LISA M. HOWARD, UN PEACEKEEPING IN CIVIL WARS (2008) (discussing the contours of classical peacekeeping).

52. Kristina Nwazota, *African Union’s Effort*, PBS NEWSHOUR (Jul. 3, 2008) [http://www.pbs.org/newshour/indepth\\_coverage/africa/darfur/union.html](http://www.pbs.org/newshour/indepth_coverage/africa/darfur/union.html).

53. *Id.*

54. Murithi, *supra* note 46.

55. *Id.*

56. *Id.*

57. Nwazota, *supra* note 52.

“protection of civilians to the government that is accused of terrorizing them.”<sup>58</sup>

Clearly, the peacekeeping operation, besides being an inappropriate response to halting genocide, war crimes, and crimes against humanity, was a dismal failure. Several factors accounted for this. The size of the peacekeeping force was very small, especially against the background of the land mass: Darfur is about the size of France.<sup>59</sup> Therefore, a peacekeeping force with 150 military observers was bound to not succeed from the onset.<sup>60</sup> Another factor was that the mandate of the peacekeeping force did not include the overarching issue of protecting civilians. Further, the peacekeeping force lacked the requisite equipment, logistical, and intelligence gathering capabilities.<sup>61</sup>

With the failures of AMIS I, which were quite glaring, a Technical Assessment Mission comprising of representatives from the United Nations, the European Union, and the United States recommended that the AU undertake another peacekeeping mission with an enhanced mandate. In this vein, the AU continued to use an inappropriate method—peacekeeping—to deal with a conflict-ridden environment in which genocide, war crimes, and crimes against humanity were being committed by the Sudanese government troops and the Janjaweed. As a result, in late 2005, AMIS II was established.<sup>62</sup> Some changes were made to the mandate and the size of the peacekeeping force: the mandate was extended to include the protection of refugee camps, and the size of the force was initially a little over 3,000.<sup>63</sup> Later, the size of the peacekeeping force was increased to 7,000.<sup>64</sup> In spite of the changes, AMIS II faced similar challenges as its predecessor. With regard to the size of the peacekeeping force, even the size of 7,000, at its peak, was still woefully inadequate to cover a region as large as Darfur. The continuing limited size issue adversely affected the peacekeeping force’s capacity to protect the refugee camps. Furthermore, AMIS II, like its predecessor, was constrained by the inadequacy of weapons, equipment, logistical, and intelligence gathering capabilities.<sup>65</sup> To make matters worse, the operational deficiencies of the peacekeeping force emboldened the

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58. *Id.*

59. See Mohamed Suliman, *The War in Darfur: The Resource Dimension*, 8 RESPECT: SUDANESE JOURNAL FOR HUMAN RIGHTS’ CULTURE AND ISSUES OF CULTURAL DIVERSITY 1 (2008), available at [http://w.sudan-forall.org/sections/ihitiram/pages/ihitiram\\_issue8/pdf\\_files/Dr-Mohamed-Suliman.pdf](http://w.sudan-forall.org/sections/ihitiram/pages/ihitiram_issue8/pdf_files/Dr-Mohamed-Suliman.pdf).

60. See *Crisis in Darfur*, INTERNATIONAL COALITION FOR THE RESPONSIBILITY TO PROTECT, [www.responsibilitytoprotect.org/index.php/crises/crisis-in-darfur](http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-darfur).

61. See Robert L. Feldman, *Problems Plaguing the African Union Peacekeeping Forces*, 24(3) DEFENSE AND SECURITY ANALYSIS 269-70 (2008).

62. See Murithi, *supra* note 46, at 10.

63. *Id.*

64. See *Crisis in Darfur*, *supra* note 60.

65. See Feldman, *supra* note 61.

Janjaweed to attack its troops, which led to the death of some peacekeepers.<sup>66</sup>

Although the peacekeeping method was inappropriate for addressing the commission of genocide, war crimes, and crimes against humanity, coupled with the fact that the two operations failed miserably, the AU continued to violate the contours of its responsibility to protect regime.<sup>67</sup> This was reflected in the AU's violation of a key provision that requires the organization to use military intervention to protect the citizens of a member state who are victims of genocide, war crimes, and crimes against humanity as a result of their government's unwillingness to protect them. It could also be used in a case where the government is the perpetrator of any of the above mentioned crimes. Instead of identifying the Sudanese government as the chief culprit in the commission of genocide, war crimes, and crimes against humanity against its own citizens, the AU continued to use the peacekeeping method inappropriately. However, since it was clearly established that the AU did not even have the operational capacity to undertake a peacekeeping mission, the AU and the U.N. agreed to establish a hybrid force as the successor to AMIS II.<sup>68</sup> Interestingly, the U.N.-AU decision was shaped by the Sudanese government's strenuous objection to having a solely U.N. peacekeeping force. In other words, the decision to establish a hybrid force consisting of troops from the AU and U.N. was a clear act of capitulation to the Sudanese government. The Bashir regime had insisted that it would not accept a U.N. peacekeeping force. However, it was willing to accept an expansion of the size of the AU's peacekeeping force. But later, the Bashir regime indicated that it would allow a hybrid U.N.-AU force. In short, based on the Bashir regime's distrust of the U.N., it was thus apprehensive about allowing a peacekeeping force that was exclusively under the control of the organization. However, in the case of the AU, the Bashir regime has confidence in the organization, because it has defended him against the backdrop of his indictment for war crimes and crimes against humanity by the ICC. Even then, the deployment of the hybrid force was delayed by continuing objections from the Sudanese government with the support of China, which has economic (oil) and strategic interests (the sale of weapons) in the Sudan.<sup>69</sup> Finally, in 2008, the hybrid force was

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66. See *Humanitarian Disaster in Sudan*, INFOPLEASE (2005) <http://www.infoplease.com/ipa/A0107996.html?pageno=3>.

67. For an excellent discussion of the failure of the AU's peacekeeping operations in Darfur, see Feldman, *supra* note 61, at 269-73.

68. Murithi, *supra* note 46, at 10.

69. See Andrew Higgins, *Oil Interests Push China into Sudanese Mire*, WASHINGTON POST, Sept. 24, 2011, available at [http://articles.washingtonpost.com/2011-12-24/world/35417909\\_1\\_south-sudan-stephen-dhieu-dau-cnpc](http://articles.washingtonpost.com/2011-12-24/world/35417909_1_south-sudan-stephen-dhieu-dau-cnpc).



deployed in Darfur.<sup>70</sup> Nonetheless, the expanded peacekeeping force, like its predecessors, has proven incapable of halting the commission of genocidal acts, war crimes, and crimes against humanity by the Sudanese government troops and their allies, the Janjaweed.

Why has the AU continuously failed to use robust military intervention when the Sudanese government has been identified as the perpetrator of genocide, war crimes, and crimes against humanity against its own people? Several factors account for this. Despite the so-called “third wave of democratization” that began sweeping across Africa in the early 1990s, the authoritarian African state and its political culture have remained intact.<sup>71</sup> That is, although the “third wave” has led to the liberalization of the political space in several African states, the democratic reconstitution of the African state has not occurred.<sup>72</sup> In other words, democracy has not been institutionalized in most African states.<sup>73</sup> Accordingly, the “culture of impunity,” has been a major bedrock of the post-colonial African state, and its political culture remains a pervasive feature of the political economy of the overwhelming majority of the African states.<sup>74</sup> Hence, there is a poverty of moral leadership among the continent’s ruling elites. This being the case, it is difficult for the AU to lecture the Sudanese government about respect for political rights and civil liberties, when many of the African states are also engaged in the violation of the human rights of their own citizens; although, such actions, in contradistinction to the Sudanese situation, have not degenerated into the commission of atrocities that rise to the level of genocide, war crimes, and crimes against humanity.

Another factor is the primacy of solidarity between and among the various regimes on the continent. As Dan Kwali aptly notes, “The AU member states appear to operate according to the norm that the mutual protection of ruling elites is of greater priority than the protection of civilians.”<sup>75</sup> For example, all of the regimes on the continent, with the exception of the new government of Malawi under the leadership of President Joyce Banda, have supported the Bashir regime by, among other things, collectively imploring the ICC to drop the charges against President

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70. See Cedric de Coning, *The Emerging UN/AU Peacekeeping Partnership*, 1 *Conflict Trends* 5, available at <http://www.isn.ethz.ch/isn/Digital-Library/Publications/Detail/?ots591=0c54e3b3-1e9c-be1e-2c24-a6a8c7060233&lng=en&id=116018>.

71. For an excellent discussion of the travails of the “third wave of democratization” in Africa, see Richard Joseph, *Democracy and Reconfigured Power in Africa*, 110 *CURRENT HISTORY* 324, 324-33 (2011), available at <http://www.currenthistory.com/Article.php?ID=924>.

72. *Id.* at 325-30.

73. *Id.*

74. See Mamphela Ramphela, Address at the “Difficult Dialogues Panel Discussion,” University of Cape Town, South Africa (July 1, 2008).

75. Dan Kwali, *The African Union and Challenges of Implementing the “Responsibility to Protect”*, 4 *NORDISKA AFRIKAINSTITUTET* 1, 2 (Mar., 2009), <http://responsibilitytoprotect.org/African%20Union%20and%20RtoP.pdf>.

Bashir, as well as revoke the writ of arrest issued against him.<sup>76</sup> However, the Banda regime in Malawi, which came to power in 2012, has refused to support the Bashir regime.<sup>77</sup> It refused to host the 2012 Summit Meeting of the Assembly of the AU, if President Bashir attended.<sup>78</sup> As such, the AU moved the meeting to its headquarters in Addis Ababa, Ethiopia.<sup>79</sup> The prevailing practice among the majority of the regimes on the continent is to defend heinous acts that are committed by their colleagues. This is because if a regime commits similar acts against its citizens, it would expect to be shielded by the other regimes—a sort of *quid pro quo*. Therefore, supporting the Bashir regime in Sudan is analogous to the securing of an “insurance policy” by the other regimes should they be in similar circumstances in the future. This has led Emmanuel Kwesi-Aning and Samuel Atuobi to observe: “[T]he AU’s response to current security challenges in Darfur in Sudan, . . . and especially the ICC’s application for the issuance of arrest warrant for President Al Bashir of Sudan, does not reflect a clear commitment to the responsibility to protect.”<sup>80</sup>

Also, the continuing centrality of state sovereignty served as an obstacle for the AU, in spite of the AU’s professed commitment to making “sovereignty a responsibility.”<sup>81</sup> For example, the AU sought the Bashir regime’s approval for the various peacemaking and peacekeeping activities it has undertaken in the Darfur conflict. And in the cases where the Bashir regime objected to certain actions contemplated by the AU, the latter capitulated to the former.<sup>82</sup> As Christine Gray argues, “The AU was not willing to intervene in the absence of consent by the government of the Sudan.”<sup>83</sup> In essence, the AU has, and continues to treat the conflict in Darfur as a domestic matter over which the Sudanese government has

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76. See *Sudan’s Wanted President Visits Egypt*, CNN, (Sept. 17, 2012), [http://articles.cnn.com/2012-09-16/africa/world\\_africa\\_egypt-sudan\\_1\\_al-bashir-sudanese-leader-president-morsy](http://articles.cnn.com/2012-09-16/africa/world_africa_egypt-sudan_1_al-bashir-sudanese-leader-president-morsy).

77. See Ananyo Ezugwu, *Ripples in AU Over Al-Bashir*, NEWSWATCH (June 20, 2012), [http://www.newswatchngr.com/index.php?option=com\\_content&task=view&id=4279&Itemid=41](http://www.newswatchngr.com/index.php?option=com_content&task=view&id=4279&Itemid=41).

78. See *Ethiopia to Host African Union Summit After Omar Bashir Malawi Row*, BBC NEWS AFRICA (Jun. 12, 2012, 4:41ET), <http://www.bbc.co.uk/news/world-africa-18407396>.

79. *Id.*

80. Kwesi Aning & Samuel Atuobi, *Responsibility to Protect in Africa: An Analysis of the African Union’s Peace and Security architecture*, 1 GLOBAL RESPONSIBILITY TO PROTECT 90, 90 (2009).

81. See Constitutive Act of the African Union art. 4(h) (July 11, 2002), OAU Doc. CAB/LEG/23.15, available at <http://www.africa-union.org>.

82. See John Bith Aliap, *Has the African Union (AU) Become a Chess Pawn in the Hands of the Khartoum Regime?*, SOUTH SUDAN NEWS AGENCY (June 20, 2012), <http://www.southsudannewsagency.com/opinion/articles/has-african-union-au-become-a-chess-pawn-in-the-hands-of-khartoums-regime>.

83. CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 55 (3d ed., 2008).

primary responsibility. Thus, the AU sees its primary role, and those of other external actors as mediatory. That is, the Bashir regime should be encouraged rather than coerced to end the conflict in Darfur. Unfortunately, the AU's view is contradicted by the fact that the conflict in Darfur is genocidal rather than simply traditional (a classical civil war involving a government and insurgent domestic faction or factions). Accordingly, since the Bashir regime is the principal source for perpetrating the genocide, military force should be used against it as is required by the AU's responsibility to protect norm.

Similarly, the AU continues to demonstrate the lack of political will to invoke the use of the military force, given the circumstances in Darfur. In spite of the hoopla and fanfare about the dawning of a "new era" on the African Continent in which governments would be held accountable for committing atrocities against their citizens, the AU has failed to match its rhetoric with praxis in the Darfur case. As Kithure Kindiki argues,

[D]arfur presents a splendid example of a government that is "unable or willing" to protect its citizens, but also tragically, an international community that is equally unable or unwilling to take on the default sovereign responsibility that the Responsibility to Protect envisages. More importantly, the Responsibility to Protect essentially endorses the legality and legitimacy of humanitarian intervention, a doctrine whose normative status has remained fraught with uncertainties over the years.<sup>84</sup>

Christine Gray puts the case this way:

[The] failure to prevent a major humanitarian crisis demonstrates that the universal acceptance in principle of a "responsibility to protect" in the World Summit Outcome Document cannot guarantee action. . . . It may be that the World Summit's acceptance of the 'responsibility to protect' has created expectations which will not be fulfilled in practice.<sup>85</sup>

In short, the AU's failure to match its rhetoric with practice in Darfur is symptomatic of the continuation of the legacy of African states that revolves around the habit of formulating documents with lofty objectives, but failing to implement them.

In addition, the AU has several institutional and operational weaknesses that would have adversely affected its use of robust military intervention in the Darfur conflict, even if it chooses to pursue this option. Institutionally, there are two major interrelated problems. The AU has not established the units that would design the modalities for the application of its

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84. Kithure Kindiki, *Intervention to Protect Civilians in Darfur Legal Dilemmas and Policy Imperatives*, 131 ISS MONOGRAPH SERIES 1, 6 (May 2007).

85. GRAY, *supra* note 83.

responsibility to protect norm. In other words, the absence of the requisite institutions has resulted in the AU's lack of operational doctrines, including strategies for enforcing the norm of the responsibility to protect. Another major limitation is that there is the lack of the requisite coordination between and among the existing institutions of the AU regarding matters concerning the processes and procedures for implementing the "responsibility to protect" norm. For example, there are no modalities for ensuring collaboration between and among the various institutions under the AU's security architecture. For instance, there are no procedures and processes in place for the African Commission on Human and People's Rights, which has the responsibility for monitoring human rights violations on the continent (including the violations that are covered under the organization's "responsibility to protect" regime), and the Peace and Security Council, which is the AU's security policy implementation organ.<sup>86</sup> The AU also lacks adequate preventative mechanisms that could be used to tackle crises and conflicts before they degenerate into the commission of genocide, war crimes, and crimes against humanity. In addition, there are very weak links between the organization's "early warning system" and its preventive actions.<sup>87</sup> That is, the required steps have not been taken to develop the appropriate mechanisms that would link early warning with preventive actions that would need to be taken by the AU to prevent the escalation of a conflict.

At the operational level, there are several major problems as well. At the vortex is the absence of a strategic doctrine for implementing the "responsibility to protect" norm. This is coupled with the lack of adequate equipment for carrying out military operations, the lack of troop mobility as a result of the former, and the lack of an effective intelligence gathering mechanism replete with the required elements. Additionally, there is the perennial problem of inadequate funding. In fact, it is a common practice for the AU to rely on the United States and European states to provide substantial portions of the funds for various regional military operations.<sup>88</sup> This means that the AU member states have failed to demonstrate a real commitment to the security of the continent, as evidenced by their lack of financial support for the AU's security architecture. Clearly, the AU cannot effectively meet its charter obligations concerning the implementation of the

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86. See Jeremy Levitt, *The Peace and Security of the African Union: The Known Unknowns*, 13 *TRANSNAT'L L. & CONTEMP. PROBS.* 109, 124 (Spring 2003) (for a discussion of the lack of coordination between and among the various institutions of the African Union that have responsibilities related to the implementation of the "responsibility to protect" norm).

87. See Kwali, *supra* note 75.

88. See Eric Berman and Katie E. Sams, *Keeping Peace in Africa*, *DISARMAMENT FORUM* (2000), available at [http://www.unidir.ch/bdd/fiche-periodique.php?ref\\_periodique=1020-7287-2000-3-en#contents](http://www.unidir.ch/bdd/fiche-periodique.php?ref_periodique=1020-7287-2000-3-en#contents).

“responsibility to protect” norm, if it is dependent upon external actors for funding, equipment, and logistics.

#### IV. TOWARD STRENGTHENING THE AU’S RESPONSIBILITY TO PROTECT REGIME

So what are some of the major steps that need to be taken to help strengthen the AU’s “responsibility to protect” regime, especially the organization’s capacity to implement the robust military intervention option, when the situation warrants pursuant to the criteria outlined in Article 4 of the AU’s Charter? First, the democratic reconstitution of the African state is imperative, especially the replacement of the “culture of impunity” with one based on accountability.<sup>89</sup> Regimes would think twice before engaging in the commission of genocidal acts, war crimes and crimes against humanity. This is because the regimes would know that they would be held responsible. Undoubtedly, the democratic state reconstitution project on the continent can only succeed, if the larger society and civil society organizations work together to shepherd the process. This is because with very few exceptions the regimes on the continent prefer the maintenance of the “culture of impunity,” so they can have *carte blanche* to abuse the human rights of their own citizens.<sup>90</sup> Also, the support and cooperation of the international community would be important. Some of the major actors in the international system such as the United States have the record of supporting some of the most authoritarian regimes on the continent, while it claims to support democracy. Without external support, authoritarian regimes on the continent such as Bashir’s in the Sudan would have two major options: democratize or face the people’s power.

Second, the rhetoric of making “sovereignty responsibility” needs to be translated into action by the African Union. One of the major requirements for doing so is the emergence of leaders on the continent, who have the moral leadership to stand up to fellow leaders, who are autocrats. The decision taken by President Banda of Malawi to have arrested President Bashir of Sudan and hand him over to the ICC, if he had attended the 2012 Summit Meeting of the Heads of State and Government of the AU in Malawi, is a major step forward.<sup>91</sup>

Third, both the AU and its member states consistently need to demonstrate political will, especially when it comes to the enforcement of the “responsibility to protect” norm. This would require, for example, African leaders, who have the moral authority, to refuse to play the insidious game of elite solidarity. As has been discussed, President Banda of Malawi has become a trail blazer in this vein.

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89. See Ramphele, *supra* note 74.

90. *Id.*

91. See Ezugwu, *supra* note 77.

The AU also needs to address its various institutional and operational weaknesses. At the institutional level, the AU need to establish new units within its Peace and Security Department that would focus on the development of the modalities for the operation of the “responsibility to protect” regime. Essentially, these new units would develop the blueprint for the operation of the “responsibility to protect regime.” Also, the various entities that have responsibilities bearing on the operation of the “responsibility to protect” regime need to coordinate their activities. This would entail the development of a framework that would serve as the roadmap for the promotion of inter-agency coordination. In terms of the operational weaknesses, the issues of linking “early warning” to preventive action, the provision of funding for various military operations, the development of a strategic doctrine that would serve as a guide for military actions, troop mobility, equipment and intelligence gathering need to be addressed. In addition, the AU needs to establish a cooperative relationship with the U.N. in the implementation of the “responsibility to protect” norm. This is because the U.N. has greater amount of resources—spanning from money to expertise— than the AU.

#### CONCLUSION

The AU has failed to meet its Charter obligations regarding the implementation of its “responsibility to protect” norm in the case of the conflict in Sudan’s Darfur region. Given the gravity of genocide, crimes against humanity and war crimes, peacekeeping is not an appropriate method for implementing the “responsibility to protect” norm. This is because the use of military force to enforce the norm under the stipulated prevailing conditions would have required the identification of the Sudanese government as the culprit, thereby requiring steps to be taken to end the commission of atrocities. Certainly, the AU’s failure to use military force has, and continues to contribute to the Sudanese government’s continuous engagement in committing genocide, crimes against humanity and war crimes.

Finally, the AU’s performance in the case of Darfur does not portend well for the implementation of the “responsibility to protect norm” at the regional level. This is because the AU’s capitulation to the Bashir regime will embolden other autocrats on the continent to engage in a similar pattern of behavior like the Bashir regime under similar circumstances. The establishment of such a bad precedent would return the continent to the era when “sovereignty was only a right for states without a concomitant “responsibility.” In order to forestall the reversion to the past, several steps would need to be taken, including the imperative of democratically reconstituting the state in Africa, particularly ending the culture of impunity, the urgency of moral leadership on the continent, the need to

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develop political will, and addressing the battery of institutional and operational pathologies.





# DEMOCRACY UNPLUGGED: SOCIAL MEDIA, REGIME CHANGE, AND GOVERNMENTAL RESPONSE IN THE ARAB SPRING

*John G. Browning*

*It is a triumph of science and energy over time and space, uniting more closely the bonds of peace and commercial prosperity, introducing an era in the world's history pregnant with results beyond the conception of a finite mind.*

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## INTRODUCTION

The “it” of the foregoing quote was the transatlantic telegraph, being described by the mayor of New York City in 1858. Yet the same words could equally be applied to the significance of social media platforms and their transformative impact on the world. From its humble beginnings in 2004 as a way for Harvard students to stay connected with one another, Facebook’s inexorable spread has resulted in the most-visited website in the world and nearly 1 billion users worldwide. Twitter, which processed roughly 5,000 “tweets” per day in 2007, now handles over 340 million tweets each day. The rise of social media represents a paradigm shift in how people communicate and share information, and it is only natural that social media play an ever-increasing role in stimulating political debate and galvanizing support for or opposition to governmental policies and the figures identified with them.

Nowhere has this impact been more evident than in what has become known as the “Arab Spring,” a term applied to the social unrest and political upheaval that spilled across the Middle East in early 2011, beginning with Tunisia and continuing across Egypt and into Yemen, leaving authoritarian governments toppled in its wake. Rather than provide a recitation of events that have already been well-documented in the media, this article will first examine the debate over the role played by social media in bringing about the Arab Spring. A number of commenters have argued that this role has been grossly overstated—that, in essence, dictators are overthrown by people, not by social media platforms. But there is compelling empirical

evidence to suggest that, if anything, social media's importance may have been understated. Next, this article will attempt to place social media's contribution to the Arab Spring in perspective, by analyzing how emerging technologies are impacting not only political and social protest in other nations, but also affecting diplomatic efforts and governmental response as well. Even in a democratic nation like Great Britain, an event like the London riots illustrates the powerful temptation for governmental response to incorporate censorship and even cutting off access to the Internet. Finally, this article will examine the use of technology in government response, and how the "unplugging of democracy" as a state media strategy can result in the very same communications platforms that galvanize political protest movements being used to stifle such expression—often with the aid of Western technology companies.

In the digital age, the power of social media to, nearly instantaneously, spread word of atrocities, inflame public opinion, and to embolden people to take action can no longer be underestimated, and neither can what that means for traditional diplomatic efforts. The acceleration of media has steadily meant changes to diplomatic channels. President Kennedy, for example, had plenty of time to formulate a response to the Soviet Union's Berlin Wall crackdown. Yet by the latter stages of the Vietnam War, President Johnson was frustrated by the increasing technological capabilities of television news as it offered an alternate version of wartime events. And the diplomatic prominence of cable news was perhaps never more important than during the Gulf War, when Saddam Hussein let CNN stay in place as a diplomatic channel to Washington. However, despite this media acceleration, the Obama administration (that itself owed a measure of its campaign success to its mastery of social media) was little more than a sideline player, diplomatically speaking, during the Arab Spring. As Philip Seib has pointed out, "Policy makers cannot be mere spectators. Stunned surprise is an inadequate response to transformative events, and yet that is what we saw from the United States and other major powers as events in the Arab world unfolded."<sup>1</sup>

Both the use of social media platforms by citizens to organize protests and the governmental response of attempting to control, limit, or completely shut down such technologies will continue to pose important questions for international law scholars for years to come, even as democracies ponder limits on Internet access. For example, in an age in which social media can influence outcomes in mere days, how can nations effectively and meaningfully conduct diplomacy? How do the laws of war affect civilians' use of social media to guide military air strikes, as in Libya? Even though revolutions were toppling governments long before Facebook and Twitter, and even though social media-coordinated political expression has not

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1. PHILIP SEIB, *REAL-TIME DIPLOMACY: POLITICS AND POWER IN THE SOCIAL MEDIA ERA* 2 (2012).

always led to regime change (witness the 2009 Iranian election protests), the Arab Spring has provided perhaps the clearest example of how the power of social media platforms can be harnessed as a tool for political organization and expression.

#### I. THE ARAB SPRING IN PERSPECTIVE

Few people could have predicted the role that a humble produce vendor, Mohamed Bouazizi, would play in unleashing a wave of protests seeking democracy across the Arab world. After being assessed an arbitrary fine, slapped by corrupt policemen, and humiliated in public, the young Tunisian stepped in front of a Tunisian government building on December 17, 2010, and set himself on fire. Video of the horrific event went viral in Tunisia, which enjoys one of the highest rates of Internet access in north Africa. Within a month, there were over 196,000 mentions on Twitter about the Tunisian revolution, and after increasing protests, the government of President Zine El Abidine Ben Ali was toppled.

Civil war broke out in Libya. Protestors took to the streets in Yemen, Syria (where a civil war would also soon begin), Bahrain, Morocco, and elsewhere. In Egypt in 2010, Khaled Said was beaten and murdered by Egyptian police after he posted a video showing police corruption online. Photos of Said and his swollen, bruised face went viral on the Internet, contradicting police reports and an official autopsy report that had concluded that Said had choked to death on a bag of drugs. Wael Ghonim, and Egyptian Google executive and Internet activist, started a Facebook page entitled “We Are All Khaled Said.” It grew to over 800,000 members, as Egyptians increasingly used social networking platforms to produce and consume political content, organize protests, stay connected, and spread word to others about abuses of the Mubarak regime.

While the success of the so-called “Facebook revolutions” or “Twitter revolutions” during the Arab Spring garnered worldwide attention—technology and, particularly social media, played significant roles in mobilizing and organizing political and social protests worldwide. On January 17, 2001, after Filipino President Joseph Estrada was acquitted of corruption charges, within minutes after the decision was announced, people took to their mobile phones to forward text messages. The messages called for people to converge on Epifanio de los Santos Avenue, a major crossroads in Manila. Over 1 million people eventually arrived, stopping traffic in downtown Manila. Nearly 7 million text messages were sent protesting the verdict. Legislators quickly reversed course and allowed key evidence that had been set aside to be introduced. By January 20, President Estrada was out, and he himself blamed “the text messaging generation” for his downfall.

All over the world, the power of social networking as a tool for effecting political change has been played out on stages that may not be as prominent

as Tahrir Square during the Arab Spring, but which nonetheless command our attention. In India, the government has demanded that social media sites like Facebook censor user content to remove objectionable content before it goes online. Sites like Facebook and Google/Orkut are already being monitored by special units in cities like Mumbai for content deemed disparaging or obscene. In South Korea, prosecutors indicted a Socialist Party member for re-tweeting pro-North Korean messages from a North Korean government Twitter account. In China, which has waged its own war with social networking sites over its censorship demands, the government was upset with the fact that the U.S. Embassy posted air pollution reading in Beijing on Twitter. The readings, which rebuke the official and wildly optimistic assessments of the Chinese government, have been picked up and spread by Chinese bloggers as an indication of the government's lack of transparency and willingness to lie to its own people. In October 2011, the office of U.S. Senator Richard Lugar released a report outlining a strategy to advance U.S. goals in Latin America by expanding social media use and by supporting software engineering training programs, IT literacy programs, and supporting local technology developers in creating language translation programs (only about 12% of Internet content is in Spanish or Portuguese). In addition, the U.S. State Department is already using social media to reach out and to explain U.S. foreign policy, through tools like *Iniciacion Emprende*, a Facebook page for online youth in Latin America who are interested in starting their own businesses.

Ongoing developments in Russia have also illustrated the vital role played by social media in fomenting dissent. In December 2011, tens of thousands of Russians protested in cities like Moscow, organizing anti-Putin rallies using social networking sites. YouTube was flooded with videos alleging vote rigging by the country's ruling United Russia Party. Russia has over 1 million Twitter users, a five-fold increase from the previous year. 40% of Russian adults are online, using sites like *Vkontakte* (Russia's "Facebook").

Governmental response that uses technology or directly addresses the use of technology by protestors is a key factor in the success or failure of movements agitating for political or social change, as the experience of the Arab Spring amply demonstrates. However, social media is a double-edged sword. During the August 2011 London riots, social networking platforms received much of the blame for providing rioters with a vehicle to help organize and cause massive, violent looting. Rioting Londoners used social media not only to plan rendezvous locations, but also to warn others of areas where the police had gathered in force. At one point, the Metropolitan Police announced that they would bring charges against people who tried to initiate looting or violence through social media postings. Indeed, in the aftermath of the riots, individuals who had used social media to coordinate looting or to incite violence were criminally charged. Even Prime Minister

David Cameron raised the stakes during the unrest, when he publicly contemplated shutting down access to the Internet.

Yet, even as social media became associated with the violence and lawlessness of the London riots, it was simultaneously a positive force. Social media aided the police in finding, apprehending, and prosecuting thousands of suspected rioters and looters in the wake of the unrest. In addition, social media helped facilitate a massive cleanup effort and helped a divided community to heal. Facebook pages and websites were created to help coordinate and centralize information about cleanup locations. In addition, @Riotcleanup, a popular Twitter feed with over 60,000 followers, was created and regularly updated to let people know where to meet to help clean up the city, donate supplies, and so forth.

Social networking platforms are all about facilitating communication and the sharing of information. These new methods of communication allow widely-dispersed individuals to connect and work together in a coordinated fashion, while also broadcasting their views and activities at home and abroad. The Arab Spring experience was but one demonstration among many on the international landscape. It is a virtual certainty that it will not be the last.

## II. WAS THE REVOLUTION REALLY TWEETED?

As the Arab Spring coalesced, media outlets worldwide clamored to credit the use of social networking platforms for the regime-changing successes. One account quoted on a tweeting Cairo activist who proclaimed “[w]e use Facebook to schedule the protests, Twitter to co-ordinate and YouTube to tell the world.”<sup>2</sup> At times, the effusiveness of the protestors themselves veered into the extreme; in February 2011, Jamal Ibrahim of Egypt even named his newborn daughter “Facebook” because of the significant role of the social networking site in his country’s revolution.<sup>3</sup> Other observers similarly applauded the importance of social media. Amjad Baiazy of Amnesty International said that during Syria’s crackdown on dissidents, for example, there were “thousands of [pieces of] evidence thanks to social media, not only to show the world, but also Syrians, of the crimes.”<sup>4</sup> Social media, Baiazy said, had “turned every citizen into a

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2. Priscilla Thomas, *Can Social Media Topple a Government?*, MAARS (Mar. 4, 2011 5:59 PM), <http://rowlands.maars.net/article/can-social-media-topple-a-government.html>.

3. Catharine Smith, *Egyptian Father Names Daughter ‘Facebook’*, HUFFINGTON POST (Feb. 21, 2011, 7:35 PM), [http://www.huffingtonpost.com/2011/02/21/baby-named-facebook-egypt\\_n\\_825934.html](http://www.huffingtonpost.com/2011/02/21/baby-named-facebook-egypt_n_825934.html).

4. Online Activists Laud Social Media With Changing the World, DAILY STAR (Dec. 9, 2011 5:58 PM), <http://www.dailystar.com.lb/Technology/International/2011/Dec-09/156442-online-activists-laud-social-media-with-changing-the-world.ashx#axzz286XiRtmW>.

journalist. Every citizen can use Twitter to broadcast.”<sup>5</sup> *The Atlantic Wire* quoted Mohammed Janjoom of CNN on the vital role played by social media, with Janjoom pointing out:

In the case of Egypt it really played a critical factor in getting out the word on how to organize . . . . There was one group in Egypt that was one of the key groups in getting people out on the street . . . . Last week in a matter of days they went from 20,000 fans to 80,000 fans . . . . We can see that these sites were used in order to get the word out about how to bypass checkpoints, how to get across bridges, how to get to places where people wanted to demonstrate. So it was a critical tool in getting people out into the streets.<sup>6</sup>

Other observers pointed to the organizational value as well as the empowering, citizen journalism aspect of social media:

Regardless of one’s personal opinion of YouTube, Twitter and Facebook, these social media platforms, along with sheer creativity, determination and innovation, became the technological weapons of this revolution. Their use confounded the Mubarak team at every turn as tech savvy people around the globe created the means with which to continue to get their messages out . . . . While many who were there in the Square argued Twitter and Facebook were not great organising tools for those physically there, they provided a tipping point of outrage that spread like wildfire throughout the region . . . . Yes, everyone knew to go to Tahrir Square . . . these social media tools were used to send out information quickly so evidence of regime atrocities were seen from places the media’s cameras were not able to show the violence.<sup>7</sup>

Moreover, as Denis Campbell went on to observe, the use of social networking platforms lent an air of honesty and transparency to coverage of the revolution, highlighting the use of candid, unguarded moments from Tahrir Square “of children protesting and spontaneous groups singing, virally across the globe countering biased coverage that painted the revolution as not meaningful or only representative of a small group of protestors.”<sup>8</sup>

Yet almost as quickly as the coverage and credit—misplaced or not—being given to social media occurred, a backlash began against those media accounts that had, as one author described it, “glazed over what the real role of social media was, instead mischaracterizing social media and the Internet

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5. *Id.*

6. John Hudson, The ‘Twitter Revolution’ Debate: The Egyptian Test Case, *ATLANTIC WIRE* (Jan. 31, 2011), <http://www.theatlanticwire.com/global/2011/01/the-twitter-revolution-debate-the-egyptian-test-case/21296/>.

7. DENIS G. CAMPBELL, *EGYPT UNSHACKLED: USING SOCIAL MEDIA TO @#:* THE SYSTEM 223-24 (2011).

8. *Id.* at 224.

as a new phenomenon that showed Egyptian youth just how wonderful democracy was.”<sup>9</sup> A host of pundits sprang up to argue that social media was merely a means and not the end, and that Western journalists were engaging in considerable wishful thinking, exaggerating the influence of emerging media because of a sense of “techno-utopianism.” Pointing out the failure of Iran’s 2009 election protests amidst the media hype about the power of social media, for example, Evgeny Morozov wrote that “Iran’s Twitter Revolution revealed the intense Western longing for a world where information technology is the liberator rather than the oppressor.”<sup>10</sup> Writing in the *Washington Post*, Anne Applebaum expressed her skepticism based on the continued Egyptian protests even after President Mubarak decided to cut off all Internet access:

Note that the Egyptian government’s decision to shut down the country’s Internet access over the weekend—something it can do because Internet access is still so limited—had almost no impact on the demonstrators. For all the guff being spoken about Twitter and social media, the uprising in Cairo appears to be a very old-fashioned, almost 19<sup>th</sup> century revolution. People see other people going out on the streets and decide to join them.<sup>11</sup>

Such critics were quick to point out that while social networking platforms may have dramatically altered the traditional relationship between popular will and political authority, ultimately there is no substitute for word of mouth and boots on the ground activism. Sites like Facebook or Twitter may be useful tools for rapid coordination, but don’t look to them for the narrative or resolve needed to sustain a movement. As Andrew Woods commented in one op-ed piece, “flash mobs do not a political organization make.”<sup>12</sup>

Soon, almost as if to compensate for the pendulum swing of media commentary that had been hailing “the Twitter Revolution” in the Mideast and arguably magnifying social media’s role in the political upheaval, the pendulum swung back. Articles begin appearing with such titles as “Successful Revolution Takes More Than Social Media,” “Did Twitter, Facebook Really Build a Revolution?,” and “The Twitter Revolution Debate is Dead.”<sup>13</sup> And new attention was focused on earlier cynics, like

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9. ADEEL A. SHAH & SHEHERYAR T. SARDAR, *SANDSTORM: A LEADERLESS REVOLUTION IN THE DIGITAL AGE* 60 (2011).

10. EVGENY MOROZOV, *THE NET DELUSION: THE DARK SIDE OF INTERNET FREEDOM* (2011).

11. Hudson, *supra* note 6.

12. Andrew Woods, *These Revolutions Are Not All Twitter*, N.Y. TIMES (Feb. 1, 2011), [http://www.nytimes.com/2011/02/02/opinion/02iht-edwoods02.html?\\_r=1](http://www.nytimes.com/2011/02/02/opinion/02iht-edwoods02.html?_r=1).

13. James J. Carafano, *Successful Revolution Takes More Than Social Media*, WASH. EXAM’R (Feb. 21, 2011), <http://washingtonexaminer.com/article/39163#UHcw5ELC5UR>; Jina Moore, *Did Twitter and Facebook Really Build a Global Revolution?*, CHRISTIAN SCI. MONITOR (June 30, 2011), <http://www.csmonitor.com/>

Golnaz Esfandiari's refutation of the role that social media had played in the 2009 unrest in Iran. Writing in *Foreign Policy*, Esfandiari said "It is time to get Twitter's role in the events in Iran right. Simply put: There was no Twitter Revolution inside Iran." Instead, Esfandiari pointed out, it was Western journalists and bloggers who were scrolling through English-language tweets with the hashtag "#iranelection," rather than communicating with people on the ground in Iran, who were spreading word of the unrest. Nevertheless, despite the confusion over the sources of the news itself, Esfandiari acknowledged that social media played a pivotal role in publicizing the Iranian protests, albeit a role that had to be viewed in the context of the efforts at regime change that predated social media. Esfandiari noted:

Twitter played an important role in getting word about the events in Iran out to the wider world. Together with YouTube, it helped focus the world's attention on the Iranian people's fight for democracy and human rights. New media over the last year created and sustained unprecedented international moral solidarity with the Iranian struggle—a struggle that was being bravely waged many years before Twitter was ever conceived.<sup>14</sup>

Perhaps the most vocal member of the "Internet freedom does not equate with securing real freedom" school of thought is Malcolm Gladwell. Rejecting the idea that the "new tools of social media have reinvented social activism," Gladwell pointed to the success of the early sit-ins during the U.S. civil rights movement to illustrate that meaningful social change could be accomplished with word of mouth instead of technology.<sup>15</sup> As Gladwell put it, "These events in the early sixties became a civil-rights war that engulfed the South for the rest of the decade—and it happened without e-mail, texting, Facebook, or Twitter."<sup>16</sup> Gladwell continued to sound this theme in the aftermath of the toppling of the Mubarak regime, writing "What evidence is there that social revolutions in the pre-Internet era suffered from a lack of cutting-edge communications and organizational

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World/Global-Issues/2011/0630/Social-media-Did-Twitter-and-Facebook-really-build-a-global-revolution; James Fellows & Ellen Chou, The Twitter Revolution Debate is Dead, *ATLANTIC* (Feb. 14, 2011, 1:00 AM ET), <http://www.theatlantic.com/technology/archive/2011/02/the-twitter-revolution-debate-is-dead/71185/>; Golnaz Esfandiari, The Twitter Devolution, *FOREIGN POLICY* (June 7, 2010), [http://www.foreignpolicy.com/articles/2010/06/07/the\\_twitter\\_revolution\\_that\\_wasnt](http://www.foreignpolicy.com/articles/2010/06/07/the_twitter_revolution_that_wasnt).

14. *Id.*

15. Malcolm Gladwell, Small Change: Why the Revolution Will Not Be Tweeted, *NEW YORKER* (Oct. 4, 2010), [http://www.newyorker.com/reporting/2010/10/04/101004fa\\_fact\\_gladwell](http://www.newyorker.com/reporting/2010/10/04/101004fa_fact_gladwell).

16. *Id.*



tools? In other words, did social media solve a problem that actually needed solving?<sup>17</sup>

Certainly, political and social protests have gone on long before social media, and dictators were being toppled long before the first glimmers of Facebook or Twitter. And without a doubt, Western journalists in a rush to anoint social networking as the new “it” tool to effect social change may have been guilty, if not of overstating social media’s role in the Arab Spring, then of failing to properly place it in the context of other organizational and broadcast tools. Viewing it more pragmatically, one commentator has noted that Egyptians “knew the value of social media was that it was a good tool to organize masses but it was not a miracle object that would create a revolution on its own. With that understanding, they used both the Internet and clandestine meetings to shape the revolution.”<sup>18</sup>

However, cyber-pessimists like Gladwell and others, in their rush to assure and convince their respective audiences that “the revolution will not be tweeted,” have failed to take several significant factors into account. The first is that a failure to appreciate the significance of the role played by social media in organizing protests, broadcasting word of the dissenting voices, and promoting government transparency during the Arab Spring is at once dismissive as well of the social networking power that can be (and has been) harnessed by repressive regimes themselves for their own purposes—surveillance of the opposition, spreading disinformation, and even networking propaganda of their own. The second factor that cyber-pessimists have ignored harkens back to Marshall McLuhan’s prophetic words that “the medium is the message.” The medium carrying the message, whether it be Facebook, Twitter, YouTube, or any one of a number of social networking platforms, cannot help but define and shape the message itself. The utility of a site like Facebook is in providing a tool for enhancing the ability to engage in public speech, to undertake collective action, and to facilitate instantaneous access to information, communication, and organization. Social media didn’t bring about the protests in Tahrir Square; these were fueled by years of corruption, poverty, unemployment, and the abuses of an authoritarian regime. Yet just because social mobilization occurs via Facebook or Twitter as opposed to face to face communication doesn’t lessen its impact or make the ties it creates any weaker. Images of friends and neighbors being beaten by riot police are powerful, and clearly can draw people to the streets. The appeals for solidarity, the calls to action, are no less powerful because they are viewed in a hastily-recorded YouTube clip as opposed to being witnessed in person. The very immediacy of social

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17. Malcolm Gladwell & Clay Shirky, *From Innovation to Revolution: Do Social Media Make Protests Possible?*, FOREIGN AFFAIRS (Mar.–Apr. 2011), <http://www.foreignaffairs.com/articles/67325/malcolm-gladwell-and-clay-shirky/from-innovation-to-revolution>.

18. SHAH & SARDAR, *supra* note 9, at 60.

media and the technological infrastructure it provided for gathering and organizing support, together with the transparency it offered by providing a global audience with news is as much a part of the message as the content itself.

The final factor overlooked by cyber-pessimists in the backlash seeking to diminish the importance of social media's role during the Arab Spring is the growing body of empirical evidence that has emerged to document social media's critical importance in enabling the historic region-wide uprising in early 2011. For example, a study by Ekaterina Stepanova of the Institute of World Economy and International Relations analyzed the penetration rate of modern information communication technologies and digital social media tools and networks throughout the Middle East in late 2010 and early 2011.<sup>19</sup> While that report chided media haste to emphasize the mobilization role of a site like Twitter, for example, as composed to the greater impact of satellite television, cell phones, and YouTube, it nevertheless concluded:

No region, state, or form of government can remain immune to the impact of new information and communication technologies on social and political movements. While the political contexts of mass unrest in large parts of the Middle East have important country and macro-regional specifics, the impact of net-based technologies and social tools goes beyond that region and will continue to affect developing and developed countries alike.<sup>20</sup>

The PONARS report highlights the conditions that made it possible for social media to play such an important role in Egypt, relying upon February 2010 figures from the Egyptian Ministry of Communications and Information Technology that revealed that the country had over 17 million users—a 3,691 percent increase from the 450,000 users it had in December 2000.<sup>21</sup> According to the Ministry, Egypt also had 4 million Facebook users at the time, and over 160,000 bloggers (roughly a third of which were focused on politics).<sup>22</sup> Nevertheless, this PONARS report points out the seeming contradiction between its conclusions and the fact that “states with some of the lowest levels of Internet exposure (like Yemen and Libya) both experienced mass protests.”<sup>23</sup>

Ultimately, the PONARS study cautions against U.S. policy making an automatic connection between social media networks and a Western-style

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19. Ekaterina Stepanova, *The Role of Information Communication Technologies in the “Arab Spring:” Implications Beyond the Region*, PONARS EURASIA (May 2011), [http://www.gwu.edu/~ieresgwu/assets/docs/ponars/pepm\\_159.pdf](http://www.gwu.edu/~ieresgwu/assets/docs/ponars/pepm_159.pdf).

20. *Id.* at 3.

21. *Id.* at 2.

22. *Id.*

23. *Id.* at 3.

democracy agenda while ignoring socioeconomic realities and social justice facets to the Arab Spring. As Stepanova aptly characterizes it, the events of the Arab Spring defied skeptics like Malcom Gladwell and Evgeny Morozov by proving social media's value as an accelerator of social transformation, but while "net-based information and communication tools may serve as powerful accelerating factors of social protest, . . . they do not in and of themselves reflect or dictate the substantive natures (sociopolitical, value-based, and ideological) and contextual forms of such protests."<sup>24</sup>

Another empirical look at the Arab Spring was conducted by the Dubai School of Government's Governance and Innovation Program in its second *Arab Social Media Report*.<sup>25</sup> The report highlights and analyzes usage trends of online social networking across the Arab region based on data collected during the first quarter of 2011, looking at (among other factors) Twitter and Facebook usage. In particular, it notes that Facebook usage between January and April 2011, jumped by 30 percent (compared with 18 percent growth for the same time period in 2010). In particular, Egypt's growth was 29 percent, up from just 12 percent for the first quarter of 2010.<sup>26</sup> The report also details the swelling numbers for terms on Twitter associated with the Arab Spring, noting that the hash tag "Egypt" garnered 1.4 million references during the first quarter of 2011, while "Jan25" had 1.2 million mentions.<sup>27</sup> While the mentions associated with the Arab Spring in Tunisia peaked right around the January 14, 2011, when protests commenced there, such mentions in Egypt did not peak until President Mubarak stepped down on February 11, 2011.<sup>28</sup> Another interesting fact from the study is that, for the Egyptians and Tunisians who were surveyed, government attempts to block sites like Facebook apparently backfired, with more than half of those surveyed (56% in Egypt, 59% in Tunisia) reporting the attempts had a positive effect by motivating them to be more creative in communicating and organizing.<sup>29</sup> The study also mapped calls for protests on Facebook with the actual demonstrations on given dates and found demonstrable correlations. While the study stopped short of calling social networking "the defining or only factor in people organizing themselves on these dates," it does conclude that, "as the initial platform for those calls, it cannot be denied that they were a factor in mobilizing movements."<sup>30</sup>

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24. *Id.* at 6.

25. See DUBAI SCH. OF GOV'T, CIVIL MOVEMENTS: THE IMPACT OF FACEBOOK AND TWITTER, 1 ARAB SOC. MEDIA REP. 1, 1-29 (2011), available at [http://www.dsg.ae/en/Publication/Pdf\\_En/DSG\\_Arab\\_Social\\_Media\\_Report\\_No\\_2.pdf](http://www.dsg.ae/en/Publication/Pdf_En/DSG_Arab_Social_Media_Report_No_2.pdf) (hereinafter DUBAI SCH. OF GOV'T).

26. *Id.* at 5.

27. *Id.* at 21.

28. *Id.* at 22.

29. *Id.* at 7.

30. *Id.* at 5.

Yet another telling result from the Arab Social Media Report concerns the significance of social media as a source of news and information. A staggering 94.29% of Tunisians surveyed reported getting their news and information on events during the civil unrest in early 2011 from social media resources like Facebook, Twitter, blogs, etc., while 88.10% of Egyptians acknowledged doing so.<sup>31</sup> This dwarfs the figure for state-sponsored media (television, radio, newspapers), which 35.71% of Egyptians and 40% of Tunisians admitted consulting.<sup>32</sup>

Overall, while the Arab Social Media Report cautions that “[i]t is still early to make a final assessment about the role of social media in the Arab civil movements or the role they will be playing in changing the ways in which governments interact with societies in the region,” it nevertheless provides compelling empirical evidence suggesting that, as the report itself puts it, “the growth of social media in the region and the shift in usage trends have played a critical role in mobilization, empowerment, shaping opinions, and influencing change.”<sup>33</sup>

A final example of the empirical analysis that refutes the media backlash against the recognition of social media’s vital role during the Arab Spring is the study performed by a group of University of Washington researchers as part of 2011’s Project on Information Technology and Political Islam.<sup>34</sup> This study, which focused primarily on Tunisia and Egypt, involved the creation and study of a database consisting of more than 3 million tweets, gigabytes of blogs, and countless hours of YouTube videos. In discussing social media’s importance in putting “a human face on political oppression,” the study found that in Egypt, the number of tweets mentioning “revolution” from Egypt and during the week before President Mubarak’s resignation skyrocketed from 2,300 a day to 230,000 a day.<sup>35</sup> Because Twitter users can send updates from any mobile phone, Professor Howard and his colleagues devoted particular attention to that data, since the number of people with cellphones in Egypt and Tunisia greatly outnumber those with standard internet access. As a result, Howard says, “Twitter offers us the clearest evidence of where individuals engaging in democratic conversations were located during the revolutions.”<sup>36</sup>

Among the observations made in the University of Washington study is not just the sheer numbers indicating that political discussion on blogs and social networking platforms often preceded mass protests, but also the

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31. DUBAI SCH. OF GOV’T, *supra* note 25, at 8.

32. *Id.*

33. *Id.* at 24.

34. Philip N. Howard et al., *Opening Closed Regimes: What Was the Role of Social Media During the Arab Spring?* 1-30 (Project on Info. Tech. & Political Islam, Working Paper No. 2011.1, 2011), available at [http://dl.dropbox.com/u/12947477/publications/2011\\_Howard-Duffy-Freelon-Hussain-Mari-Mazaid\\_pITPI.pdf](http://dl.dropbox.com/u/12947477/publications/2011_Howard-Duffy-Freelon-Hussain-Mari-Mazaid_pITPI.pdf).

35. *Id.* at 4.

36. *Id.*

“who” and “how” behind the social media efforts. Howard and his fellow researchers found that a key demographic group—young, urban, relatively well-educated individuals (many of whom were women)—played a critical role in steering the political conversation, and often in inventive ways.<sup>37</sup> In Tunisia, for example, dissidents streamed video of President Zine El Abidine Ben Ali’s wife using a government jet to make expensive shopping trips to Europe to highlight the regime’s excesses.<sup>38</sup> In addition, as with the Dubai School of Government’s Arab Social Media Report, the University of Washington study demonstrated that a spike in online conversations about revolutionary subjects usually preceded major events, with Twitter traffic peaking with street protests.

Another interesting aspect of this study is not just the increasing social media activity and content produced by political actors in Egypt as they reacted to events on the street, but the close affinity with Western media. From mapping the digital space in Egypt twice (once in November 2010 and a second time in May 2011), the University of Washington found that, for Egyptians, Facebook and other social networking platforms are not simply used for entertainment, but instead, are where Egyptians go to engage in politics. Major political actors frequently linked to social networking platforms like Facebook or to Western media (like CNN) and, in fact, were more likely to link to these resources than to each other.<sup>39</sup> Over 20% of the 928 links going out of Egyptian party websites were to social media platforms like Facebook and YouTube and to major Western news websites.<sup>40</sup> Interestingly, none of the outgoing links from the Egyptian websites went to Al-Jazeera in November 2010, and when the web crawl was performed again in May 2011, there were only 6 outgoing links to Al-Jazeera.<sup>41</sup>

The University of Washington study relied on this body of empirical evidence to reach several conclusions. One was that, “by using digital technologies, democracy advocates created a freedom meme that took on a life of its own and spread ideas about liberty and revolution to a surprisingly large number of people.”<sup>42</sup> Another was that conversations about democracy and revolution on blogs and social networking platforms usually immediately preceded mass protests.<sup>43</sup> Finally, the report concluded that social media helped spread democratic ideas transnationally, as democracy proponents used social media to connect with others outside their borders. The result, according to Howard and his fellow researchers, was that “social media brought a cascade of messages about freedom and democracy across

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37. *Id.* at 2.

38. *Id.*

39. Howard, *supra* note 34, at 19-20.

40. *Id.*

41. *Id.* at 20.

42. *Id.* at 3.

43. *Id.*

North Africa and the Middle East, and helped raise expectations for success of political uprising.”<sup>44</sup> In other words, far from being merely an exaggeration by “cyber-utopian” Western media overly eager to anoint social media as a digital political savior, social networking platforms played a genuine, vital and, more importantly, quantifiable role in the Arab Spring. As Howard and his colleagues sagely point out:

Democratization movements had existed long before technologies such as mobile phones and the Internet came to these countries. But technologies have helped people interested in democracy build extensive networks, create social capital, and organize political action. Technology may not have created the desire for political freedom, but it is a tool democracy advocates have used to their advantage.<sup>45</sup>

### III. GOVERNMENTAL RESPONSE

As vital as appreciating the uses of social networking platforms by protesters themselves may be, no understanding of the significance of social media during the Arab Spring can be complete without appreciating the nature of the governmental response. In particular, the use of technology by repressive regimes—technology all too often developed and/or sold by Western nations—in attempting to stifle and combat dissent has been largely overlooked. Whether or not another Arab Spring might succeed could very well depend on how leaders in the West respond to attempts to “unplug democracy.” Legislative efforts such as the Global Online Freedom Act could impact the extent to which the very same technology credited with fomenting dissent can be used by an authoritarian regime to crush opposing voices.

Looking at Egypt and Tunisia in particular, the conditions were certainly ripe for technology to serve as both a tool for marshaling and organizing protests and a means of exerting government control. Both countries have comparatively young populations comfortable with technology. In Tunisia, the median age is 30 years old, and approximately 23% of the country’s population of 10 million is under the age of 14.<sup>46</sup> For every 100 people in Tunisia, there are 93 mobile phone subscribers.<sup>47</sup> Twenty-five percent of the Tunisian population has used the Internet, and approximately 66% of the online population in Tunisia is 34 or younger.<sup>48</sup> In Egypt, the median age is 24, and out of the nation’s 83 million residents, a third is under the age of 34.<sup>49</sup> Out of 100 Egyptians, 67 have mobile phone subscriptions.<sup>50</sup> Ten

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44. Howard, *supra* note 34, at 3-4.

45. *Id.* at 5.

46. *Id.*

47. *Id.*

48. *Id.* at 6.

49. *Id.* at 5.

percent of the Egyptian population has used the Internet, and 70% of the online population in Egypt is under the age of 34.<sup>51</sup> And in both nations, there was a long history of government censorship of the media, giving people greater incentive to look to the Internet for sources of credible news and information.

Prior to the Arab Spring itself, government crackdowns on Internet use, and particularly the use of social media, were not unknown. For example, in Tunisia in August 2007, video of the president's plane arriving at and departing from prime shopping spots in Europe—with the president's wife as the only passenger—was published on YouTube and other sites. The Tunisian government responded by blocking YouTube and another video site, Daily Motion, for an extended period of time.<sup>52</sup> In 2008, the government blocked Facebook for a month.<sup>53</sup> During both periods, it was widely speculated that the Tunisian administration of Ben Ali was concerned about the power of social media to nurture communication ties among its citizens.

With the spark that ignited national protests in Tunisia—the self-immolation of Mohamed Bouazizi on December 17, 2010—came more crackdowns. Although the state-sponsored media had not covered either Bouazizi's act, the protests it engendered, or his eventual death in a hospital on January 14, 2011, the uploaded YouTube videos of the tragedy spread rapidly, initially among networks of family and friends. Critics of the Ben Ali regime, like 29 year-old fashion designer Shamseddine Abidi, posted videos and updates on Facebook that were picked up by news outlets like Al Jazeera. At the same time, there were online campaigns calling for particular groups (like lawyers and unions) to form committees to support the protests that had begun in the city of Sidi Bouzid. While the Tunisian government responded by trying to ban Facebook, Twitter, YouTube, and Daily Motion, organization using these social networking platforms had already spread thanks to the near-universal access to cell phones. In addition, outside Tunisia, hacker organizations like Anonymous targeted Tunisian government efforts with “Operation Tunisia” denial-of-service attacks and with software solutions that activists used to evade government firewalls.<sup>54</sup>

The study by Professor Nolan and his colleagues show that Twitter traffic with hashtags associated with Tunisian protesters (such as #sidibouzid) ebbed and flowed along with government efforts to curb the effects of social media. Many of the tweets themselves gave glimpses into personal stories of suffering under the Ben Ali regime, while others

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50. Howard, *supra* note 34, at 6.

51. *Id.* at 6.

52. *Id.* at 7-8.

53. *Id.*

54. *Id.* at 8.

provided links to YouTube videos, news stories, or Facebook groups critical of the regime. Before Ben Ali fled Tunisia on January 14, 2011, the volume of Twitter traffic would periodically decline while mobile networks were under attack, but it would always surge again when service returned to normal.<sup>55</sup> Similarly, the number of tweets coming from inside Tunisia increased over the same period, just as the number of tweets with no location information declined, an indication that as the winds of political change were blowing, more and more Tunisians were willing to publicly declare that they were tweeting from inside their own country.<sup>56</sup>

As social media has become a key forum for the debate of political movements as well as an organizational tool for would-be reformers, governmental response has taken various forms, ranging from suppressing the use of such platforms, using them as an avenue for surveillance, or by blocking them altogether. In a study of thirty-seven countries conducted by Washington, D.C. based Freedom House, researchers identified a variety of different practices employed by governments, including increased website blocking and filtering; content manipulation; attacks upon and imprisonment of bloggers; punishment of ordinary users; and coercion of website owners to remove content.<sup>57</sup> This study identified twelve nations, including Egypt and Tunisia, where social media sites have been at least temporarily shut down.<sup>58</sup> Of the forms of governmental response to dissent being disseminated via social media, internet blocking is the most widely used. The aim of this response (essentially a form of censorship) is to prevent specific content from reaching a final user, using software or hardware that reviews communications and content and decides whether to block the information on the basis of some predetermined, pre-programmed criteria.

Another widely used form of governmental response is coercion, or censorship by pressure. Here, governmental actors contact either the authors of particular information or the operators of an Internet site and apply pressure for the removal of particular content. This can take the form of threats of legal action, withdrawal of government contracts or licenses, or even outright bans of specific companies from operation within the country. One example of this is Google and China. In 2010, under immense pressure from the Chinese government to censor its content, Google China began redirecting all search queries from mainland-based Google.cn to Google.com.hk, based in Hong Kong. In this manner, Google could bypass Chinese regulatory authorities, allowing users access to uncensored search results as opposed to those that had been “simplified” by government filters.

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55. *Id.* at 9, 11.

56. Howard, *supra* note 34, at 10.

57. Ian Brown & Douwe Korff, *Social Media and Human Rights*, in HUMAN RIGHTS AND A CHANGING MEDIA LANDSCAPE 175, 177 (2011).

58. *Id.*



As a unique entity acknowledged by international treaty, Hong Kong was not subject to Chinese laws requiring the restriction of the free flow of information. Governmental coercion can also take the form of encouraging users of social networking platforms like Facebook to complain directly to the site owners about user content. Content manipulation is another tactic in which government agents (portraying themselves as ordinary citizens) post pro-government messages or content on social media sites.

The most direct forms of governmental response, however, are more aggressive. At the low end of this spectrum is the deliberate slowing down of connection speeds, particularly in newspaper offices, internet cafés, private residents, and hotels. At the other end of the spectrum is the complete shutdown of national networks. This tactic was employed by the Mubarak regime in Egypt. It was also used in Syria, where the Internet is almost exclusively controlled by state-owned Syrian Telecom Establishment. In June 2011, nearly all Internet networks in Syria were shut down, with the exception of a handful controlled by the Bashar Al-Assad regime.<sup>59</sup>

In the middle of the spectrum of governmental response is Internet surveillance, legal action by the state (including arrest and formal prosecution), imprisonment and even torture. Internet surveillance often includes monitoring what information people are accessing, their online communications such as emails or tweets, and even using geo-location features on sites like Facebook to track the location of a given user. Organizing protests and mobilizing dissenting voices becomes increasingly difficult when the organizers are living in fear of spies, arrest, or physical attack.

The Egyptian governmental response to social media activism during the Arab Spring is an example of escalating response, as the Mubarak regime first moved to attack and limit first the content and then the social networking platforms themselves before ultimately moving against the communications infrastructure itself. All the while, the Egyptian government simultaneously was employing social media platforms for its own purposes. As one scholar has noted, this strategy had the effect of throwing out the baby with the bathwater, because the full quarantine and shutdown of media infrastructures helped turn the tide of public opinion against the Mubarak regime. This quarantine strategy, notes Alexandra Dunn, “required a disproportionate attack on apolitical actors and was ultimately ineffective at fully impeding the communications networks of those that were the most politically engaged.”<sup>60</sup>

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59. James Cowie, Syrian Internet Shutdown, RENESYS BLOG (June 3, 2011), <http://www.renesys.com/blog/2011/06/syrian-internet-shutdown.shtml>.

60. Alexandra Dunn, Unplugging a Nation: State Media Strategy During Egypt’s January 25 Uprising, 35 FLETCHER F. OF WORLD AFF. 15, 16 (2011), available at

Beginning in October 2010, the Egyptian government's response to the growing unrest with the ruling party was to focus its attack on content. This began with the shuttering of fourteen predominantly religious satellite television stations, the firing of four prominent critics of the Mubarak regime from their posts at newspapers and television talk shows, and the requirement that all live talk shows be broadcast from the headquarters of Egyptian State television.<sup>61</sup> On the day of the parliamentary elections themselves, the regime blocked websites that hosted the newspapers of major opposition groups, such as the Muslim Brotherhood.<sup>62</sup> However, this blockage was both focused in nature and limited in time (the government lifted the blockage immediately after the elections). Clearly, at this point, the regime was seeking to keep specific information from reaching the population at a specific time.

However, by January 2011, in the face of mounting unrest, the regime's efforts shifted to blocking entire platforms such as Facebook (which boasted 3.5 million users in Egypt) and Twitter (which had 12,000 users in Egypt). Another site, Bambuser, had 15,000 registered users in Egypt (most of which signed up just before the November election). A video-sharing site, Bambuser enabled live broadcasts from protests, and allowed people all around the country to follow protests and ensuing government crackdowns in real time.<sup>63</sup> With the escalating signs of social media's importance in coordinating protests (the phenomenal popularity of the "We are all Khaled Said" Facebook page, the use of Twitter to coordinate marches), the Egyptian government shut down Facebook, Twitter, and other social networking sites in their entirety on January 25, 2011.

As previously noted, the ubiquity of cell phones in Egypt made such technology an important organizing tool for activists. Along with the disruption of service of Facebook and Twitter, the government also targeted specific activists by cutting off their mobile phone lines, such as the Frontline SMS hotline for the group Front to Defend Egyptian Protestors (FDEP). However, activists responded by simply purchasing new SIM cards for their phones, or, in the case of FDEP, replacing the phone numbers multiple times. Ultimately, however, the Mubarak regime realized that more extreme measures would be needed in order to slow the flow of information that was helping to fuel and coordinate the protests. On January 27, 2011, the government shut down text messaging and almost all Internet service (with the exception of one small internet service provider, Noor ISP, which was not shut down until January 30, 2011.<sup>64</sup> Internet service would not be

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[http://fletcher.tufts.edu/~media/Fletcher/Microsites/Fletcher%20Forum/PDFs/2011summer/Dunn\\_FA.ashx](http://fletcher.tufts.edu/~media/Fletcher/Microsites/Fletcher%20Forum/PDFs/2011summer/Dunn_FA.ashx).

61. *Id.* at 17.

62. *Id.*

63. *Id.* at 18.

64. *Id.* at 19.

restored until February 2, and text messaging services remained frozen until February 6, 2011. This amounted to the most drastic attack ever taken by a government against national-level media technologies.<sup>65</sup>

The Internet and SMS shutdown, however, backfired. First, the consequences of the media blackout could still be circumvented. The blocking of Twitter prompted activist to use circumvention software to access it, and when the Internet was shut down entirely, people used landlines to call friends outside the country and have them tweet for them. Satellite television stations showed tweets on air, and even provided telephone numbers for access to Google's newly-developed Speak2Tweet system. But most importantly, shutting down the Internet and text-messaging had an immediate impact beyond politics, particularly among business people and the wealthiest, most highly-educated segments of Egyptian society. As Dunn described it:

For the vast majority of Egyptians without Internet access or satellite television services, the SMS shutdown was their first experience with government-imposed limitations on their ability to communicate openly. For nonpolitical individuals, the shutdown of SMS services likely came as a surprise, and it increased people's engagement in the uprising, if only due to curiosity about the unavailable services.<sup>66</sup>

The Mubarak regime inadvertently brought people together by “unplugging” the Internet. By this unplugging, Egypt inflicted potentially catastrophic collateral damage on itself: it “unplugged” its own economy, lost credibility with the international community, and showed international corporations, who were doing business in Egypt, such as Vodaphone, that like Egyptian citizens they, too, were subject to the whims and the will of the regime. Ultimately, even this extreme demonstration of the lengths to which the Mubarak regime was willing to go in order to quell dissent was not enough to keep the regime in power.

Along with orchestrated attacks on international journalists, the extreme measures taken by Egypt to attack media infrastructure and media freedoms also had the byproduct of increasing diplomatic pressures, particularly by the United States. With the United States' long-standing interest in cherished media freedoms, it came as no surprise that the media blackout would bring political fallout from Egypt's single largest source of foreign aid. Then-Assistant Secretary of State P.J. Crowley tweeted “we are concerned that communication services, including the Internet, social media, and even this #tweet, are being blocked in #Egypt.”<sup>67</sup>

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65. *Id.*

66. Dunn, *supra* note 60, at 19.

67. Matthew Weaver, et al., Protests in Egypt—As They Happened, *GUARDIAN* (Jan. 28, 2011), <http://www.guardian.co.uk/news/blog/2011/jan/28/egypt-protests-live-updates>.

Yet one cannot ignore the fact that even as Western diplomats and media outlets condemned the extreme and often brutal efforts to curb expression and dissent during the Arab Spring, Western technology has been complicit in such crackdowns. Innovations from Western countries have enabled oppressive regimes in the Middle East to conduct surveillance and intercept the email, text messages, and cell phone calls of political dissidents. Even as protesters in the Middle East were using social media to organize and communicate, the very regimes they were battling were often equipped with highly-sophisticated technology, purchased from or produced by Western companies that they used to thwart such efforts. In a thought-provoking series of articles entitled “Wired for Repression,” *Bloomberg News* journalists shed light on these dealings. For example, an Iranian engineer who had become involved in the opposition movement in the wake of the 2009 elections was arrested, beaten, and jailed for 52 days.<sup>68</sup> During that time, he was repeatedly interrogated, with security agents confronting him with transcripts of text messages, geo-location records that showed where he had been at specific times, and even a diagram showing all of the people he had called, and the contacts that they in turn had called.<sup>69</sup> The cruel irony was that this engineer, who had worked for telecommunications giant Ericsson in Tehran until 2010, had worked on some of the very technology that was now being used against him.<sup>70</sup>

In addition to Ericsson technology being sold to Iran, Creativity Software of the United Kingdom sold systems to both Iran and Yemen designed to aid in customer location. The systems, which can record a person’s location every 15 seconds, generate reports of a person’s movements, and alert the user when two targets come in close proximity to each other, were intended for law enforcement use.<sup>71</sup> Dublin-based Adaptive Mobile Security Ltd. also sold software intended for law enforcement purposes to Iran, technology, which would be used to monitor the text messaging of suspected dissidents. The system would analyze all messages in English, Persian, or Arabic for key words or phrases; store the messages; and flag ones that had been selected by a filter for review.<sup>72</sup> Even more troubling than the capability for these features to be misused to quash dissenters is the fact that Iranian law enforcement officials requested other

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68. Ben Elgin, Vernon Silver & Adam Katz, Iranian Police Seizing Dissidents Get Aid of Western Companies, BLOOMBERG NEWS (Oct. 30, 2011), <http://www.bloomberg.com/news/2011-10-31/iranian-police-seizing-dissidents-get-aid-of-western-companies.html> [hereinafter Iranian Police Seizing Dissidents Get Aid of Western Companies].

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

specific features, one of which was the ability to change the content of messages.<sup>73</sup>

U.S. companies, of course, have long been banned from nearly all trade with Iran. Moreover, in July 2010, President Obama signed new U.S. sanctions into law, barring federal agencies from doing business with companies that export to Iran “any technology specifically used to disrupt, monitor or restrict the speech of Iranians.”<sup>74</sup> Despite this, U.S. technology still winds up in the hands of authoritarian regimes. For example, Blue Coat Systems, and NetApp Inc., both from Sunnyvale, California, purportedly developed and sold filtering technology to Tunisia that the Ben Ali regime used to censor websites critical of the government.<sup>75</sup> Tunisia also used Smartfilter, a product from Santa Clara, California-based McAfee Inc., for its internet surveillance and web-blocking efforts.<sup>76</sup> Prior to the fall of the Ben Ali government, Tunisian bloggers and other activists lived in an Orwellian existence in which a “Big Brother” type of message —“Ammar 404”—would appear instead of the blocked websites they were trying to access, just as words, random symbols, or threatening messages like “you can run but you can’t hide” would appear instead of the emails they were trying to exchange with friends.<sup>77</sup> One opponent of the Ben Ali regime, Asma Hedi Nairi, described how the “Ammar 404” intrusions forced her to shut down multiple email accounts prior to the Arab Spring, and how the government interference would sometimes even harm reputations by inserting pornographic images in work emails and by routing embarrassing photos onto Facebook.<sup>78</sup> Nairi says that “Ammar 404 was seeing everything. Ammar 404 is more dangerous than any police man in the street. It was a war of information.”<sup>79</sup>

The digital surveillance industry is worth an estimated \$3 billion to \$5 billion a year.<sup>80</sup> Just as activists during the Arab Spring and throughout the Middle East have used emerging technologies and social networking platforms to organize protests, mobilize support, and communicate with others, repressive regimes have used technology to intrude into and disrupt these digital connections. Marietje Schaake, a member of the European Parliament who follows the abuses of communications technology, points

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73. *Id.*

74. *Iranian Police Seizing Dissidents Get Aid of Western Companies*, *supra* note 68.

75. Vernon Silver, Post-Revolt Tunisia Can Alter E-Mail with ‘Big Brother’ Software, BLOOMBERG NEWS (Dec. 12, 2011), <http://www.bloomberg.com/news/print/2011-12-12/tunisia-after-revolt-can-alter-e-mails-with-big-brother-software.html>.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. Ben Elgin & Vernon Silver, Torture in Bahrain Becomes Routine With Help From Nokia Siemens, BLOOMBERG NEWS (Aug. 22, 2011), <http://www.bloomberg.com/news/2011-08-22/torture-in-bahrain-becomes-routine-with-help-from-nokia-siemens-networking.html>.

out that “[w]e have to acknowledge that certain software products now are actually as effective as weapons.”<sup>81</sup> Regimes like the Bashar Al-Assad government in Syria have made widespread use of these digital weapons. Using Western technology from companies like Nokia Siemens and others, the Syrian regime monitors emails and online traffic. A storage and archival system copies the emails, scanning across a network and stores them in a searchable database where the authorities can perform searches at a later date.

Efforts have been made to stop the sale of such surveillance technologies to repressive regimes. Last year, U.S. Representative Christopher Smith of New Jersey, introduced the Global Online Freedom Act, which would create a legally-enforceable obligation on the part of any U.S. business that “creates, provides, or offers to the public for commercial purposes an internet search engine, internet communications services, or internet content hosting services” to ensure that the foreign countries in which it operates or provides service are not violating the basic human rights of their citizens to freely express themselves.<sup>82</sup> The Act’s stated purpose is threefold: (1) to prevent American businesses from cooperating with repressive governments in transforming the Internet into a tool of censorship and surveillance; (2) to fulfill the responsibility of the U.S. government to promote freedom of expression on the Internet; and (3) to restore public confidence in the integrity of U.S. businesses.<sup>83</sup> As justification for its goals, the Act notes that U.S.-based technology companies have enabled or even assisted oppressive practices of governments by supplying them with necessary technology and/or training.<sup>84</sup> It also decries the cooperation by U.S. businesses with repressive governments by providing these regimes with information about their users. The bill also proposes an in-depth study of the feasibility of devolving expert controls concerning items being exported to an Internet-restricting country “for the purpose, in whole or in part, of facilitating substantial restrictions on internet freedom.”<sup>85</sup> Should the study indicate that such controls are viable, the Act could potentially be revised to include them, something that could significantly impact U.S. diplomatic relations with a country subjected to such controls. Finally, the bill would also establish an “Office of Global Internet Freedom,” as a suborganization within the State Department.<sup>86</sup>

While the Global Online Freedom Act is to be applauded as a market-based approach to what is, fundamentally, a human rights problem, it raises as many questions as it answers. How will U.S. companies, already dealing

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81. *Id.*

82. Global Online Freedom Act of 2011, H.R. 1389, 112th Cong. § 201 (2011).

83. *Id.* § 2.

84. *Id.*

85. *Id.* § 301.

86. *Id.* § 204.

with a patchwork quilt of data privacy issues at home and abroad, react to being pressed into service as a sort of global police force, providing intelligence on the practices of the “Internet restricting” countries where they operate? Moreover, if violating nations wind up subject to trade controls, will that prompt retaliation against the United States through trade restriction of their own? Finally, the Act is silent on the question of solving the very practical issue of circumventing the letter and spirit of the Act through the use of “middle man” companies. Certain foreign regimes that are already subject to scrutiny, like Iran, have a long history of acquiring technology through such roundabout means.

#### CONCLUSION

Have iPads and iPhones become the protest signs and placards of the 21<sup>st</sup> century? A glance at political upheaval worldwide during the digital age—from anti-Putin demonstrators in Moscow holding their tablets and smartphones over their heads during protests to the demonstrations in Tahrir Square at the height of the Arab Spring—illustrates that, contrary to Malcolm Gladwell’s denials, the revolution will indeed be tweeted. In the modern age, no social or political protest is complete without the requisite electronic accessories: a fast-trending hashtag (#) on Twitter that concisely describes the movement itself and provides updates on escalating developments; a critical mass of Twitter users adding momentum with their masses of followers and re-tweeters; and a Facebook page with thousands of “friends” sharing and posting. While the critics who were quick to counter the social media narrative that enthralled many Western journalists correctly pointed out that revolutions were occurring long before the advent of Facebook and Twitter, the fact remains that social media platforms and technology in general enabled protests to spread more quickly and organization to occur more efficiently. Facebook, Twitter, and the Internet may not have ignited the upheavals of the Arab Spring, but they certainly served as an accelerant. These new technologies may not have made history happen—the simmering resentments formed by decades of tyranny did that—but they did make history happen faster. The empirical studies of the role of technology during the Arab Spring bear this out.

At the same time, the flipside of technology cannot be ignored, as the governmental response of “unplugging democracy” makes use of the very same innovations to monitor and stifle expression. Governments like the Mubarak regime simultaneously feared the impact that electronic content could have on their entrenched positions and used technology to further their repressive aims, ultimately (and unsuccessfully) playing the ultimate trump card of cutting off internet access altogether. Moreover, such a state media strategy provides a cautionary tale, even to countries as justifiably proud of their commitment to free speech as the United Kingdom and the United States. During the London riots of 2011, Prime Minister David

Cameron contemplated cutting off access to the Internet. And in San Francisco in August 2011, city mass transit administrators worried about planned protests at a number of subway stations elected to shut down network access, ostensibly to ensure safety. Although measures like the Global Online Freedom Act represent an important recognition of the role that U.S. businesses can inadvertently play in supporting the cyber surveillance efforts of repressive regimes, threats to free expression can originate from the highest levels of government. For the Mubarak regime at least, the last-ditch governmental efforts to quell unrest by “unplugging” the Internet failed miserably.



# COVERT INTERNATIONAL INTELLECTUAL PROPERTY LEGISLATION: THE IGNOBLE ORIGINS OF THE ANTI-COUNTERFEITING TRADE AGREEMENT (ACTA)

*Michael Blakeney*

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## INTRODUCTION

Considerable controversy was generated in the United States by the introduction into the Senate in May 2011 of the Protect IP Act (PIPA)<sup>1</sup> and by the Stop Online Piracy Act (SOPA)<sup>2</sup> which was introduced into the House of Representatives in October 2011. Both pieces of legislation sought to facilitate the capacity of the IP enforcement authorities in the U.S. to combat the online trade in pirated copyright works and counterfeit trademarked goods. Provisions included court orders to take down websites which made infringing products available and payment facilities from conducting business with infringing websites, search engines from linking to the sites, and court orders requiring Internet service providers to block access to the sites. Existing criminal laws were to be extended to penalise the unauthorized streaming of copyrighted content.

Characterizing SOPA and PIPA as attempts to introduce censorship of the Internet, notable companies such as “Tumblr, Mozilla, Techdirt, and the Center for Democracy and Technology were among many Internet companies who protested by participating in ‘American Censorship Day’ on November 16, 2011.”<sup>3</sup> They displayed black banners over their site logos with the words “STOP CENSORSHIP.”<sup>4</sup>

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1. Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act, S. 968, 112th Cong. (2011) [hereinafter PIPA] (referencing the Senate bill, which may also be cited as “Protect IP Act of 2011”).

2. Stop Online Piracy Act, H.R. 3261, 112th Cong. (2011) [hereinafter SOPA].

3. *Protests Against SOPA and PIPA*, WIKIPEDIA: THE FREE ENCYCLOPEDIA, [http://en.wikipedia.org/wiki/Protests\\_against\\_SOPA\\_and\\_PIPA](http://en.wikipedia.org/wiki/Protests_against_SOPA_and_PIPA) (last visited June 10, 2012) (providing a comprehensive account of the protests referenced).

4. *Id.*

On January 18, 2012, Wikipedia's English language site and an estimated 7,000 other smaller websites coordinated a service blackout to raise awareness.<sup>5</sup> Over 160 million people viewed Wikipedia's banner.<sup>6</sup> "Other protests against SOPA and PIPA included petition drives, with Google stating that it had collected over seven million signatures, as well as boycotts of companies and organizations that supported the legislation."<sup>7</sup> Paradoxically, in a protest about censorship, the web sites of organizations that were considered supporters of the legislation, such as the United States Justice Department, Federal Bureau of Investigation (FBI), Universal Music Group, the Recording Industry Association of America (RIAA), and the Motion Picture Association of America (MPAA) were slowed or shut down with denial of service attacks.<sup>8</sup>

On January 18, 2012, Senate Majority Leader Harry Reid announced that a vote on PIPA would be postponed until the issues raised about the bill were resolved, and on January 20, 2012, House Judiciary Committee Chairman Lamar Smith announced that the Committee would postpone consideration of SOPA until there was wider agreement.<sup>9</sup> Although lauded as a triumph for the Internet community, the apparent demise of SOPA and PIPA was paralleled by the covert triumph of the Anti-Counterfeiting Trade Agreement (ACTA), was described on Internet blogs as being "SOPA's Pimp Daddy,"<sup>10</sup> as "SOPA and PIPA on Steroids,"<sup>11</sup> and as being "more dangerous than SOPA"<sup>12</sup> and "worse than SOPA."<sup>13</sup>

ACTA was adopted by the negotiating parties, including the U.S., on April 15, 2011.<sup>14</sup> On October 1, 2011, a special signing ceremony was held in Tokyo, with the United States, Australia, Canada, Japan, Morocco, New

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5. *Stop Online Piracy Act*, WIKIPEDIA: THE FREE ENCYCLOPEDIA, [http://en.wikipedia.org/wiki/Stop\\_Online\\_Piracy\\_Act](http://en.wikipedia.org/wiki/Stop_Online_Piracy_Act) (Last visited June 10, 2012).

6. *Id.*

7. *Id.*

8. See Molly Wood, *Anonymous Goes Nuclear; Everybody Loses?*, CNET NEWS (Jan. 19, 2012, 5:40 PM PST), [http://news.cnet.com/8301-31322\\_3-57362437-256/anonymous-goes-nuclear-everybody-loses/](http://news.cnet.com/8301-31322_3-57362437-256/anonymous-goes-nuclear-everybody-loses/).

9. Jonathan Weisman, *After an Online Firestorm, Congress Shelves Antipiracy Bills*, N.Y. TIMES, Jan. 20, 2012, available at <http://www.nytimes.com/2012/01/21/technology/senate-postpones-piracy-vote.html>.

10. "Acta" is SOPA's Pimp Daddy, THE POLITICAL FILM BLOG (Jun. 10, 2012), <http://politicalfilm.wordpress.com/2012/01/24/acta-is-sopas-pimp-daddy/>.

11. Anomaly, *Meet ACTA; It's SOPA and PIPA on Steroids, the Global Edition*, FREAKOUTNATION (Jun. 10, 2012), <http://freakoutnation.com/2012/01/22/meet-acta-its-sopa-and-pipa-on-steroids-the-global-edition/>.

12. Lance Ulanoff, *ACTA 'Is More Dangerous Than SOPA'*, MASHABLE SOCIAL MEDIA (Jun. 10, 2012), <http://mashable.com/2012/01/26/acta-more-dangerous-than-sopa/>.

13. Erik Kain, *If You Thought SOPA Was Bad, Just Wait Until You Meet ACTA*, FORBES (Jun. 10, 2012), available at <http://www.forbes.com/sites/erikkain/2012/01/23/if-you-thought-sopa-was-bad-just-wait-until-you-meet-acta/>.

14. Press Release, Ministry of Foreign Affairs of Japan, *Anti-Counterfeiting Trade Agreement (ACTA) (Opening for Signature)*, (May 1, 2011), available at [http://www.mofa.go.jp/announce/announce/2011/5/0501\\_01.html](http://www.mofa.go.jp/announce/announce/2011/5/0501_01.html).

Zealand, Singapore, and South Korea all signing ACTA.<sup>15</sup> This article explores how ACTA was negotiated without the scale of the protests which accompanied SOPA and PIPA.

#### I. THE ROAD TO ACTA- FAILURE OF ENFORCEMENT NEGOTIATIONS IN OTHER FORA

The World Trade Organization's (WTO) Agreement on Trade Related aspects of Intellectual Property Rights (TRIPS Agreement) had originated as a response to the frustration which principally the U.S. and the European Union (EU) shared about the inadequacy of the international intellectual property rights IPR regime to deal with the growth of counterfeiting and piracy.<sup>16</sup> The proposal made by the United States that IPR regulation be shifted to the General Agreement on Tariffs and Trade (GATT), made at the launch of the Uruguay Round in 1987,<sup>17</sup> was created because of its disillusionment with the World Intellectual Property Organization (WIPO) as an effective custodian of the international IPR system.<sup>18</sup> The creation of the World Trade Organization as the body responsible for the administration of the GATT and the TRIPS Agreement, suggested that IPR enforcement would be placed on sound footing.<sup>19</sup> However, within ten years of the commencement of the TRIPS Agreement, a more than ten-fold increase in counterfeiting and piracy from \$20 billion annually to at least \$450 billion,<sup>20</sup> together with

the difficulties that the [United States] had in raising the enforcement issue in the TRIPS Council, as well as the fairly poor result which it obtained in its complaint about the enforcement of China's copyright law, meant that

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15. See *Anti-Counterfeiting Trade Agreement (ACTA)*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, available at <http://www.ustr.gov/acta>.

16. See generally MICHAEL BLAKENEY, TRADE RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS: A CONCISE GUIDE TO THE TRIPS AGREEMENT (1996) (providing, within chapter 2, background regarding the origin of the TRIPS Agreement).

17. See generally *Information: The Uruguay Round: Decisions of 28 January 1987* (Feb. 5, 1987), GATT/1405 (1987).

18. See generally William N. Walker, *A Program to Combat International Commercial Counterfeiting*, 70 TRADEMARK REP. 117 (1980).

19. See generally THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY (1986-1992) (Terrence P. Stewart ed., 1993) (providing a comprehensive account of the negotiating history of the Uruguay Round).

20. It should be noted that there is a significant lack of agreement about the size of the annual trade in infringing products. See World Intellectual Prop. Org., Advisory Comm. on Enforcement, Dec. 1 – 2, 2010, *The Economic Effects of Counterfeiting and Piracy: A Literature Review*, 6<sup>th</sup> Sess., Dec. 1-2, 2010, ¶ 49, WIPO Doc. WIPO/ACE/6/7 (Sept. 3, 2010); See World Intellectual Prop. Org., Advisory Comm. on Enforcement, Dec. 1 – 2, 2010, *Observations on Efforts to Quantify the Economic Effects of Counterfeit and Pirated Goods*, 6<sup>th</sup> Sess., Dec. 1-2, 2010, ¶ 1, WIPO Doc. WIPO/ACE/6/4 (Sept. 3, 2010).

the WTO was not the effective forum which the [United States] had [sought].<sup>21</sup>

In June 2005, the EU sought to initiate discussions on IPR enforcement.<sup>22</sup> At the TRIPS Council meeting in June 2006, it called for an “in-depth discussion” of enforcement issues.<sup>23</sup> This proposal was met with strong opposition from leading developing countries such as Argentina, Brazil, China, and India, which considered the enforcement issue a diversion from the Doha Development Agenda.<sup>24</sup> At the TRIPS Council meeting in October 2006, the EU, with support from Japan, Switzerland, and the U.S., submitted a joint communication asserting that the TRIPS Council was “an appropriate forum to examine and assist Members in the implementation of enforcement provisions of the TRIPS Agreement” and that the work of the TRIPS Council “should complement Members’ efforts to use other cooperative mechanisms to address IPR enforcement.”<sup>25</sup> The co-sponsors stated that they:

- Invite other Members to engage in a constructive discussion of how to implement the enforcement provisions of TRIPS in a more effective manner.
- Invite other Members to engage in a constructive discussion of accompanying measures which could enhance the effectiveness of national implementing legislation and enforcement efforts, such as for example promoting interagency co-operation, fostering a higher public awareness, and reinforcing institutional frameworks.
- Ask the Secretariat to prepare a synopsis of Members’ contributions to the Checklist of Issues on Enforcement that would serve as a basis for the above-mentioned discussion.

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21. Panel Report, *China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/R (Jan. 26 2009) (interpretation of Article 61 was raised in *China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, which arose on a complaint by the U.S. about the enforcement of China’s copyright law).

22. Council for Trade-Related Aspects of Intellectual Property Rights, *Enforcement of Intellectual Property Rights: Communication from the European Communities*, IP/C/W/448 (June 9, 2005).

23. Council for Trade-Related Aspects of Intellectual Property Rights, *Enforcing Intellectual Property Rights: Border Measures: Communication from the European Communities*, IP/C/W/471 (June 9, 2006).

24. Tove Iren S. Gerhardsen, ‘EU Gets Little Support for Enforcement Proposal at WTO; CBD Issue Unresolved’, IP-WATCH (June 16, 2006, 2:52 PM), <http://www.ip-watch.org/weblog/2006/01/25/ustr-clarifies-demand-for-details-on-chinas-ipr-enforcement-cases/>.

25. Council for Trade-Related Aspects of Intellectual Property Rights, *Enforcement of Intellectual Property Rights: Joint Communication from the European Communities, Japan, Switzerland and the United States*, ¶ 4, IP/C/W/485 (Nov. 2, 2006).

- Stand ready, in cooperation with recipients of technical assistance and with relevant international organizations, to better focus the technical assistance they provide in favour of developing countries in order to facilitate the implementation of enforcement provisions.<sup>26</sup>

A number of Least Developed Countries (LDCs) objected to this proposal on procedural grounds and it was rejected.<sup>27</sup> The LDCs apparently interpreted the joint communication as an “implied threat that countries failing to provide ‘adequate’ protection of intellectual property rights ultimately could be found not to be in compliance with TRIPS.”<sup>28</sup> Taking a more capacity-building approach, the U.S., at the next TRIPS Council meeting in January 2007, circulated a paper sharing its experience on border enforcement of intellectual property rights, and called on the TRIPS Council to “make a positive contribution to addressing [IPR enforcement] problems through a constructive exchange of views and experiences.”<sup>29</sup> Although the LDCs found this approach to be procedurally acceptable, they reiterated that the issue of enforcement did not belong in the TRIPS Council.<sup>30</sup> China, with the support of Argentina, Brazil, Cuba, India, and South Africa, declared that “enforcement could not be a permanent agenda item in the council.”<sup>31</sup> In June 2007, Switzerland introduced a paper suggesting ways to implement the enforcement provisions of the TRIPS Agreement and to improve the overall enforcement of IPRs, particularly in the area of border measures.<sup>32</sup> Finally, on October 11, 2007, Japan introduced a paper on border enforcement of IPRs that outlined the recent trend on IPR infringements.<sup>33</sup> Less than two weeks later, on October 23, 2007, each of these countries

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26. *Id.* ¶ 7.

27. See Tove Iren S. Gerhardsen, ‘WTO TRIPS Council Stumbles over Inclusion of Enforcement’, IP-WATCH (Oct. 27, 2006, 12:23 PM), <http://www.ip-watch.org/weblog/2006/10/27/wto-trips-council-stumbles-over-inclusion-of-enforcement/>.

28. See Peter K. Yu, *TRIPS and Its Discontents*, 10 MARQ. INTELL. PROP. L. REV. 369, 383-86 (2006).

29. Council for Trade-Related Aspects of Intellectual Property Rights, *Communication from the United States: Enforcement of Intellectual Property Rights (Part III of the TRIPS Agreement): Experiences of Border Enforcement*, IP/C/W/488 (Jan. 30, 2007).

30. Tove Iren S. Gerhardsen, *TRIPS Meeting: Boost to IP Issues as Part of Resumed Trade Talks, US Submits Enforcement Proposal*, IP-WATCH (Feb. 14, 2007, 11:54 AM), <http://www.ip-watch.org/2007/02/14/trips-meeting-boost-to-ip-issues-as-part-of-resumed-trade-talks-us-submits-enforcement-proposal/>.

31. *Id.*

32. Council for Trade-Related Aspects of Intellectual Property Rights, *Communication from Switzerland: Enforcement of Intellectual Property Rights: Communication and Coordination as a Key to Effective Border Measures*, IP/C/W/492 (May 31, 2007).

33. Council for Trade-Related Aspects of Intellectual Property Rights, *Communication from Japan, Enforcement of Intellectual Property Rights*, IP/C/W/501 (Oct. 11, 2007).

joined in the announcement of commencement of the ACTA negotiations.<sup>34</sup> Although, as we will see below, the proponents of ACTA would be criticised for ignoring multilateral fora such as the WTO and WIPO in their efforts to establish ACTA, they unsuccessfully attempted to initiate discussions on IPR enforcement in the TRIPS Council. Thus, Peter K. Yu points out that as “these countries have claimed, the unwillingness of less-developed countries to discuss enforcement issues gave them no choice but to explore discussions in another forum.”<sup>35</sup>

Interestingly, after the ACTA negotiations were well under way and it seemed that an agreement was likely to be forthcoming, the issue of IPR enforcement was again placed on the TRIPS Council’s agenda, but this time on the initiative of China and India. At a meeting of the TRIPS Council in June 2010, the representative from China expressed concern “about the TRIPS-plus enforcement trend” embodied in ACTA, which might cause at least the following problems:

First were potential legal conflicts and unpredictability. Though TRIPS required only minimum standards of IP protection and allowed Members to implement in their laws more extensive protection, it also provided certain conditions for applying such extensive protection. First, such protection should “not contravene the provisions” of TRIPS. Secondly, it required Members to ensure that measures and procedures to enforce intellectual property rights did not themselves become barriers to legitimate trade. Thirdly, these extensive protections should not inappropriately restrict the inbuilt flexibilities and exceptions in the TRIPS Agreement. Fourthly, according to the chapeau of Article 20 of GATT 1994, if applied as border measures, they should not violate other covered agreements under the WTO and not be applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination among Members or a disguised restriction on international trade, and only measures necessary to secure compliance with laws or regulations could be applied, which was the so-called necessity test.<sup>36</sup>

The Chinese delegate expressed her country’s concern that ACTA would break the delicate balance “between the three pillars of GATT, GATS and TRIPS . . . between developed and developing countries, rights and obligations, technology innovation and transfer and dissemination of

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34. Press Release, Office of the United States Trade Representative, Ambassador Schwab Announces U.S. Will Seek New Trade Agreement to Fight Fakes (Oct. 23, 2007), available at <http://www.ustr.gov/ambassador-schwab-announces-us-will-seek-new-trade-agreement-fight-fakes>.

35. Peter K. Yu, *Six Secret (and Now Open) Fears of ACTA* 64 SMU L. REV. 975, 993 (2011) [hereinafter *Six Secret (and Now Open) Fears of ACTA*].

36. Council for Trade-Related Aspects of Intellectual Property Rights, *Minutes of Meeting: Held in the Centre William Rappard on 8-9 June 2010*, ¶ 252, IP/C/M/63, (Oct. 4, 2011) (hereinafter *Minutes of Meeting: Held in the Centre William Rappard on 8-9 June 2010*).

technology, the advantage of producers and interests of users of technology . . . [and between] economic welfare and social welfare including public health and nutrition.”<sup>37</sup> She noted the “imbalance of interests between the developed and developing world in IP protection caused by the digital divide and the impact of TRIPs-plus enforcement on the allocation of public resources in developing countries.”<sup>38</sup> She concluded that IPR infringement “was largely a problem during the process of development. Therefore, development was the crux of the matter.”<sup>39</sup>

The representative from India supported China’s statement that the high levels of protection envisaged in ACTA were likely to disturb the balance of rights and obligations in the TRIPs Agreement and could restrain TRIPs flexibilities.<sup>40</sup> He suggested that the released ACTA text “showed a general shift in the focus of enforcement which enhanced the power of IP holders beyond reasonable measure . . . shifting the enforcement forum towards customs administrative authorities and away from civil courts.”<sup>41</sup> The U.S. representative said that the notion that TRIPs-plus enforcement standards were somehow a trend “was a problematic one and was misplaced” “[as] every national IP enforcement regime . . . was TRIPs-plus- “in the sense that national implementing measures for IP enforcement were necessary to address numerous procedural and substantive issues for which there was no TRIPs requirement.”<sup>42</sup> He mentioned the attempts of the U.S., together with the EU, Japan, and Switzerland, to support a dialogue in the Council for TRIPs on the implementation of the existing enforcement obligations under the TRIPs Agreement, and to identify solutions to implementation deficiencies. However, he noted “through the course of past meetings of the Council, that Members of the WTO had widely divergent views on the nature of the enforcement provisions of the TRIPs Agreement and even, regrettably, on the appropriateness of discussing those provisions in the Council,” and that “members should not be surprised to see the concerned Members seeking to combat this threat elsewhere.”<sup>43</sup>

Among the other ACTA negotiators, the representative of Korea referred to the right of WTO Members under Article 1.1 of TRIPs to implement in their domestic law more extensive protection than was required by the Agreement and that the public text of ACTA, stating that “[n]othing in this Agreement shall derogate from any international obligation of a Party with respect to any other Party under existing agreements to which both Parties

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37. *Id.* ¶ 255.

38. *Id.* ¶¶ 255-58.

39. *Id.* ¶ 262.

40. *Id.* ¶¶ 264, 270.

41. *Id.* ¶ 271.

42. *Id.* ¶ 279.

43. *Minutes of Meeting: Held in the Centre William Rappard on 8-9 June 2010*, *supra* note 36, ¶ 282.

are party” and that “there was nothing more than this to clarify the concerns raised.”<sup>44</sup> A similar point was made by the Japanese representative, who added that discussion on enforcement practices “should be conducted in a fact-based and analytical manner taking into account concrete situations and the types of measures to be considered.”<sup>45</sup> The representative of Canada pointed out that “effective enforcement of IPRs was a fundamental aspect of the TRIPS Agreement that was not only a matter of establishing procedural remedies, but also of improving cooperation, capacity building and communication” and that “the objective of ACTA was not to undermine the TRIPS Agreement but to complement it by focusing on improving aspects of enforcement, including legal procedures, cooperation and communication, that the Council for TRIPS had so far been prevented from considering.”<sup>46</sup> The representative of Australia also referred to the previous difficulty in discussing enforcement within the Council for TRIPS and explained that “[s]tandards in ACTA were largely built upon those negotiated within the WTO, and reflected the TRIPS consistent measures already in place in many WTO Member countries.”<sup>47</sup> The Swiss representative also explained that the ACTA initiative was being undertaken because “thus far, attempts to even only discuss issues relating to the growing problem of counterfeiting and piracy in an open and constructive spirit in multilateral forums such as the Council for TRIPS had met with absolute rejection by some delegations, including China and India “[and that it]“considered its participation in the ACTA negotiations “as additional to its commitment and efforts at the multilateral level, particularly the WTO and WIPO.”<sup>48</sup> The representative of New Zealand explained its participation in ACTA because it believed that ACTA would be an important, effective to combat the “increasingly prolific trade in counterfeit and pirated goods, through better enforcement mechanisms for intellectual property rights, including through international co-operation.”<sup>49</sup> Finally, the representative from the EU explained that with the tenfold increase of counterfeiting and piracy fifteen years after the commencement of the TRIPS Agreement,

[H]e failed to understand why Members who rightly enjoyed the flexibilities under the TRIPS Agreement had to prevent other Members from also enjoying the flexibilities under the TRIPS Agreement to tackle a growing problem, the consequences of which in terms of risks for safety and health, and in terms of criminal organizations, were even worse in

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44. *Id.* ¶ 287.

45. *Id.* ¶¶ 294-95.

46. *Id.* ¶¶ 301-02.

47. *Id.* ¶ 303.

48. *Id.* ¶¶ 314-15.

49. *Minutes of Meeting: Held in the Centre William Rappard on 8-9 June 2010*, *supra* note 36, ¶ 323.



developing countries that had less means, and were more exposed to traffic of spurious medicines.<sup>50</sup>

Of the major developing countries, the representative of Brazil said his country “had always taken the position that enforcement was essentially a matter of domestic policy making and priority setting that had no place on the agenda of the Council . . . [and] preferred that the sharing of national experiences on enforcement . . . at WIPO’s Advisory Committee on Enforcement that had been specifically designed for that purpose.”<sup>51</sup> In addition to supporting the concern of China and India about the impact of ACTA upon the delicate balance of TRIPS, he expressed the concern that the ACTA negotiating process “lacked the legitimacy of initiatives conducted in multilateral organizations” and that it might “end up being TRIPS-minus to the extent that it contributed to narrowing down the scope for flexibilities.”<sup>52</sup> The representative of Nigeria, speaking on behalf of the African Group, expressed concern “about the erosion of policy space that might curtail Members’ ability to access medicines critical for the African continent” but he reported that the African Group was also concerned about the issue of counterfeiting and piracy “which had an economic impact in Members countries as many industries were closing down.”<sup>53</sup>

When the 2 October 2010 of ACTA became available in the public domain, the Indian and Indonesian delegations took the opportunity to revisit the implications of ACTA for WTO Members at the October 26 -27, 2010 TRIPS Council meeting.<sup>54</sup> The delegate from India noted the broad reach of the border measures and that in scaling up the minimum enforcement level enshrined in the TRIPS Agreement, through its Most Favored Nation (MFN) provisions, ACTA would have a direct impact on exports, even of Members which were not involved in ACTA negotiations, “contrary to one of the main principles of the WTO rules based system, which was to liberalize trade.”<sup>55</sup> He alleged that ACTA negotiators “decided among themselves to overturn the decision of the WTO dispute settlement panel in the recent *China-IPRs* case by reinterpreting the phrase ‘commercial scale’ with respect to willful trademark counterfeiting and copyright piracy so as to refer to any activity carried out for a direct or indirect economic or commercial advantage.”<sup>56</sup> He said that ACTA would

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50. *Id.* ¶ 326.

51. *Id.* ¶ 316.

52. *Id.* ¶¶ 317-18.

53. *Id.* ¶ 319.

54. Council for Trade Related Aspects of Intellectual Property Rights, *Minutes of Meeting Held in the Centre William Rappard, Oct. 26-27, 2010*, ¶ 440, IP/C/M/64, (Feb. 17, 2011), available at [http://docsonline.wto.org/gen\\_search.asp?language=1](http://docsonline.wto.org/gen_search.asp?language=1) (hereinafter *Minutes of Meeting Held in the Centre William Rappard, Oct. 26-27, 2010*).

55. *Id.* ¶ 444.

56. *Id.* ¶ 445.

substantially increase customs authorities' *ex officio* activity in enforcing intellectual property rights, limit the protection otherwise available to accused infringers under the TRIPS Agreement by potentially lowering knowledge thresholds and limiting due process requirements, and expressed concern that ACTA would set up "a plurilateral intellectual property enforcement body outside the purview of either WIPO or the WTO, which might undermine the role of the multilateral organizations."<sup>57</sup> After reiterating the arguments about interference with the delicate balance of the TRIPS Agreement, he concluded that "to find an effective and enduring solution to the problem, Members needed to step back from a purely mercantilist approach and needed to avoid exaggerating the issue of counterfeiting and piracy in view of the lack of empirical data."<sup>58</sup> The representative of Indonesia "urged WTO Members to refrain from supporting this TRIPS-plus initiative as it could create a new type of non-tariff barrier, particularly for developing and least-developed country Members."<sup>59</sup>

Among the other major developing countries, the Brazilian representative added the concern that ACTA might be converted "into a truly international organization dealing with the enforcement of intellectual property rights, whose impact on WIPO and the WTO, especially on capacity building and technical assistance, was unpredictable at this stage."<sup>60</sup> The representative of China said that excessive or unreasonably high standards for intellectual property protection could unfairly increase monopolistic profits of right holders, eating into the consumer surplus and further broadening the gap between the rich and the poor in the world. She also pointed out that as ACTA did not have any multilateral WTO mandate, any negative spill-over effects of ACTA on WTO Members which were not party to ACTA would "be subject to review in various WTO councils and committees, but also subject to the WTO dispute settlement mechanism and possible counter measures in accordance with the DSU, the TRIPS Agreement, GATT, GATS, and other WTO Agreements."<sup>61</sup>

Of the ACTA signatories, the representative of the U.S. (or United States representative?) outlined the provisions which were contained in the final draft of the ACTA highlighting the fact that "ACTA would []be the first agreement of its kind to promote several key best practices that contributed to effective enforcement of intellectual property rights" and he welcomed all Members who were interested in enhancing IPR enforcement to consider joining the agreement.<sup>62</sup> The representative of Japan reiterated that ACTA

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57. *Id.* ¶ 446.

58. *Id.* ¶¶ 449-50.

59. *Id.* ¶ 454.

60. *Minutes of Meeting Held in the Centre William Rappard, Oct. 26-27, 2010, supra* note 54, ¶ 451.

61. *Id.* ¶ 459.

62. *Id.* ¶¶ 460-63.

was consistent with WTO obligations and would be implemented in such a manner as to avoid the creation of barriers to legitimate trade.<sup>63</sup> The representative of Canada “said that ACTA was consistent with the TRIPS Agreement . . . [A]nd that the objectives and principles of the TRIPS Agreement applied *mutatis mutandis* to ACTA.”<sup>64</sup> Nor did ACTA create or alter rights relating to the protection of intellectual property rights, but rather “it set new standards for the enforcement of existing intellectual property rights which were complementary to those provided in the TRIPS Agreement.”<sup>65</sup> This was supported by Australia.<sup>66</sup> The representative of the EU claimed “a clear preference for dealing with enforcement within the WTO or WIPO” but that this had been frustrated by the refusal of a number of WTO Members to engage in any discussion on IP enforcement in the TRIPS Council obliging it to pursue such discussions outside this forum<sup>67</sup> The representative of Mexico explained that his country had suffered from counterfeiting and piracy in its new economic sectors such as clothing, tobacco, medical drugs, music, books etc. and that Mexico was a party to ACTA “because it was important to have effective border measures to combat counterfeiting and piracy.”<sup>68</sup> In a written statement, Singapore focused its comments on the “value that [it saw] in participating in the ACTA process,” which included “the encourage[ment] of innovation, creativity and the growth of industry and commerce” and “strengthening cooperation to better protect the interests of consumers and industries alike.”<sup>69</sup> It saw ACTA as complementing and strengthening the role of the multilateral institutions and their processes.

On October 17, the final text of ACTA was circulated to WTO Members at the request of the delegations of Australia, Canada, the European Union, Korea, Japan, New Zealand, Singapore, Switzerland, and the U.S.<sup>70</sup>

## II. PLURILATERAL ANTI-COUNTERFEITING TRADE AGREEMENT (ACTA) PROPOSED

The idea of establishing a new agreement on IPR enforcement has its origins in the Global Congress on Combating Counterfeiting and Piracy,

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63. *Id.* ¶ 464.

64. *Id.* ¶ 466.

65. *Id.* ¶ 466.

66. *Minutes of Meeting Held in the Centre William Rappard, Oct. 26-27, 2010, supra* note 54, ¶ 468.

67. *Id.* ¶ 469.

68. *Id.* ¶ 473.

69. *Id.* ¶ 481.

70. Council for Trade Related Aspects of Intellectual Property Rights, *Enforcement of Intellectual Property Rights: Communication from Australia, Canada, the European Union, Korea, Japan, New Zealand, Singapore, Switzerland and the United States*, IP/C/W/563 (Oct. 17, 2011), available at [http://docsonline.wto.org/gen\\_search.asp?language=1](http://docsonline.wto.org/gen_search.asp?language=1).

organised for the first time in 2004 by the World Customs Organization (“WCO”) in collaboration with Interpol with the participation of a number of business organizations, which was concerned with “the rampant theft of intellectual property.”<sup>71</sup> At the Second Global Congress on Combating Counterfeiting and Piracy hosted by Interpol at Lyon in November 2005, Japan had proposed a Treaty on Non-Proliferation of Counterfeits and Pirated Goods. The twin central features of this proposed treaty were proposals for the confiscation of the proceeds of IP crimes and the extradition of IP criminals.

The Treaty also proposed to address a number of matters that had been omitted from the border control provisions of the TRIPS Agreement. These provisions focus upon the imports of infringing products. It also proposed controls over the export and transshipment of counterfeit and pirated goods. The Japanese Treaty also proposed the removal of the *de minimis* exception contained in TRIPS of importation for private use. An area of enforcement the Treaty addressed was the deterrence of the distribution and sale of counterfeit and pirated goods on the Internet. Finally, a dispute settlement mechanism was proposed, together with deterrent sanctions. At the end of the Congressional session, the participants adopted the Lyon Declaration, which recommended the further consideration of “Japan’s proposal for a new international treaty.”<sup>72</sup> The Japanese Treaty proposal was reiterated at the Third and Fourth Global Congresses on Counterfeiting and Piracy in Brussels 2006 and Geneva 2007.

Paralleling the Japanese initiative the U.S. contemplated collaborating with its trading partners to develop an international strategy to fight counterfeiting and piracy. In 2005, pursuant to its Strategy Targeting Intellectual Property (“STOP!”) Initiative, the United States Trade Representative (USTR), Susan Schwab, “led interagency teams to meet with key trading partners to advocate closer cooperation in fighting piracy and counterfeiting, and to advocate sharing of ‘best practices’ for strong legal frameworks.”<sup>73</sup> “In 2006 the USTR encouraged the interagency Trade Policy Staff Committee (TPSC), representing the interests of twenty U.S. government agencies, to endorse the concept of a multi-party, ‘TRIPS-plus’ ACTA.”<sup>74</sup> In explaining the origins of ACTA, in a Freedom of Information proceeding, Assistant USTR, Stanford McCoy, explained:

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71. *About the Global Congress*, GLOBAL CONGRESS COMBATING COUNTERFEITING & PIRACY, <http://www.ccapcongress.net/about.htm> (last visited Sept. 22, 2012).

72. *Second Global Congress on Combating Counterfeiting & Piracy, Lyon Declaration*, (Nov. 15, 2005), at 4, available at <http://www.ccapcongress.net/archives/Lyon/files/OutcomesStatement20051115.pdf>.

73. *Six Secret (and Now Open) Fears of ACTA*, *supra* note 35, at 110 (quoting Declaration of Stanford McCoy at 4-5, Elec. Frontier Found. v. Office of the U.S. Trade Representative, No. 08-1599 (RMC) (D.D.C. May 29, 2009)).

74. *Id.*

USTR proposed that a group of leading IPR-protecting nations could work together to set a new standard for IPR enforcement that was better suited to contemporary challenges, both in terms of strengthening the relevant laws and in terms of strengthening various frameworks for enforcing those laws. The interagency TPSC concurred with USTR's recommendation that USTR begin contacting trading partners to join a plurilateral ACTA.<sup>75</sup>

From 2006, the U.S. and Japan had begun joint discussions on a new multilateral treaty to combat counterfeiting and piracy.<sup>76</sup> During 2006 and 2007 these discussions were extended to include Canada, the EU and Switzerland. The Japanese treaty proposal was superseded by the announcement on October 23, 2007, by the U.S., EU, Japan, South Korea, Mexico, New Zealand, Switzerland, and Canada of negotiations for a Plurilateral Anti-Counterfeiting Trade Agreement (ACTA). The use of the word "plurilateral" was presumably to distinguish ACTA from existing multilateral trade agreements, such as TRIPS and the various bilateral free trade agreements negotiated between various trading partners subsequent to the establishment of the WTO and the regional free trade agreements such as the North American Free Trade Agreement (NAFTA) and the trade agreements of the EU; specifically, U.S. announcement stated that the "ACTA will not involve any changes to the TRIPS Agreement, rather, the goal is to set a new, higher benchmark for enforcement that countries can join on a voluntary basis."<sup>77</sup>

The European Commission indicated that it would use the ACTA "to create a new layer of intellectual property protections because it mandates from EU Member States to negotiate the ACTA with a list of specific countries, including the U.S., Japan, Korea, Mexico and New Zealand."<sup>78</sup> One of its aims is described as "[c]reating a strong modern legal framework which reflects the changing nature of intellectual property theft in the global economy . . . ."<sup>79</sup> A statement by METI Minister Akira Amari, stated that "it is essential to establish a new international framework aimed at strengthening the enforcement of intellectual property rights" to deal with

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75. *Id.*

76. ACTA – *Summary of Key Elements Under Discussion*, OFFICE OF THE U.S. TRADE REPRESENTATIVE (Nov. 2009), <http://www.ustr.gov/about-us/press-office/fact-sheets/2009/november/acta-summary-key-elements-under-discussion>.

77. C.R. McManis, *The Proposed Anti-Counterfeiting Trade Agreement (ACTA): Two Tales of a Treaty*, 46 HOUS. L. REV. 1235, 1236 n.3 (2009).

78. Pinsent Masons, *European Commission asks for new IP protection layer*, OUT-LAW.COM (Oct. 25, 2007), <http://www.out-law.com/page-8578>.

79. Press Release, European Comm'n, *European Commission Seeks Mandate to Negotiate Major New International Anti-Counterfeiting Pact* (Oct. 23, 2007), <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/1573&format=HTML&aged=1&language=EN&guiLanguage=en>.

“serious and significant threat to the world economy” caused by the proliferation of pirate and counterfeit goods.<sup>80</sup>

### III. TRANSPARENCY OF THE ACTA NEGOTIATIONS

In December 2007, before formal negotiations commenced, the USTR requested that its negotiating partners agree to be bound by a confidentiality agreement it had prepared.<sup>81</sup> Subsequently, this was used by the USTR to classify all correspondence between ACTA negotiating countries as “national security” information on the grounds that it was confidential “foreign government information.”<sup>82</sup> Similarly, its negotiating partners justified their failure to divulge information about ACTA to their confidentiality obligation. Thus for more than two years, no official drafts of the treaty were released for public scrutiny and the specific terms under discussion in the negotiations were not identified. This lack of information, as well as the restricted participation of states in the negotiation of the ACTA and the exclusion of public interest groups from the negotiating process was the subject of widespread criticism, particularly by civil society groups.<sup>83</sup> Exacerbating this criticism was the revelation that certain favoured bodies were obtaining access to documents.

In September 2008, the Electronic Frontier Foundation and Public Knowledge, two U.S. civil society organizations, filed a lawsuit under the Freedom of Information Act (FOIA) requesting the release of records concerning ACTA “as a matter of public interest” to acquire documents such as “participant lists, agendas, presentations and documents distributed at, or received at, meetings of USTR staff with” representatives of the entertainment, luxury, and pharmaceutical industries, “agents, representatives and officials of international entities dealing with the enforcement of intellectual property,” and any other “agency memoranda,

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80. Japan Minister of Economy, Trade, and Industry, *Regarding “Anti-Counterfeiting Trade Agreement (ACTA) [tentative]”* (Oct. 23, 2007), available at [http://warp.ndl.go.jp/info:ndljp/pid/286890/www.meti.go.jp/press/20071023001/004\\_danwa=eng.pdf](http://warp.ndl.go.jp/info:ndljp/pid/286890/www.meti.go.jp/press/20071023001/004_danwa=eng.pdf).

81. Eddan Katz & Gwen Hinze, *The Impact of the Anti-Counterfeiting Trade Agreement on the Knowledge Economy: The Accountability of the Office of the U.S. Trade Representative for the Creation of IP Enforcement Norms Through Executive Trade Agreements*, 35 *YALE J. INT’L L. ONLINE* 24, 30-31 (2009); <http://www.yjil.org/docs/pub/o-35-katz-hinze-ACTA-on-knowledge-economy.pdf>.

82. See Exec. Order No. 12958, 3 C.F.R. 333 (1995), amended by Exec. Order No. 12958, 3 C.F.R. 196 (2003).

83. See generally ROBIN GROSS, IP JUSTICE, IP JUSTICE WHITE PAPER ON THE PROPOSED ANTI-COUNTERFEITING TRADE AGREEMENT (ACTA) (2008), available at <http://ipjustice.org/wp/2008/03/25/ipj-white-paper-acta-2008/>; *Anti-Counterfeiting Trade Agreement*, PUBLIC KNOWLEDGE, <http://www.publicknowledge.org/issues/acta> (last visited Sept. 26, 2012); Robert Weissman, *Secret Counterfeiting Treaty Public Must be Made Public*, *Global Organizations Say*, WIKILEAKS (Sept. 15, 2008), [http://wikileaks.org/wiki/Secret\\_Counterfeiting\\_Treaty\\_Public\\_Must\\_be\\_Made\\_Public\\_Global\\_Organizations\\_Say](http://wikileaks.org/wiki/Secret_Counterfeiting_Treaty_Public_Must_be_Made_Public_Global_Organizations_Say).

briefing notes, and analysis concerning ACTA. “However, the two organizations dropped the lawsuit in June 2009 after the Obama administration classified the ACTA negotiations a matter of national security.”<sup>84</sup>

In November 2008, the Foundation for a Free Information Infrastructure (FFII) applied to the Council of the European Union for access to documents concerning ACTA. This request was refused by the Council on the ground that “unauthorised disclosure . . . could be disadvantageous to the interests of the European Union or of one or more of its Member States,” as the negotiations are still in progress and their disclosure “could impede the proper conduct of the negotiations.”<sup>85</sup>

In September 2009, another U.S. civil society organization, Knowledge Ecology International (KEI),<sup>86</sup> reported that the USTR was using nondisclosure agreements “to selectively share copies of the ACTA Internet text outside of the USTR formal advisory board system.”<sup>87</sup> On September 11, 2009, KEI submitted a Freedom of Information request to the USTR, asking for the names of persons who had signed these agreements, as well as copies of them. On October 9, 2009, it received copies of these agreements identifying a total of 32 persons who received the Internet texts.<sup>88</sup> These included representatives from: the Business Software Alliance (3), eBay (4), Google (3), News Corporation (2), a law firm, Wilmer Hale (2), Intel (2) Dell, Verizon, Sony Pictures Entertainment, Time Warner, Consumer Electronics Association (2), the International Intellectual Property Alliance (IPI), and four persons from two civil society organizations: Public Knowledge (3) and the Centre for Democracy and Technology. The USTR also informed KEI that seven persons received the ACTA Internet text as members of the Industry Trade Advisory Committees on Intellectual Property Rights (ITAC 15),<sup>89</sup> as well as three persons from

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84. Emily Ayoob, Note, *Recent Development: The Anti-Counterfeiting Trade Agreement*, 28 CARDOZO ARTS & ENT. L. J. 175, 188 (2010).

85. Letter from Ramón Jiménez Fraile, on behalf of the Gen. Secretariat of the Council of the European Union, to Ante Wessels (Nov. 5, 2008), available at <http://action.ffii.org/acta/Analysis?action=AttachFile&do=get&target=08-1835en.wes.wsjj.pdf>.

86. KEI was created as an independent legal organization in 2006, assimilating the staff and work program of the Consumer Project on Technology (CPTech) to engage inter alia in global public interest advocacy, and to enhance the “transparency of policy making.” See KNOWLEDGE ECOLOGY INTERNATIONAL, <http://keionline.org> (last visited Sept. 28, 2012).

87. KNOWLEDGE ECOLOGY INTERNATIONAL, <http://keionline.org/node/660> (last visited Nov. 6, 2012).

88. *Id.*

89. *Id.* (including Anissa S. Whitten, Vice President, International Affairs and Trade Policy, Motion Picture Association of America, Inc; Eric Smith, President, International Intellectual Property Alliance; Neil I. Turkewitz Executive Vice President, International Recording Industry Association of America; Sandra M. Aistars, Assistant General Counsel, Intellectual Property, Time Warner Inc.; Stevan D. Mitchell, Vice President, Intellectual Property Policy, Entertainment Software Association; Thomas J. Thomson, Executive Director, Coalition for Intellectual Property Rights; Timothy P. Trainer, President, Global

the Industry Trade Advisory Committee on Information and Communications Technologies, Services, and Electronic Commerce (ITAC 8).<sup>90</sup> These are two of a number of committees established by the U.S. Department of Commerce and the Office of the USTR to “engage business leaders in formulating U.S. trade policy.”<sup>91</sup> The role of the business community in the formulation of United States IPR trade policy has been the subject of extensive analyses in relation to the negotiation of the TRIPS Agreement,<sup>92</sup> and so it is unexceptional that similar business representatives have been involved in contributing to U.S. policy on the formulation of the ACTA. As will be seen below, criticism was leveled about the lack of transparency by those persons within and outside the U.S. who were denied access to negotiating texts.

Indeed, the official position taken by the negotiating parties until April 2010 was that draft texts did not exist. Yu suggests that on the basis of the history of the way in which the TRIPS Agreement evolved, this may well have been the case, as the earlier sessions may have been taken up with amassing information.<sup>93</sup> In any event, as the USTR noted in its denial of the Electronic Frontier Foundation’s request under the Freedom of Information Act, ACTA-related documents concerned “information that is properly classified in the interest of national security pursuant to Executive Order 12958.”<sup>94</sup> This Executive Order, issued in April 1995, allowed documents to be classified as confidential when their unauthorized disclosure “reasonably could be expected to result in damage to the national security.”<sup>95</sup> It is difficult to see how information about an agreement concerned with intellectual property enforcement could have national security implications.

The first intimation of the content of the ACTA was a “Discussion Paper on a Possible Anti-Counterfeiting Trade Agreement” which was posted to

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Intellectual Property Strategy Center, P.C., Zippo Manufacturing Company (also former president of the IIPA).

90. *Id.* (including Jacquelynn Ruff, Vice President, International Public Policy, and Regulatory Affairs Verizon Communications Inc.; John P. Goyer, Vice President, International Trade, Negotiations and Investment, U.S. Coalition of Service Industries; Mark F. Bohannon, General Counsel and Senior Vice President, Public Policy, Software and Information Industry Association).

91. INDUSTRY TRADE ADVISORY CENTER, <http://www.trade.gov/itac/index.asp> (last visited Sept. 26, 2012).

92. *See generally* PETER DRAHOS & JOHN BRAITHWAITE, *INFORMATION FEUDALISM: WHO OWNS THE KNOWLEDGE ECONOMY?* (Oxford Univ.2003); SUSAN SELL, *PRIVATE POWER, PUBLIC LAW- THE GLOBALIZATION OF IPRS* (2003).

93. *Six Secret (and Now Open) Fears of ACTA*, *supra* note 35, at 1008.

94. *See* Letter from Carmen Suro-Bredie, Chief FOIA Officer, USTR, to James Love, Director, Knowledge Ecology Int’l (Mar. 10, 2009), *available at* [http://www.keionline.org/misc-docs/3/ustr\\_foia\\_denial.pdf](http://www.keionline.org/misc-docs/3/ustr_foia_denial.pdf).

95. 3 C.F.R. 333.



the Wikileaks website.<sup>96</sup> Other sources include the websites of negotiating parties which identified the matters under discussion in the ACTA negotiations, from which the content of the ACTA could be inferred.<sup>97</sup> Responding to an increasing crescendo of calls for the publication of the ACTA, in February 2009 the USTR issued a “Summary of Key Elements Under Discussion.”<sup>98</sup> The USTR’s Summary stated that “ACTA delegations are still discussing various proposals for the different elements that may ultimately be included in the agreement. A comprehensive set of proposals for the text of the agreement does not yet exist.”<sup>99</sup> It provided “an overview of the elements suggested under the different headings and highlights the main issues.”<sup>100</sup> The USTR noted that “discussions are ongoing; new issues might come up and other issues may finally not be included in the agreement.”<sup>101</sup>

Calls for greater transparency were made even by supporters of ACTA. For example, Dan Glickman, the CEO of the Motion Picture Association of America wrote to Senator Patrick Leahy, chairman of the Senate Judiciary Committee, and to USTR Ron Kirk, that “outcries on the lack of transparency in the ACTA negotiations . . . distract from the substance and the ambition of the ACTA which are to work with key trading partners to combat piracy and counterfeiting across the global marketplace.”<sup>102</sup> In March 2010, a fact sheet was published informing on the content and the objectives of the agreement.<sup>103</sup> It addressed the transparency issue by stating that the steps negotiating parties had taken to provide more information to the public included: “issuing a summary of the issues under discussion, publishing agendas ahead of each negotiating round and issuing press

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96. Proposed US ACTA Multi-Lateral Intellectual Property Trade Agreement (2007), WIKILEAKS (May 22, 2008), [http://wikileaks.org/wiki/Proposed\\_US\\_ACTA\\_multi-lateral\\_intellectual\\_property\\_trade\\_agreement\\_\(2007\)](http://wikileaks.org/wiki/Proposed_US_ACTA_multi-lateral_intellectual_property_trade_agreement_(2007)).

97. See, e.g. AUSTRALIAN DEPARTMENT OF FOREIGN AFFAIRS AND TRADE, <http://www.dfat.gov.au/> (last visited Sept. 26, 2012); THE DEPARTMENT OF FOREIGN AFFAIRS AND INTERNATIONAL TRADE, CANADA, [http://www.international.gc.ca/trade-agreements-accords-commerciaux/fo/intellect\\_property.aspx](http://www.international.gc.ca/trade-agreements-accords-commerciaux/fo/intellect_property.aspx), and the Swiss Federal Institute of Intellectual Property: <https://www.ige.ch/en/legal-info/legal-areas/counterfeiting-piracy/acta.html> (last visited Sept. 26, 2012).

98. See OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, <http://www.ustr.gov/about-us/press-office/fact-sheets/2009/november/acta-summary-key-elements-under-discussion> (last visited Sept. 26, 2012).

99. *Id.*

100. *Id.*

101. *Id.*

102. Letter from Dan Glickman, Chairman & CEO, Motion Picture Ass’n of Am., Inc., to Senator Patrick Leahy (Nov. 19, 2009), available at <http://www.scribd.com/doc/22785108/MPAA-letter-re-ACTA>.

103. See *Anti-Counterfeiting Trade Agreement (ACTA): Fact Sheet*, EIDGENÖSSISCHES INSTITUT FÜR GEISTIGES EIGENTUM (Mar. 2010), [https://www.ige.ch/fileadmin/user\\_upload/Juristische\\_Infos/e/acta\\_factsheet.pdf](https://www.ige.ch/fileadmin/user_upload/Juristische_Infos/e/acta_factsheet.pdf).

104. *Id.*

releases shortly after the conclusion of each round.”<sup>104</sup> However, the press releases did little more than list the participating countries and the subjects which were addressed.

The problem with this lack of transparency was that various versions of the alleged ACTA have been made available, causing concern to those who consider themselves to be adversely affected. For example, the French civil rights organisation La Quadrature du Net, on January 18, 2010, placed a fifty-six page consolidated version of the text of an EU stakeholder dialogue meeting shortly after its conclusion.<sup>105</sup> This version was of particular concern to NGOs and organizations concerned with the Internet freedom.

Probably the most strident calls for transparency were made by politicians. Michael Geist lists legislators from Canada, France, Germany, New Zealand, Sweden, and the U.S. who called for the ACTA to be made public.<sup>106</sup> “On January 21, 2010 UK Junior Business Minister David Lammy was quoted as saying that he could not put documents about ACTA in the House of Commons Library because other countries wanted to maintain secrecy.”<sup>107</sup> However, on March 17, 2010, he was reported as being in favour of placing the draft text in the public domain.<sup>108</sup> This change of heart was no doubt attributed to a resolution of the European Parliament on Transparency and State of Play of the Anti Counterfeiting Trade Agreement that “[the European] Commission should immediately make all documents related to the ongoing international negotiations on the Anti-Counterfeiting Trade Agreement (ACTA) publicly available.”<sup>109</sup> The Resolution stated that

The Anti-Counterfeiting Trade Agreement (ACTA) will contain a new international benchmark for legal frameworks on what is termed intellectual property right enforcement. The content as known to the public is clearly legislative in character. Further, the Council confirms that ACTA

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105. See *ACTA 20100118 Version Consolidated Text*, LA QUADRATURE DU NET (Jan. 18, 2010), [http://www.laquadrature.net/wiki/ACTA\\_20100118\\_version\\_consolidated\\_text](http://www.laquadrature.net/wiki/ACTA_20100118_version_consolidated_text).

106. MP Charlie Angus, Canada; Senators Bernie Sanders and Sherrod Brown, Reps. Mike Doyle, Zoe Lofgren, United States; Nicolas Dupont-Aignan, France; Tom Watson (Labour), John Whittingdale (Conservative), Lindsay Hoyle (Labour), and Don Foster (Lib Democrats), United Kingdom, Minister Åsa Torstensson, Sweden, MEPs Jens Holms, Sweden, Axel Voss, Germany; MPs Clare Curran, and Peter Dunne, New Zealand. Michael Geist, *ACTA Guide, Part Three: Transparency and ACTA Secrecy*, MP3NEWSWIRE.NET (Jan. 27, 2009), <http://www.mp3newswire.net/stories/0102/acta-guide-3.htm>.

107. *MPs Frozen Out of Super-Secret Copyright Talks*, THE REGISTER (Jan. 21, 2010), [http://www.theregister.co.uk/2010/01/21/acta\\_lammy/](http://www.theregister.co.uk/2010/01/21/acta_lammy/).

108. *UK IP Minister Lammy Backs EU Release of ACTA Text*, INTELLECTUAL PROPERTY WATCH (Mar. 17, 2010), <http://www.ip-watch.org/2010/03/17/uk-ip-minister-lammy-backs-eu-release-of-acta-text/>.

109. Resolution on the Transparency and State of Play of the Anti-Counterfeiting Trade Agreement ACTA Negotiations, EUR. PARL. DOC. P7\_TA(2010)0058, (Mar. 10, 2010), <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2010-0058>.

110. *Id.*

includes civil enforcement and criminal law measures. Since there can not be secret objectives regarding legislation in a democracy, the principles established in the ECJ *Turco* case must be upheld.<sup>110</sup>

The *Turco* case concerned a request by Mr. Maurizio Turco, the Italian Radical MP and former MEP, to the European Council for access to documents appearing on the agenda of a Justice and Home Affairs Council meeting, including an opinion of the Council's legal service on a proposal for a directive laying down minimum standards for the reception of applicants for asylum in Member States. The Council had refused to disclose the legal opinion on the ground that it deserved special protection so as not to create uncertainty regarding the legality of the measure adopted further to that opinion; the Court of First Instance upheld the Council's refusal<sup>111</sup> but the decision was reversed by the European Court of Justice (ECJ).<sup>112</sup> Regarding the fear expressed by the Council that disclosure of an opinion of its legal service relating to a legislative proposal could lead to doubts as to the lawfulness of the legislative act concerned, the ECJ held that it was precisely this openness which contributed to conferring greater legitimacy on the institutions in the eyes of European citizens and increasing their confidence in them by allowing different points of view to be openly debated.

On April 15, 2010, a number of European Members of Parliament from the Green Party wrote to the WIPO Director General, drawing his attention to the EU Resolution of March 10, 2010 "showing the growing concern of European citizens regarding ACTA" and requesting "an expert assessment and analysis of the current provisions of ACTA" from WIPO's institutional viewpoint "as one the two specialised organisations entrusted with the issue of norm-setting in the field of intellectual property rights and related issues."<sup>113</sup> The letter noted "with disappointment that ACTA has bypassed the multilateral WTO and WIPO institutions which have structured and practised processes to assure participation, information sharing and transparency in international norm-setting negotiations" and it commended WIPO's practices of making negotiating texts available, when distributed to all members of the negotiation as well as procedures which allow accredited non-governmental organisations to attend meetings and organise side-events. This was contrasted with the negotiations for the 8<sup>th</sup> round of ACTA being negotiated in New Zealand, which was characterised as "secret from the public and consumers, and in defiance of the principles of democratic

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111. Case T-84/03, *Turco v. Council*, 2004 E.C.R. II-4061.

112. Joined Cases C-39/05 P & C-52/05 P, *Sweden v. Council*, 2008 E.C.R. I-4723.

113. Letter from Jan Philipp Albrecht, MEP, et al., Greens/European Free Alliance to Pascal Lamy, Director General, WTO (Apr. 15, 2010), available at <http://www.erikjosefsson.eu/sites/default/files/WTO-letter-from-Greens-EFA.html>.

114. *Id.*

decision making.”<sup>114</sup> The letter then sought answers to a number of questions about the negotiation of international IP norms. There is no formal record of an answer to this letter, although in a joint statement issued by the ACTA negotiating partners it was suggested that “it is accepted practice during trade negotiations among sovereign states to not share negotiating texts with the public at large, particularly at earlier stages of the negotiation.”<sup>115</sup> Although the word “trade” appears in the title of the ACTA, it is questionable whether the Agreement can properly be characterised as a “trade agreement” given that it is largely concerned with IP enforcement and contains no provisions that facilitate or promote trade.<sup>116</sup>

In anticipation of the ACTA negotiators’ meeting in Wellington in April 2010, participants at a “PublicACTA Conference” April 10, 2010 promulgated the Wellington Declaration for the consideration of the negotiators.<sup>117</sup> This Declaration appears to have been actuated by concerns about possible attacks on Internet freedoms. In relation to transparency, it called for full transparency and public scrutiny of the ACTA process including release of the text after each round of negotiations.<sup>118</sup>

On April 16, 2010, following the 8<sup>th</sup> round of negotiations, a Joint Statement was issued by participants explaining that “negotiations have now advanced to a point where making a draft text available to the public will help the process of reaching a final agreement” and that “the consolidated text coming out of these discussions” would be made available to the public on April 21, 2010.<sup>119</sup> On that day a “Consolidated Text” prepared for public release was made available, described as a “PUBLIC Predecisional/Deliberative Draft.”<sup>120</sup> Most of the text was in square brackets, indicating a lack of agreement on those provisions. In a press release, EU Trade Commissioner Karel De Gucht declared that the ACTA “will be fully in line with current EU legislation. . . . The agreement will not

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115. *The Anti-Counterfeiting Trade Agreement: Summary of Key Elements Under Discussion*, FOREIGN AFFAIRS AND INTERNATIONAL TRADE CANADA, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/fo/key-summary-resume-cle.aspx?lang=en> (last modified Jan. 1, 2012). *But see* Geist, *supra* note 106 (commenting on this statement by annexing two schedules of international the negotiating committees of international organizations, including: WTO, WIPO, WHO, UNCITRAL, UNIDROIT, UNCTAD, OECD, Hague Conference on Private International Law, in which negotiating documents are freely available).

116. Kimberlee Weatherall, *Politics, Compromise, Test and the Failures of the Anti-Counterfeiting Trade Agreement*, 33 SYDNEY L. REV. 229, 233-34 (2011).

117. *Wellington Declaration*, ACTA (Apr. 10, 2010), available at <http://acta.net.nz/the-wellington-declaration>.

118. *Id.*

119. Press Release, ACTA, Joint Statement on Anti-Counterfeiting Trade Agreement (ACTA) (Apr. 16, 2010), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/437&format=HTML&aged=0&language=EN&guiLanguage=en>.

120. *Anti-Counterfeiting Trade Agreement: PUBLIC Predecisional/Deliberative Draft* (Apr. 2010), available at [http://trade.ec.europa.eu/doclib/docs/2010/april/tradoc\\_146029.pdf](http://trade.ec.europa.eu/doclib/docs/2010/april/tradoc_146029.pdf).

include provision which modify substantive intellectual property law, create new rights or change their duration.”<sup>121</sup> The publication of the consolidated text was described as a partial victory for transparency, which would not have happened without the agitation of civil society organizations and the various leaked documents.<sup>122</sup> The victory was described as partial because the published text was “decided without any input from consumer organisations or ordinary people.”<sup>123</sup>

Responding to these concerns, meetings were held between ACTA negotiators and civil society representatives at the time of the 9th round of negotiations in Lucerne in July 2010 and civil society and business representatives at the time of the Tokyo round in October 2010. Consolidated texts of ACTA were issued in August, October and November 2010. The final text was released on December 6, 2010 after a meeting of negotiators in Sydney for what they called “legal scrubbing.” It was noted that “in fitting form” this final meeting was “performed behind closed doors” and that the host Australian Ministry for Foreign Affairs and Trade “did not answer press inquiries on the agenda or a list of discussed changes.”<sup>124</sup>

The negotiation of ACTA by a select group of invited countries, in negotiations attended by a lack of transparency will inevitably taint its acceptance as an international IP enforcement standard, particularly on the part of the uninvited. In an early account of the ACTA a commentator wrote that “the activity envisaged by the plan is more usually undertaken by trade bodies such as the WTO, the G8 group of industrialised nations and WIPO” but that a statement by the European Commission “said that it felt it needed more room to maneuver than those bodies provided.”<sup>125</sup> It was pointed out that the “European Commission wants to create a new layer of intellectual property protections because it says that existing structures such as WIPO are not flexible enough.”<sup>126</sup> As the Director General of WIPO pointed out, at the time of the Lucerne round, it is “a bad development for a multilateral agency, that member states start to do things outside. Either the machinery works, or it doesn’t,” and he concluded that “[I] think [that this] is the real

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121. Press Release, European Comm., Anti-Counterfeiting Trade Agreement: European Commission Welcomes Release of Negotiation Documents (Apr. 21, 2010), available at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=552>.

122. Glyn Moody, *One Act is Over for ACTA: How Will the Drama End?*, COMPUTERWORLD UK (Apr. 21, 2010), <http://www.computerworlduk.com/community/blogs/index.cfm?blogid=14&entryid=2922>.

123. *Id.*

124. Monika Ermert, ‘Final Final’ ACTA Text Published: More Discussion Ahead for EU, INTELLECTUAL PROPERTY WATCH (June 16, 2010), <http://www.ip-watch.org/2010/12/06/‘final-final’-acta-text-published-more-discussion-ahead-for-eu/>.

125. *European Commission Asks for New IP Protection Layer*, OUT-LAW.COM (Oct. 25, 2007), <http://www.out-law.com/page-8578>.

126. *Id.*

significance of ACTA.”<sup>127</sup> He said that the challenge is first, to “make the multilateral system relevant” because international problems require an international solution, as opposed to a partial one.<sup>128</sup> Secondly, the most vulnerable countries are the ones that most need the inclusiveness of the international system in which all countries have a voice.<sup>129</sup> Thirdly, it is bad public policy for solutions to happen by default.<sup>130</sup>

A study by Jeremy Malcolm of a number of international institutions observed that “[e]ven the WTO, the least participatory of the organizations studied, posts all of its official documents online, and most of the other institutions also make available negotiating texts.”<sup>131</sup> He concluded that “ACTA meets none of the basic best practices for transparency of the existing institutions of the intellectual property policy regime.”<sup>132</sup> This study was referred to in the submission to the USTR of thirty U.S. legal academics cautioning against the acceptance of the Agreement by the President as an executive act.<sup>133</sup> They pointed out that “ACTA was drafted under unusual levels of secrecy for a legislative minimum standards agreement.”<sup>134</sup> They concluded that the “kind of secrecy envisioned and practiced by the USTR needlessly created and fostered an adversarial relationship with the public that reinforced the worst fears and criticism about international intellectual property lawmaking” and that “[t]his has further undermined the legitimacy of the ACTA negotiating process, and ACTA itself.”<sup>135</sup>

Despite the criticisms about the ACTA negotiating process, concerns about the lack of transparency continue. In March 2011, a request under the U.S. Freedom of Information Act by the NGO Knowledge Ecology International (KEI) to study a Congressional Research Service study of

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127. Catherine Saez, *ACTA A Sign of Weakness in Multilateral System*, WIPO Head Says, INTELLECTUAL PROPERTY WATCH (June 30, 2010, 6:18 PM), <http://www.ip-watch.org/weblog/2010/06/30/acta-a-sign-of-weakness-in-multilateral-system-wipo-head-says/>.

128. *Id.*

129. *Id.*

130. *Id.*

131. Jeremy Malcolm, *Public Interest Representation in Global IP Policy Institutions*, PIJIP, 17 (Sept. 1, 2010), available at <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1006&context=research>.

132. *Id.* at 20.

133. Sean M. Flynn et al., *ACTA Public Comments: Submission of Legal Academics*, Docket No. USTR-2010-0014, *ACTA's Constitutional Problem*, INFOJUSTICE.ORG, 9 (Feb. 18, 2011), <http://infojustice.org/wp-content/uploads/2011/02/ACTA-Comment-Thirty-Professors-USTR-2010-0014.pdf>.

134. *Id.* at 8. See also David S. Levine, *Transparency Soup: The ACTA Negotiating Process and “Black Box” Lawmaking*, PIJIP (Feb. 08, 2011), available at <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1020&context=research>.

135. Flynn et al., *supra* note 133, at 12-13.

ACTA and its legality that was undertaken for the U.S. Senate and shared with the USTR was denied.<sup>136</sup>

#### IV. POST NEGOTIATION DEVELOPMENTS

ACTA was submitted to the respective authorities in participating countries to undertake relevant domestic processes. Article 39 provides for ACTA to remain open for signature by participants in its negotiation<sup>137</sup> and by any other WTO Members the participants may agree to by consensus, from March 31, 2011 until March 31, 2013. Article 40 provides that ACTA enters into force thirty days after the date of deposit of the sixth instrument of ratification, acceptance, or approval. “The Government of Japan will receive signatures as the nominated Depositary of the Agreement.”<sup>138</sup>

The Office of the United States Trade Representative (USTR) sought written comments from the public on the final text of the ACTA in connection with consideration of U.S. signature of the agreement, by February 15, 2011.<sup>139</sup> In response to this request, Public Knowledge urged that the USTR should “[s]eek to include, as part of the agreement, an agreed statement reflecting the understanding that ACTA would not require changes to U.S. law,” that it would “[n]ot coerce non-ACTA countries to accede to the agreement” and “employ a more open and inclusive process as it negotiates the proposed Transpacific Partnership (TPP) agreement.”<sup>140</sup>

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136. See Mike Masnick, *USTR Refuses to Release Congressional Research Service Study on Legality of ACTA*, TECHDIRT (Mar. 28, 2011, 7:27 AM), <http://www.techdirt.com/articles/20110325/04480513628/ustr-refuses-to-releasecongressional-research-service-study-legality-acta.shtml>.

137. Anti-Counterfeiting Trade Agreement, Dec. 3, 2010, 50 I.L.M. 243, 256. The participants are identified as:

Australia, the Republic of Austria, the Kingdom of Belgium, the Republic of Bulgaria, Canada, the Republic of Cyprus, the Czech Republic, the Kingdom of Denmark, the Republic of Estonia, the European Union, the Republic of Finland, the French Republic, the Federal Republic of Germany, the Hellenic Republic, the Republic of Hungary, Ireland, the Italian Republic, Japan, the Republic of Korea, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, the Republic of Malta, the United Mexican States, the Kingdom of Morocco, the Kingdom of the Netherlands, New Zealand, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Singapore, the Slovak Republic, the Republic of Slovenia, the Kingdom of Spain, the Kingdom of Sweden, the Swiss Confederation, the United Kingdom of Great Britain and Northern Ireland, and the United States of America. *Id.* at 257 n.17.

138. Press Release, Ministry of Foreign Affairs of Japan, Anti-Counterfeiting Trade Agreement (ACTA) (Opening for Signature) (May 1, 2011) ([http://www.mofa.go.jp/announce/announce/2011/5/0501\\_01.html](http://www.mofa.go.jp/announce/announce/2011/5/0501_01.html)).

139. Anti-Counterfeiting Trade Agreement: Request for Comments From the Public, 75 Fed. Reg. 79,069 (Dec. 17, 2010), available at <http://www.gpo.gov/fdsys/pkg/FR-2010-12-17/pdf/2010-31763.pdf>.

140. Rashmi Rangnath, Pub. Knowledge, *In the Matter of the Anti-Co[un]terfeiting Trade Agreement*, Docket No. USTR-2010-0014, *Comments of Public Knowledge*,

The International Trademark Association (INTA), responding to this invitation, in a letter dated February 15 2011, recommended that the ACTA Committee, established under the Agreement, “should help other countries develop assessments of the economic, social and other benefits of participating in ACTA or at a minimum adopting its principles” and that the Committee “should also ‘recruit’ other non-signatories to sign and implement this agreement.”<sup>141</sup>

It had been pointed out that “[t]he US Government has made clear that it intends to conclude ACTA as a ‘sole executive agreement,’ meaning that it will enter into effect upon the signature of the President or his representative, without being formally presented for approval to either house of Congress.”<sup>142</sup> In a submission to the USTR, thirty U.S. legal academics wrote a submission calling “on the Obama administration to comply with the Constitution by submitting the Anti-Counterfeiting Trade Agreement (ACTA) to Congress for approval” pointing out that “the executive branch lacks constitutional authority to enter international agreements on intellectual property without congressional consent.”<sup>143</sup> A Global Congress on Intellectual Property and the Public Interest, held between August 25-27, 2011, “convened over 180 experts from 32 countries and six continents to “help re-articulate the public interest dimension in intellectual property law and policy.”<sup>144</sup> It issued the Washington-Declaration on Intellectual Property and Public Interest which made a plea for reasonableness and proportionality of legal penalties, processes, and remedies to the acts of infringement they target and to preserve the right of countries to “retain the rights to implement flexibilities to enforcement measures and to make independent decisions about the prioritization of law enforcement resources to promote public interests.”<sup>145</sup> The Declaration was a response to the passage of ACTA.

On November 24, 2010 the European Parliament adopted a resolution on ACTA, which stressed, *inter alia*, that any agreement reached by the EU on ACTA must comply fully with the *acquis communautaire* and noted that as a result of the entry into force of the Lisbon Treaty in December 2009, the

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INFOJUSTICE.ORG, 1 (Feb. 17, 2011), <http://infojustice.org/wp-content/uploads/2011/02/Public-Knowledge1.pdf>.

141. Letter from Gerhard Bauer, President, INTA, to Ron Kirk, Ambassador, United States Trade Representative (Feb. 15, 2011) (<http://www.inta.org/Advocacy/Documents/INTA%20Response%20to%20USTR%20FRN%20Docket%20USTR-2010-0014.pdf>).

142. Oona A. Hathaway & Amy Kapczynski, *Going It Alone: The Anti-Counterfeiting Trade Agreement as a Sole Executive Agreement*, ASIL INSIGHTS (Aug. 24, 2011), <http://www.asil.org/pdfs/insights/insight110824.pdf>.

143. Flynn et al., *supra* note 133, at 2.

144. See The Global Congress on Intellectual Property and the Public Interest, *The Washington Declaration on Intellectual Property and the Public Interest*, INFOJUSTICE.ORG (Aug. 27, 2011), <http://infojustice.org/wp-content/uploads/2011/09/Washington-Declaration.pdf>.

145. *Id.*



Parliament will have to give consent to the ACTA text prior to the agreement's entry into force in the EU. In November 2010, the Policy Department of the EC's Directorate-General for External Policies issued the terms of reference for an external Study on ACTA to "provide a concise and comprehensive overview" of the Agreement and to "respond to certain key questions which have been raised by the MEPs during the negotiation of the agreement."<sup>146</sup> In February 2011, an Opinion was issued by a group of European academics on ACTA which claimed that certain ACTA provisions were not entirely compatible with EU law particularly in relation to criminal enforcement.<sup>147</sup> In response to the criticisms made in the Opinion in March 2011, the European Commission held a meeting with representatives of non-governmental organisations, as part of its DG Trade Civil Society Dialogue.<sup>148</sup> At this meeting the Commission rejected the Academics Opinion stating that no legislative changes would be required as ACTA went no further than the existing EU enforcement rules. On April 27, 2011, the European Commission released a Working Paper in which it took issue with this Opinion.<sup>149</sup> In June 2011, the Study which the Policy Department of the EC's Directorate-General for External Policies had commissioned on ACTA was published.<sup>150</sup> The primary recommendation of the assessment was that "unconditional consent would be an inappropriate response from the European Parliament . . ."<sup>151</sup> It proposed that if the European Parliament decided to give its consent "this should be conditional on the inclusion of statements that provide interpretation and guidance on how member states should apply ACTA in a way that complies with EU member states international obligations."<sup>152</sup> It found that "the letter of the agreement is not incompatible with the Acquis but that there are no

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146. Directorate-General for External Policies of the Union, *External Study on the ACTA Anti-counterfeiting Trade Agreement*, PEOPLE.FFII.ORG (Nov. 15, 2010), <http://people.ffii.org/~ante/acta/EXPO-Terms-of-Reference.pdf>.

147. See Roberto D'Erme et al., *Opinion of European Academics on Anti-Counterfeiting Trade Agreement*, STATEWATCH.ORG, available at <http://www.statewatch.org/news/2011/jul/acta-academics-opinion.pdf>.

148. See generally European Comm'n, Directorate-General for Trade (DG Trade), *Civil Society Meeting Anti-Counterfeiting Trade Agreement (ACTA)*, EC.EUROPA.EU (Mar. 25, 2011, 10:30 AM), available at [http://trade.ec.europa.eu/doclib/docs/2011/february/tradoc\\_147497.pdf](http://trade.ec.europa.eu/doclib/docs/2011/february/tradoc_147497.pdf).

149. Anselm Kamperman Sanders et al., Directorate-General for External Policies of the Union, *The Anti-Counterfeiting Trade Agreement (ACTA): An Assessment* (June 2011), [http://www.erikjosefsson.eu/sites/default/files/DG\\_EXPO\\_Policy\\_Department\\_Study\\_ACTA\\_assessment.pdf](http://www.erikjosefsson.eu/sites/default/files/DG_EXPO_Policy_Department_Study_ACTA_assessment.pdf).

150. Directorate-General for External Policies of The Union, Directorate B, Policy Department, *Study The Anti-Counterfeiting Trade Agreement (ACTA): An Assessment*, Brussels, European Parliament, June 2011, [http://www.erikjosefsson.eu/sites/default/files/DG\\_EXPO\\_Policy\\_Department\\_Study\\_ACTA\\_assessment.pdf](http://www.erikjosefsson.eu/sites/default/files/DG_EXPO_Policy_Department_Study_ACTA_assessment.pdf)

151. *Id.* at 66.

152. *Id.*

guarantees that its implementation will be.”<sup>153</sup> Consequently, it was recommended that the European Parliament “may therefore wish to consider a need for a clarification of and guidance on how ACTA will be implemented especially the border and criminal enforcement measures as well as the in-transit procedures.”<sup>154</sup>

On June 28, 2011, the European Commission circulated a Proposal for a Council Decision on the conclusion of the ACTA with the country parties to the negotiation.<sup>155</sup> At the request of the Greens/European Free Alliance group in the European Parliament an Opinion was prepared on whether the final version of ACTA and its foreseen legislative procedure was in line with the European Convention on Human Rights and/or the EU Charter of Fundamental Rights.<sup>156</sup> This opinion concluded that the current draft of ACTA “seriously threatens fundamental rights in the EU and in other countries, at various levels.”<sup>157</sup> Specifically, it asserted that “an explicit *de minimis* rule and an explicit public interest defence are the minimum that are required” to bring the criminal enforcement provisions into conformity with the European Convention and Charter.<sup>158</sup> The overall assessment was that.

ACTA tilts the balance of IPR protection manifestly unfairly towards one group of beneficiaries of the right to property, IP right holders, and unfairly against others. It equally disproportionately interferes with a range of other fundamental rights, and provides or allows for the determination of such rights in procedures that fail to allow for the taking into account of the different, competing interests, but rather, stack all the weight at one end.<sup>159</sup>

In September 2011, the Committee on International Trade (INTA) of the European Parliament filed a request to its Legal Services to advise on the compliance of ACTA with the EU *acquis*.

Mindful of the controversy generated by the ACTA negotiations on February 22, 2012, the European Commission announced that it would seek an advisory opinion from the European Court of Justice before moving

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153. *Id.* at 8.

154. *Id.*

155. *Proposal for a Council Decision on the Conclusion of the Anti-Counterfeiting Trade Agreement between the European Union and its Member States, Australia, Canada, Japan, the Republic of Korea, the United Mexican States, the Kingdom of Morocco, New Zealand, the Republic of Singapore, the Swiss Confederation and the United States of America*, COM (2011) 380 final (June 24, 2011).

156. Douwe Korff & Ian Brown, *Opinion on the Compatibility of ACTA with the ECHR and the EU Charter of Fundamental Rights*, THE GREENS/EUROPEAN FREE ALLIANCE, <http://rfc.act-on-acta.eu/fundamental-rights>.

157. *Id.* at 58.

158. *Id.*

159. *Id.* at 61.

forward with the ratification of the ACTA. This was explained as a means of easing the concerns of European citizens about whether the agreement could lead to censorship.<sup>160</sup> A reflection of this concern was a petition received on February 28, 2012 by the European Parliament signed by more than 2.4 million Internet users against ACTA.

Australia and New Zealand reported that their respective parliamentary committees would be scrutinizing ACTA before action is taken.<sup>161</sup> On October 16, 2010, the Australian Minister for Trade commended the Agreement, stating that the Government would make a final decision on ratifying the ACTA treaty after it was examined by the Joint Standing Committee on Treaties.<sup>162</sup> This examination does not yet appear to have taken place, but in March 2011 the Australian Government released the *Intellectual Property Laws Amendment (Raising The Bar) Bill 2011*, which proposed to make a number of significant amendments to the major Australian industrial property statutes.<sup>163</sup> In addition, the Bill contained a suite of measures for enhancing trademark and copyright enforcement, including measures for the confiscation of counterfeit and pirate goods in line with ACTA. The Bill was introduced into the Senate on June 22, 2011.

On January 31 and February 7, 2011 the House of Commons Standing Committee on Canadian Heritage held hearings to determine the status of negotiations on the free trade agreement with the EU and to find out the position of Canada's negotiators in talks to sign ACTA. The Minister of International Trade reported that the Copyright Modernization Bill had been introduced to the Canadian Parliament to support Canada's obligations under ACTA. The Standing Committee called on the Government of Canada to ensure that Canada's commitments to the implementation of ACTA "are limited to the agreement's focus on combating international counterfeiting and commercial piracy efforts; and that the Government of Canada retains the right to maintain domestic copyright policies that have been developed within the framework of its commitments to the World Intellectual Property Organization and the Berne Convention."<sup>164</sup>

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160. Press Release, European Comm'n, Statement by Comm'r Karel De Gucht on ACTA (Anti-Counterfeiting Trade Agreement) (Feb. 22, 2012) (<http://trade.ec.europa.eu/doclib/press/index.cfm?id=778>).

161. Monika Ermert, *Still a Long Way to Go for Anti-Counterfeiting Trade Agreement*, (Sept. 8, 2011, 9:23 PM), <http://www.ip-watch.org/weblog/2011/09/08/still-a-long-way-to-go-for-anti-counterfeiting-trade-agreement/>.

162. Craig Emerson, *Anti-Counterfeiting Agreement to Benefit Creative Industries*, (Nov. 16, 2010), [http://www.trademinister.gov.au/releases/2010/ce\\_mr\\_101116](http://www.trademinister.gov.au/releases/2010/ce_mr_101116).

163. Explanatory Memorandum from The Parliament of the Commonwealth of Austl., *Intellectual Prop. Laws Amendment (Raising The Bar) Bill 2011 (2010-2011)* ([http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/s837\\_ems\\_561ef790-9811-43d0-b14f-04c924723c94/upload\\_pdf/356916em.pdf;fileType=application%2Fpdf](http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/s837_ems_561ef790-9811-43d0-b14f-04c924723c94/upload_pdf/356916em.pdf;fileType=application%2Fpdf)).

164. HOUSE OF COMMONS, 40th PARLIAMENT, 3d SESS., STANDING COMM. ON CANADIAN HERITAGE, THE CANADA-EUROPEAN UNION COMPREHENSIVE ECONOMIC AND TRADE AGREEMENT, THE ANTI-COUNTERFEITING TRADE AGREEMENT, AND ISSUES REGARDING

ACTA has had a chequered history in Mexico. A Working Group of the Senate conducted hearings which resulted in a resolution of the Senate on September 28, 2010, requesting that the President stop the process of negotiations for Mexico to sign the agreement.<sup>165</sup> This was largely based on objections to the lack of transparency in the negotiating process.<sup>166</sup> After publication of the final version of the ACTA, the Working Group again recommended rejection of ACTA by Mexico.<sup>167</sup> A resolution of the Senate in July 2011 requested the President not to proceed with signature of ACTA.<sup>168</sup>

In Switzerland, it was reported in September 2011 that “the internal process preparing the decision for signature is ongoing” and that “[t]here is no timeline . . . .”<sup>169</sup>

To some extent, the implementation of ACTA by a number of signatory countries is being overshadowed by their participation in the negotiations for the Trans Pacific Partnership Agreement. This is being negotiated between Australia, Brunei, Chile, Malaysia, New Zealand, Peru, Singapore, the U.S., and Vietnam. President Obama set the APEC summit in November 2011 as the target for the settlement of negotiations. This Agreement is described by some commentators as the “Son of ACTA”<sup>170</sup> or as “everything the U.S. wanted in ACTA but didn’t get.”<sup>171</sup>

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CULTURAL DIVERSITY (Mar. 2011), available at [http://publications.gc.ca/collections/collection\\_2011/parl/XC61-403-1-1-04-eng.pdf](http://publications.gc.ca/collections/collection_2011/parl/XC61-403-1-1-04-eng.pdf).

165. *Point Proposed Agreement with the Federal Executive will Remove the Trade Negotiations or Anti-Counterfeit ACTA*, SENADO DE LA REPÚBLICA (Oct. 5, 2010), <http://www.senado.gob.mx/index.php?ver=sp&mn=2&sm=2&id=26924>.

166. Mike Masnick, *Mexican Senate Unanimously Votes To Remove Mexico from ACTA Negotiations*, TECHDIRT.COM (Oct. 6, 2010, 7:37 AM), <http://www.techdirt.com/articles/20101005/17320811304/mexican-senate-unanimously-votes-to-remove-mexico-from-acta-negotiations.shtml>.

167. Letter from Eloy Cantú Segovia et al., Senator, Comm. on Trade and Indus. Promotion, to Manlio Fabio Beltrones Rivera, Chairman of the Bd. of the Senate of the Rep. (July 20, 2011) ([http://www.senado.gob.mx/sgsp/gaceta/61/3/2011-09-06-1/assets/documentos/GrupoPlural\\_ACTA.pdf](http://www.senado.gob.mx/sgsp/gaceta/61/3/2011-09-06-1/assets/documentos/GrupoPlural_ACTA.pdf)).

168. Mike Masnick, *Mexican Senate Calls on President To Reject ACTA*, TECHDIRT.COM (July 28, 2011, 10:07 PM), [www.techdirt.com/articles/20110727/23163815295/mexican-senate-calls-president-to-reject-acta.shtml#comments](http://www.techdirt.com/articles/20110727/23163815295/mexican-senate-calls-president-to-reject-acta.shtml#comments).

169. Ermert, *supra* note 161.

170. Nate Anderson, *Son of ACTA: Meet the Next Secret Copyrighting Treaty*, ARSTECHNICA.COM (Mar. 11, 2011, 12:20 PM), <http://arstechnica.com/tech-policy/news/2011/03/son-of-acta-meet-the-next-secret-copyright-treaty.ars>.

171. Michael Geist, *U.S. Intellectual Property Demands for TPP Leak: Everything it Wanted in ACTA But Didn't Get* (Mar. 11, 2011), <http://www.michaelgeist.ca/content/view/5686/125/>.

# GLOBAL FOOD SECURITY AND INTELLECTUAL PROPERTY RIGHTS

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## INTRODUCTION

Global food price spikes in recent years have led to food riots and government-imposed emergency price controls,<sup>2</sup> reminding the global community of the integral connections between food security and political and economic stability. With nearly one billion people already suffering from chronic hunger,<sup>3</sup> and the expected 70 percent rise in demand for food by 2050,<sup>4</sup> increased and sustained agricultural productivity and production will be a critical component of achieving global food security, which is integral to political stability, particularly in developing countries.

In response to this challenge, global leaders, convened at the G-8 Summit in L'Aquila, Italy in 2009, launched the L'Aquila Food Security Initiative.<sup>5</sup> This \$20 billion pledge, contributed over three years, deepened donor governments' short-, medium-, and long-term investments in agriculture and rural development in developing countries to combat food insecurity and was designed to catalyze broader economic growth,

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2. *The 9 Billion People Question: A Special Report on Feeding the World*, THE ECONOMIST, Feb. 26, 2011, at 2.

3. See "L'Aquila" Joint Statement on Global Food Security: L'Aquila Food Security Initiative (AFSI), GROUP OF 8 SUMMIT 2009, [http://www.g8italia2009.it/static/G8\\_Allegato/LAquila\\_Joint\\_Statement\\_on\\_Global\\_Food\\_Security%5B1%5D,0.pdf](http://www.g8italia2009.it/static/G8_Allegato/LAquila_Joint_Statement_on_Global_Food_Security%5B1%5D,0.pdf) (last visited June 28, 2012) [hereinafter L'AQUILA].

4. FOOD & AGRIC. ORG. OF THE UNITED NATIONS, HOW TO FEED THE WORLD IN 2050 at 2, [http://www.fao.org/fileadmin/templates/wsfs/docs/expert\\_paper/How\\_to\\_Feed\\_the\\_World\\_in\\_2050.pdf](http://www.fao.org/fileadmin/templates/wsfs/docs/expert_paper/How_to_Feed_the_World_in_2050.pdf).

5. L'AQUILA, *supra* note 3.

prosperity, and stability.<sup>6</sup> Building upon the commitments and progress from L'Aquila, in 2012, the G-8 renewed its commitment to food security through the establishment of the New Alliance for Food Security and Nutrition, with the ambitious goal of “achiev[ing] sustained and inclusive agricultural growth and rais[ing] 50 million people out of poverty over the next 10 years.”<sup>7</sup>

One of the objectives of the New Alliance for Food Security and Nutrition is to increase agricultural yields and close the productivity gap in Sub-Saharan African countries by increasing the dissemination and adoption of improved seeds and new technologies.<sup>8</sup> Though the G-8 effort is focused on the transfer of technology already “on the shelf” to improve African agriculture, these efforts are inherently linked to the broader donor community’s support of agricultural research. The donor community, including bilateral and multilateral donors, has increased its investments in international agricultural research in recent years, as seen in Figure 1 below.<sup>9</sup> This reversed a trend from previous decades and is largely due to the growing recognition that research provides the necessary pipeline of technologies and knowledge to strengthen global food security. This commitment is significant, as the donor community contributed nearly \$700 million in 2010 to the Consultative Group on International Agricultural Research (CGIAR), the primary purveyor of public sector agricultural research targeted to advance agricultural productivity and production among poor, subsistence farmers in the developing world.<sup>10</sup>

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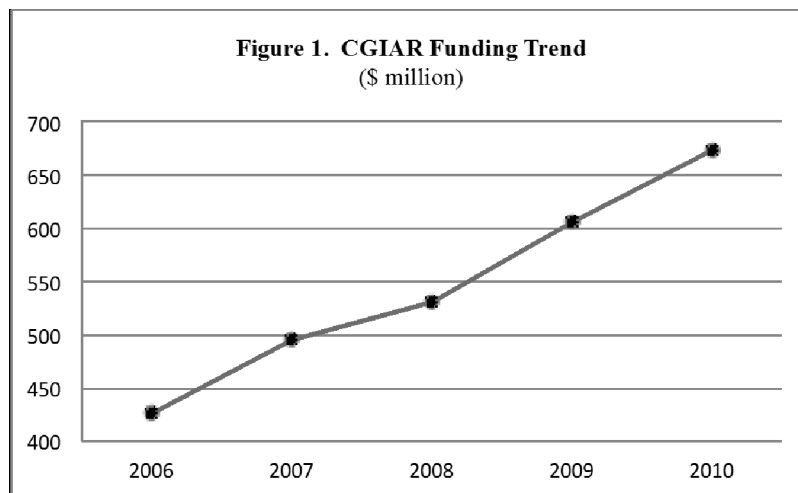
6. *Id.* at 1.

7. Fact Sheet: G-8 Action on Food Security and Nutrition, THE WHITE HOUSE (May 18, 2012), <http://www.whitehouse.gov/the-press-office/2012/05/18/fact-sheet-g-8-action-food-security-and-nutrition>. [hereinafter WHITE HOUSE].

8. *Id.*

9. CONSULTATIVE GRP. OF INT’L AGRIC. RESEARCH [CGIAR], FINANCIAL REPORT 2010 6, *available at* [http://library.cgiar.org/bitstream/handle/10947/5280/2010\\_CGIAR\\_Financial\\_Report.pdf?sequence=1](http://library.cgiar.org/bitstream/handle/10947/5280/2010_CGIAR_Financial_Report.pdf?sequence=1) (last visited July 3, 2012).

10. *Id.*

Figure 1. Donor support to CGIAR, 2006-2012 (in millions USD)<sup>11</sup>

Though the donor community has funded international agricultural research for decades, issues associated with intellectual property have become an increasingly important feature in the agricultural research landscape—among both public and private sector actors.<sup>12</sup> While the CGIAR has managed intellectual property issues on a center-by-center basis, in March 2012, after nearly one year of negotiation, the donor community and the CGIAR adopted the “CGIAR Principles on the Management of Intellectual Assets,” a system-wide policy to guide the management of intellectual assets produced or acquired by CGIAR centers.<sup>13</sup> Further, international agreements, such as the International Treaty on Plant Genetic Resources for Food and Agriculture<sup>14</sup> and the Nagoya Protocol to the Convention on Biological Diversity,<sup>15</sup> are being implemented to address access to and benefit-sharing from the use of genetic resources, the building blocks of agricultural research. Greater understanding of this evolving legal landscape is critical, so that researchers pursuing international agricultural research funded by the public sector can more effectively work towards improving global food security. This paper will briefly describe these international agreements and policies and how they relate to publicly-funded, agricultural research intended to increase the

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11. *Id.*

12. MICHAEL BLAKENEY, INTELLECTUAL PROPERTY RIGHTS AND FOOD SECURITY 5 (2009).

13. CGIAR Fund, Update, March 2012, available at <http://cgiarfund.org/Resourcesnew/9>.

14. ITPGRFA, International Treaty of Plant Genetic Resources for Food and Agriculture website, <http://planttreaty.org/>.

15. CBD, Convention on Biological Diversity website, <http://www.cbd.int/abs/>.

availability and accessibility of innovations to enhance economically and environmentally viable smallholder agricultural production and productivity.

## I. AGRICULTURAL RESEARCH & GLOBAL FOOD SECURITY

Agricultural research is a key driver for advancing agricultural productivity,<sup>16</sup> and as such, it is a significant component of international efforts to improve global food security. Public sector investments in agricultural research are most likely to improve food security,<sup>17</sup> and historically, the public sector was the key developer of Green Revolution technologies.<sup>18</sup> CGIAR centers were established during the 1960s and 1970s to serve as hubs of international public sector agricultural research<sup>19</sup>, and CGIAR scientists (both before and after the centers were established) were key contributors of Green Revolution technologies, primarily improved crop genetics.<sup>20</sup> A synthesis by Suresh Pal<sup>21</sup> illustrates that CGIAR research, particularly crop genetic improvement, has had a significant positive impact on poverty reduction, agricultural growth and environmental protection. It also attributes much of the impact from crop genetic improvement on the free exchange of plant genetic resources and partnerships with national agricultural research systems (NARS).

## II. AGRICULTURAL RESEARCH & ACCESS TO GENETIC RESOURCES

Given the role of agricultural research in advancing global food security goals, attention to factors that can enhance or impede research is critical. During the development of Green Revolution technologies by public sector researchers, “there was no consideration of any role that IP might play in agricultural innovation.”<sup>22</sup> Further, researchers during this period operated in an environment of relatively free movement of genetic resources and

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16. See PAUL HEISEY, ISSUES IN FOOD SECURITIES: AGRICULTURAL RESEARCH AND DEVELOPMENT, AGRICULTURAL PRODUCTIVITY, AND FOOD SECURITY, US DEPT. OF AGRIC (June 2001), available at [http://www.ers.usda.gov/media/303967/aib765-10\\_1\\_.pdf](http://www.ers.usda.gov/media/303967/aib765-10_1_.pdf).

17. See *id.*

18. BLAKENEY, *supra* note 12, at 4.

19. FAO, INTRODUCTION TO THE INT’L TREATY ON PLANT GENETIC RESOURCES FOR FOOD AND AGRIC 64, Rome, (February 2011), available at <http://www.planttreaty.org/content/training-resources>.

20. Suresh Pal, *Impacts of CGIAR Crop Improvement and Natural Resource Management Research: A Review of Evidence*, 24 AGRIC. ECON. RES. REV. 185, 187 (2001).

21. See *id.*

22. BLAKENEY, *supra* note 12, at 5.



improved crop varieties resulting from their use.<sup>23</sup> As noted above, the free exchange of plant genetic resources was identified as a key factor underlying the impacts from CGIAR research on crop genetic improvement.<sup>24</sup> Access to a variety of genetic resources is critical in agricultural research, particularly for crop genetic improvement. There are generally two parts to the issue of access for crop genetic improvement. First, a wide variety of genetic resources, which can originate from anywhere, are necessary to screen for potentially valuable traits. Once a trait is identified, it would then be integrated into crops grown in a particular area. Thus, access to genetic resources from the target region (e.g., local crop varieties) is necessary to ensure that the new trait is introduced into crops already known to perform well under local farming conditions. Access to genetic resources is critical for both identifying important new traits as well as ensuring the relevance of emerging technologies to target beneficiaries, such as smallholder farmers in developing countries. However, currently emerging systems for managing access to and benefit-sharing from the use of genetic resources are being implemented at the national level and could restrict access to the range of genetic resources needed for agricultural research.<sup>25</sup>

The Nagoya Protocol (NP) was adopted in 2010 under the Convention on Biological Diversity.<sup>26</sup> The objective of the Nagoya Protocol is to provide a “transparent legal framework for the effective implementation of . . . fair and equitable sharing of benefits arising out of the utilization of genetic resources.”<sup>27</sup> Further, contracting parties to the Nagoya Protocol are obligated to “take measures in relation to access to genetic resources, benefit-sharing and compliance.”<sup>28</sup> As the Nagoya Protocol is implemented at the national level—and this process is only just beginning—it is unclear how implementation will affect international research collaborations. Some have voiced concern that the Nagoya Protocol could stifle academic

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23. See Kelly Day Rubenstein and Melinda Smale, International Exchange of Genetic Resources: The role of information and implications for ownership: the Case of the U.S. National Plant Germplasm System, 2, EPTD Discussion Paper 119 (July 2004).

24. See *PAL*, *supra* note 20.

25. Commission on Genetic Resources for Food and Agriculture. Background Study paper No. 42. “Framework study on food security and access and Benefit-sharing for genetic resources for food and Agriculture” (September 2009) [http://www.fao.org/nr/cgrfa/cgrfa-back/en/?no\\_cache=1](http://www.fao.org/nr/cgrfa/cgrfa-back/en/?no_cache=1).

26. See CONVENTION ON BIOLOGICAL DIVERSITY (CBD), *Status of Signature, and ratification, acceptance, approval or accession*, <http://www.cbd.int/abs/nagoya-protocol/signatories/> (last visited Sept. 22, 2011) for a list of countries that have signed and/or ratified the Nagoya Protocol. All countries, except the U.S., Andorra, South Sudan and the Holy See, have ratified the Convention on Biological Diversity (CBD), though the U.S. has signed the Convention. *Id.*

27. *About the Nagoya Protocol*, CONVENTION ON BIOLOGICAL DIVERSITY, [http://www.cbd.int/abs/about/#objective\\_](http://www.cbd.int/abs/about/#objective_) (last visited Aug. 19, 2012).

28. *Id.*

research through the limitations on sharing of genetic resources.<sup>29</sup> Given the collaborative, multi-national nature of public sector international agricultural research, developed and developing country researchers alike must be educated about the Nagoya Protocol and their rights and responsibilities when conducting collaborative research.

The International Treaty on Plant Genetic Resources for Food and Agriculture (“Treaty”) entered into force in 2004.<sup>30</sup> This Treaty establishes a global system to provide farmers, plant breeders and scientists with access to plant genetic materials and provides for terms and conditions on benefit-sharing from the use of plant genetic resources.<sup>31</sup> The Treaty is a separate instrument from the Nagoya Protocol and is considered a specialized instrument for a specific category of genetic resources as described in Article 4 of the Nagoya Protocol.<sup>32</sup> The Treaty’s multilateral system of access and benefit-sharing was developed in response to the way in which plant genetic resources are used to develop new materials.<sup>33</sup> That is, a number of plant genetic resources may be used to develop a single final variety and attributing the value of the final variety to any single parental genetic resource would be challenging. Through the Multilateral System, parties to the Treaty make plant genetic resources under national jurisdiction (e.g., national seed banks) available to others for research and breeding.

Those who access genetic materials through the Multilateral System agree that they will freely share any new developments with others for further research or, if they want to keep the developments to themselves, they agree to pay a percentage of any commercial benefits they derive from their research into a common fund to support conservation and further development of agriculture in the developing world.<sup>34</sup>

Through the establishment of a benefit-sharing fund, the Treaty Secretariat facilitates the distribution of resources to advance goals of conservation of plant genetic resources for agriculture and building capacity in developing countries to conserve and conduct research with these genetic resources.<sup>35</sup>

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29. Sikina Jinnah & Stefan Jungcurt, *Global Biological Resources: Could Access Requirements Stifle Your Research?* 323 *SCI* 464, 464-65 (2009).

30. See ITPGRFA, *supra* note 14.

31. *Id.*

32. Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, art. 4, Oct. 29, 2010, available at <http://www.cbd.int/abs/text/articles/?sec=abs-04> [hereinafter Nagoya Protocol].

33. See FAO, 19, *supra* note 19.

34. *What is the Multilateral System?*, INT’L TREATY ON PLANT GENETIC RESOURCES FOR FOOD AND AGRIC., <http://www.planttreaty.org/content/what-multilateral-system> (last visited Aug. 19, 2012).

35. See ITPGRFA, *supra* note 14.

Plant genetics resource collections held by the CGIAR research centers represent the largest collection of these resources for food and agriculture.<sup>36</sup> These plant germplasm collections have been entered into the Multilateral System (MLS) to enable researchers globally to have access to these unique collections.<sup>37</sup> Thus, the Treaty has direct relevance to agricultural research carried out to advance the goals of global food security, especially as the CGIAR and collaborating scientists use these genetic resources to improve crop varieties produced by smallholder farmers in developing countries. As the Nagoya Protocol has not yet entered into force,<sup>38</sup> implementation of the Treaty is more advanced than implementation of the Nagoya Protocol, leaving some researchers to find that they can only obtain some of the genetic resources they need to pursue their work. For example, a plant breeder may be able to obtain unique plant germplasm from the CGIAR, but may not be able to obtain a wide variety of plant pathogens used to evaluate plant resistance to a new disease. Plant pathogens would fall under the purview of the Nagoya Protocol,<sup>39</sup> and until governments have systems in place to enable the movement of the genetic resources, research in some areas may be significantly delayed. This could have significant consequences for food security. In the event of an emerging plant health threat, like Ug99, a virulent wheat stem rust to which roughly 80% of the wheat crop in Africa and Asia was susceptible when it appeared,<sup>40</sup> consequences can be significant if access to the genetic resource is encumbered. In this case, had Ug99 spread to these susceptible regions before researchers and governments had had a chance to identify and disseminate resistant wheat varieties, wheat-dependent populations in these regions could have faced serious food insecurity.<sup>41</sup> Given the importance of access to genetic resources for international agricultural research, the implementation of international agreements governing access to and benefit-sharing from the use of genetic resources can have significant consequences for global food security.

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36. Carlos Perez del Castillo, Genetic Resources Scoping Study Report, 1, (February 2011) See [http://library.cgiar.org/bitstream/handle/10947/2701/CGIAR\\_Consortium\\_Board\\_Commissioned\\_Genetic\\_Resources\\_Scoping\\_Study.pdf?sequence=1](http://library.cgiar.org/bitstream/handle/10947/2701/CGIAR_Consortium_Board_Commissioned_Genetic_Resources_Scoping_Study.pdf?sequence=1).

37. See FAO, *supra* note 19.

38. See CBD, *supra* note 26.

39. See Article 3, Scope, Nagoya Protocol, CBD, [www.cbd.int/abs/text/articles/?sec=abs-03](http://www.cbd.int/abs/text/articles/?sec=abs-03).

40. *Introduction*, CIMMYT INT'L MAIZE AND WHEAT IMPROVEMENT CENTER, <http://apps.cimmyt.org/gis/rustmapper/index.htm> (last modified June 9, 2010).

41. See FAO wheat rust disease global programme, [www.fao.org/agriculture/crops/core-themes/theme/pests/wrdgp/en/](http://www.fao.org/agriculture/crops/core-themes/theme/pests/wrdgp/en/).

## III. AGRICULTURAL RESEARCH &amp; INTELLECTUAL PROPERTY RIGHTS

Though as noted earlier, researchers developing the Green Revolution technologies may not have considered intellectual property rights,<sup>42</sup> public sector agricultural researchers must consider these issues given the current legal landscape. Recognition of the links between intellectual property rights issues and food security is increasing, as evidenced by the negotiation of a new IP policy for the CGIAR in 2012 and the recognition by the G-8 New Alliance for Food Security and Nutrition to “[e]xplore opportunities for applying the non-profit model licensing approach that could expand African access to food and nutritional technologies developed by national research institutions.”<sup>43</sup> Part of the emphasis on intellectual property rights issues comes from increasing engagement of the private sector by the traditional donor community in international development efforts. Though the private sector has participated in many, often less visible, ways in past development efforts, international development donors increasingly recognize the role the private sector can play in both focusing private sector investment on agricultural research for smallholder producers in developing countries as well as facilitating the deployment of technologies developed by public sector investments to poor smallholder producers in developing countries.<sup>44</sup> Naseem and his colleagues reviewed policy options that could cultivate private sector investment in research and development (R&D) for agriculture in developing countries, and indicated that intellectual property rights are one important incentive to stimulate private investment in agricultural research, though the impacts on pro-poor agriculture are variable depending on a number of factors.<sup>45</sup> Public sector research, especially that being undertaken by the CGIAR’s new research programs, contributes to the development of pro-poor technologies to improve the productivity of smallholder agriculture and/or reduce the vulnerability associated with agricultural production among poor smallholder producers.<sup>46</sup> Through strategic engagement with the private sector, the outputs of research, both in terms of technology and knowledge, (e.g., greater understanding of factors to increase technology adoption among smallholders) can potentially reach greater numbers of target beneficiaries.

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42. See BLAKENEY, *supra* note 12.

43. WHITE HOUSE, *supra* note 7.

44. WHITE HOUSE, *supra* note 7.

44. Reuters, describes pledge announced at May 2012 G-8 discussion of global hunger and food security, <http://www.reuters.com/article/2012/05/18/us-g8-food-idUSBRE84H00920120518>, (last visited Dec 11, 2012).

45. See Anwar Naseem, David J. Spielman & Steven W. Omamo, Private-Sector Investment in R&D: A Review of Policy Options to Promote its Growth in Developing-Country Agriculture, 26(1) AGRIBUSINESS 143 (2010), available at <http://siteresources.worldbank.org/CFPEXT/Resources/NaseemetalPrivateRDAgribusiness10.pdf>.

46. See CGIAR Strategic Results Framework, [http://www.cgiarfund.org/strategy\\_results\\_framework](http://www.cgiarfund.org/strategy_results_framework).

Further, engagement with the private sector could potentially improve the sustainability of availability of technologies, through steady demand for pro-poor technologies, when priced and available in ways accessible to poor smallholders. To harness these opportunities available through the private sector, intellectual property rights are an important tool. Thus, donors have taken steps to address how and in what context intellectual property rights are asserted over publicly funded international agricultural research outputs through the negotiation of the CGIAR *Principles on the Management of Intellectual Assets*.

During the recent reform process of the CGIAR system, intellectual property issues were raised, as individual CGIAR centers had, over time, established their own policies and procedures for managing intellectual assets and engaging with the private sector. The Principles were drafted to ensure that under the new CGIAR system, all CGIAR centers were guided by the same principles to manage their intellectual assets as these assets exist largely from decades of public sector funding. These Principles commit the CGIAR to “prudent and strategic use of intellectual property rights,” such as patents or plant variety protection, that are only to be pursued in situations necessary to improve the asset or “to enhance the scale or scope of impact on target beneficiaries.”<sup>47</sup> The provisions also address exclusivity agreements that the CGIAR may undertake with third parties, to ensure there is a careful review of how and under what circumstances agreements are developed. This is a living document, subject to review and revision in two years from the adoption by the Fund Council in March 2012. The review will enable donors to learn how intellectual assets management is faring under these principles, and what new or unexpected impacts this has for how the CGIAR engages with partners, and most importantly, to examine how these evolving principles can best be structured to increase the impacts of public sector funded research on smallholder producers in the developing world.

#### LOOKING FORWARD

Intellectual property issues are increasingly relevant to the public-sector international agricultural research landscape. Given the expected significant increases in public sector funding in the coming years to address global food security issues, and the increasing role of public-private sector engagement, intellectual property rights may be an increasingly important tool to help achieve impacts from these investments. Additional research on how and in what contexts to best use intellectual property tools to achieve the intended impacts from this expansion in international agricultural research funding will be critical for the international donor community as it strives to meet its commitment to addressing global food security.

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47. See CGIAR 7th Fund Council Meeting documents Agenda Item 9, [www.cgiarfund.org/7th\\_fund\\_council\\_meeting](http://www.cgiarfund.org/7th_fund_council_meeting).



# INTELLECTUAL PROPERTY AND OPPORTUNITIES FOR FOOD SECURITY IN THE PHILIPPINES

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## ABSTRACT

By 2050, the Philippine population is projected to increase by as much as 41 percent, from 99.9 million to nearly 153 million people. Producing enough food for such an expanding population and achieving food security remain a challenge for the Philippine government. This paper argued that intellectual property rights (IPR) can play a key role in achieving the nation's current goal to be food-secure and provided examples to illustrate that the presence of sound intellectual property (IP) helps foster research, development, and deployment of agricultural innovations. This paper also offered key recommendations about how the IP system can be further leveraged to enable access, creation, and commercialization of new and innovative agricultural practices and technologies to enhance the nation's agricultural productivity, meet rice self-sufficiency, and sustain food security.

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## INTRODUCTION

At a basic level, food security is about fulfilling each individual's human right to food.<sup>2</sup> The Rome Declaration on World Food Security and the World Food Summit Plan of Action describes it as "when all people, at all times, have physical, social and economic access to sufficient, safe, and nutritious food which meets their dietary needs and food preferences for an active and healthy life."<sup>3</sup> This simply means that a food-secure population does not live in hunger or fear of starvation. For the Filipino people, the presence of rice—the country's major staple—on the table already symbolizes food security and emancipation from hunger and malnutrition.

Based on FAO's latest publication titled, *The State of Food Insecurity of the World 2011*, the Philippines is one of the few Asian developing countries currently on track to cut its "food-insecure" population in half by 2015.<sup>4</sup> The Philippine government recently claimed that due to increased rice production in the past two years, the Philippines will be able to achieve its target of rice self-sufficiency (i.e. less rice importation), hence, achieve food security by 2013. With 50 million more mouths to feed by 2050, however, there is a constant pressure and marching mandate for the country to address hunger and malnutrition, expand domestic rice production, and continue to improve productivity of the country's rice industry.

This paper argues that the presence of a sound IP system is essential to the access, generation, efficient and effective commercialization of new and improved agricultural innovations to boost Philippine agriculture and foster rice self-sufficiency, which, in this country, is equated with food security. Higher productivity in the agriculture sector backed with appropriate government incentive policies, such as IPR, can increase food availability and income, resulting in economic growth and more opportunities for people to break out of the poverty-hunger-malnutrition trap. This view complements the report of the Commission on Intellectual Property Rights (CIPR) *Integrating Intellectual Property Rights and Development Policy*, which stated that by stimulating invention and new technologies, IPR can help increase agricultural production, promote domestic and foreign investment, facilitate technology transfer, and improve the availability of

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2. Philippe Cullet, *Food Security and Intellectual Property Rights in Developing Countries* 1 (2003), available at [http://www.IPRonline.org/resources/docs/PCull.Food\\_sec\\_IPR\\_7.11.03.pdf](http://www.IPRonline.org/resources/docs/PCull.Food_sec_IPR_7.11.03.pdf).

3. U.N. FAO, Rome Declaration on World Food Security (Nov. 13-17, 1996), available at [http://www.fao.org/documents/show\\_cdr.asp?url\\_file=/docrep/003/w3613e/w3613e00.htm](http://www.fao.org/documents/show_cdr.asp?url_file=/docrep/003/w3613e/w3613e00.htm).

4. See U.N. Food & Agric. Org. (FAO), *The State of Food Insecurity in the World 46*, Annex Table 1.1 (2012), available at <http://www.fao.org/docrep/016/i3027e/i3027e.pdf>.



food to combat hunger.<sup>5</sup> This view also supports recent econometric findings that IPR are important policy tools that promote agricultural development in developing countries.

This paper begins with an overview of the Philippine agriculture sector and the role of the rice sub-sector in the country's economic growth and food security objectives. The second and third sections present the importance of innovation to modernizing agriculture, the link of innovation and IPR, an update on the implementation of IPR laws and measures in the Philippines, and the relevance of the expansion of IPR protection on agriculture. These sections put into context the role of IPR in the country's effort to address food security and make the country self-sufficient in terms of rice. The fourth section presents two case studies featuring the experiences of the Philippine Rice Research Institute (PhilRice) and the Philippine Center for Postharvest Development and Mechanization (PhilMech). This section aims to illustrate that IP, when well-managed, helps the access, generation, and commercialization of agricultural innovations to benefit the country's rice industry. Specifically, this section shares PhilRice's success story on its rice varietal improvement program through effective transfer of biotechnology highlighting the case of golden rice and PhilMech's success story on the implementation of its new licensing protocol to deploy agricultural machinery effectively. Finally, the last section offers concluding remarks focused on lessons learned and recommendations on how IP can be further leveraged to meet rice self-sufficiency and attain food security in the Philippines.

## I. A LOOK AT PHILIPPINE AGRICULTURE AND THE RICE SECTOR

The Philippines is an emerging economy and archipelago consisting of more than 7,100 islands situated in Southeast Asia. Although the contribution of agriculture to the national output has been decelerating over the years (See Figure 1), the Philippines remains largely an agriculture-based economy. The Philippine agriculture sector performs critical roles for the country's economic growth and development, as it is a source of food and vital raw materials; a source of jobs and employment especially for the rural poor a significant market for the products of the non-agricultural economy; and a source of surplus labor to the industry and services sectors.<sup>6</sup>

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5. See generally Comm'n on Intellectual Property Rights, *Integrating Intellectual Property Rights and Development Policy* (2002), [http://www.iprcommission.org/papers/text/final\\_report/reportwebfinal.htm](http://www.iprcommission.org/papers/text/final_report/reportwebfinal.htm).

6. Cielito F. Habito & Roehlano M. Briones, *Philippine Agriculture over the Years: Performance, Policies, and Pitfalls*, WORLD BANK.ORG1-2 (2005), <http://siteresources.worldbank.org/INTPHILIPPINES/Resources/Habito-word.pdf>.

The country's rice sector is one of the main sources of growth for the country's agriculture.<sup>7</sup> In 2010, rice accounted for 21.86 percent of gross value added in agriculture and 2.37 percent of GNP.<sup>8</sup> Labor absorption by the rice industry is highest among the agriculture sub sectors that involve 11.5 million farmers and family members. Close to three-fourths of farm household income is derived from rice farming and related activities.<sup>9</sup>

For 99.9 million Filipinos, rice is indeed life. Rice is the primary food source that is very much embedded in their cultural heritage and the most important food crop, essential to the nation's food security, poverty alleviation, and improved livelihoods. Rice provides the necessary calories to cover the daily energy needs of Filipinos and accounts for 35 percent of the average caloric intake of the population to as high as 60-65 percent for households in the lowest income quartile<sup>10</sup>. One Filipino consumes an average of 119 kilograms per year based on 2008 data.<sup>11</sup>

Rice, the country's main staple, is planted over 2.7 million hectares (M ha). The average farm size in the Philippines is 1.5 hectares (ha). In 2010, rice was harvested from some 4.35 M ha, 7 percent higher than the area harvested for 2000, which is an indication that farmers are planting more of the crop.<sup>12</sup> Production wise, the rice industry has been performing well, with a growth rate of 2.89 percent from 1980 to 2010. Over the past three decades, production has more than doubled despite the El Nino phenomenon and other natural and man-made factors that have affected the country (see Figure 2). In 2010, production reached 15.77 million metric tons (MT) mark,<sup>13</sup> or 27.29 percent higher than in 2000. Rice yield per

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7. See Bureau of Agricultural Statistics, Performance of Philippine Agriculture, Jan.-Dec. 2011, BUREAU OF AGRIC. STATISTICS, PERFORMANCE OF PHILIPPINE AGRICULTURE JANUARY-DECEMBER 2011, available at [http://www.bas.gov.ph/?Ids=downloads\\_view&id=516](http://www.bas.gov.ph/?Ids=downloads_view&id=516) (last visited Jan. 11, 2012).

8. Nat'l Statistical Coordination Bd., *National Accounts of the Philippine Fourth Quarter 2010*, PHILIPPINE NAT'L STATISTICAL COORDINATION BD. (Jan. 31, 2011), <http://www.nscb.gov.ph/sna/2010/4th2010/2010hi4.asp>.

9. *Agri-Pinoy Rice Program*, REPUBLIC OF THE PHILIPPINES DEP'T OF AGRIC., <http://www.da.gov.ph/index.php/2012-03-27-12-03-56/2012-04-13-12-38-11> (last visited Jan. 11, 2012).

10. Leocadio Sebastian, Pedro Alviola, and Sergio R. Francisco, Bridging the Rice Yield Gap in the Philippines (Minas Papademetriou, Frank Dent and Edward Herath ed. 2000), available at <ftp://ftp.fao.org/docrep/fao/003/x6905e/x6905e00.pdf>.

11. Kristine L. Alave, *Filipinos urged to reduce dependence on rice*, INQUIRER NEWS (Nov. 5, 2011, 2:47 AM), <http://newsinfo.inquirer.net/88421/filipinos-urged-to-reduce-dependence-on-rice>.

12. See Food and Agriculture Organization of the United Nations, FAOSTAT, <http://faostat.fao.org/site/567/DesktopDefault.aspx?PageID=567#ancor> (last visited Dec. 15, 2012) [hereinafter FAOSTAT Database].

13. See FAOSTAT Database, *supra* note 12.

hectare has also improved through the years, averaging 3.5 tons per hectare (t/ha) in 2000 to 2010, more than double the figures in the 1990s.<sup>14</sup>

Notwithstanding the steady increase in production and yield, the Philippines, a rice self-sufficient country in the 1970s, cannot satisfy its own demand and has increasingly relied on rice imports since the 1990s to ensure its food security.<sup>15</sup> To meet its population's requirements, it imports rice from the world's top rice exporting countries, such as Thailand and Vietnam. It is the world's biggest rice importer, averaging 2.27 million MT per year in 2000 to 2010 (see Figure 3).<sup>16</sup> Such huge importation is due to several factors: small rice areas (at 4.35 M ha) compared to that of Asia's major rice producing countries;<sup>17</sup> shrinking rice harvested area to feed increasing number of people;<sup>18</sup> the frequent occurrence of typhoons and other calamities (average of 3 typhoons per month, which coincides with the cropping season); high post-production losses at 15 percent (mostly from sun drying);<sup>19</sup> low milling rice recovery because of outdated rice milling facilities;<sup>20</sup> and rice wastage.<sup>21</sup>

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14. *Philippine Rice Industry: Facts and Figures*, PINOY RICE KNOWLEDGE BANK, <http://www.pinoyrkb.com> (last visited Jan. 9, 2012).

15. Ronilo A. Beronio, Jane G. Payumo & Rowena Villanueva, *Status of Public Rice Biotechnology Research and Development and Commercialization in the Philippines*, in BUSINESS POTENTIAL FOR AGRICULTURAL BIOTECHNOLOGY 161, 161 (Paul S. Teng ed. 2007), available at [http://www.apo-tokyo.org/00e-books/AG-19\\_BusinessPotential/AG-19\\_BusinessPotential.pdf](http://www.apo-tokyo.org/00e-books/AG-19_BusinessPotential/AG-19_BusinessPotential.pdf) ("A buffer stock of 60 days' worth is maintained through import to ensure food security.").

16. See FAOSTAT Database, *supra* note 12.

17. FOOD & AGRICULTURAL ORGANIZATION OF THE U.N. THE STATE OF FOOD INSECURITY IN THE WORLD: HOW DOES INTERNATIONAL PRICE VOLATILITY AFFECT DOMESTIC ECONOMIES AND FOOD SECURITY (2011), available at <http://www.fao.org/docrep/014/i2330e/i2330e.pdf> (stating that rice area harvested for China in 2010 is recorded at 29.49 M ha, 44 M ha for India, 12.31 M ha for Indonesia, 10.25 M ha for Thailand and 7.41 M ha for Vietnam).

18. Pinoy Rice Knowledge Bank, *Philippine Rice Industry: Facts and Figures*, PHILRICE (last visited Sept. 17, 2012), <http://www.pinoyrkb.com/main/resources/facts-and-figures> (follow "Philippine Rice Industry Q & A 2" hyperlink).

19. The Philippines is known for its "highway dryers," the cheapest, but unreliable method of drying high moisture paddy. Dante de Padue, *Rice Post Harvest E-mail Conference Draft Summary V.1.2*, FOOD & AGRICULTURAL ORGANIZATION OF THE U.N. (June 1998) (conference papers), <http://www.fao.org/docrep/X5427E/x5427e0d.htm#drying%20of%20high%20moisture%20paddy>. U.N. & SOCIAL COMMISSION FOR ASIA AND THE PACIFIC, ORGANIC AGRICULTURE AND RURAL POVERTY ALLEVIATION: POTENTIAL AND BEST PRACTICES IN ASIA 120-45 (2002).

20. Joji Co, Panel Discussion, *Private Sector Investments to Improve Rice Milling Efficiencies and Reduce Post-Harvest Losses*, at the USAID Food Security Conference: "Improving Access, Advancing Food Security" (July 18-19, 2011), available at <http://aseanfoodsecurityfoodproduction.files.wordpress.com/2011/07/12-herculano-joji-co-rfs.pdf>.

21. In 2008, the Philippine Food and Nutrition Research Institute reported that every Filipino wastes on average 3.3 kg/year. With 94 million people, total wastage of the country is 0.3 t, 36% of 2011 rice imports. Aileen Macalintal, *That Rice You Throw Away*, RICE TODAY, Apr.-June 2012, at 14.

The Philippine Department of Agriculture claims that the country's rice import situation can be changed and the country can become rice self-sufficient. This can be done by modernizing the country's rice sector as envisioned in the country's Agriculture and Fisheries Modernization Plan. Specifically, the country's rice modernization efforts are now focused on optimizing: the use of existing rice farms and labor productivity through new and improved technologies, from production to postharvest operations adapted to the agro-climatic conditions of the country; infrastructure development (e.g., irrigation and roads); farmers' training; and policy development. In 2010, the country's rice production improved by 15 percent, cutting the import volume to 0.86 million MT, more than 57 percent volume reduction of the country's 1999's import. By 2013 and onwards, the Philippine government is aiming to attain rice self-sufficiency again.

## II. IGNITING AGRICULTURAL INNOVATIONS THROUGH INTELLECTUAL PROPERTY RIGHTS

The 2001 Human Development Report stated: "innovation and technological advance has contributed greatly to the acceleration of human progress in the past several centuries and that those contributions have the promise of even greater acceleration."<sup>22</sup> There is general agreement that innovations based on existing or emerging technologies, especially when linked to a national innovation system, are crucial for growth. Innovations are also important to increase competitiveness, productivity, and social gain within organizations, among institutions, and across various sectors of the economy. In the rice sector, there is no doubt that technological innovations have contributed to increased production volumes and incremental yields over the past decades. For instance, the use of new, high-yielding rice varieties, mechanization, fertilizers, and pesticides, which were promoted by the Green Revolution<sup>23</sup> of the 1960s and 1970s, increased average rice productivity and rice supplies. The agricultural innovations during this period enabled the Philippines to become a net exporter of rice (albeit on a small scale) in the late 1970s. Green Revolution technologies were also claimed to have contributed to the overall economic growth of the country by increasing the incomes of farmers who were then able to afford tractors

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22. U.N. DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT 2001: MAKING NEW TECHNOLOGIES WORK FOR HUMAN DEVELOPMENT 25 (2001), *available at* <http://hdr.undp.org/en/media/completenew1.pdf> (last visited Sept. 17, 2012).

23. The term "green revolution" was coined William Gaud, former Director of the United States Agency for International Development (USAID), when he described the spectacular increases in cereal crop yields in Pakistan, India, China, then to other developing countries. Norman Borlaug Institute for Plant Science Research, *The Green Revolution & Dr. Norman Borlaug: Toward the "Evergreen Revolution,"* AGBIOWORLD, <http://www.agbioworld.org/biotech-info/topics/borlaug/green-revolution.html>.

and other modern equipment. The Green Revolution also promoted the use of electrical energy and consumer goods, which increased the pace and volume of trade and commerce.<sup>24</sup> Publicly-funded national and international agricultural research institutes also played a significant role in the development of these agricultural technologies.

Agricultural innovations can be part of the toolbox to achieve food security and rice self-sufficiency objectives. However, development and implementation need a supportive environment in which to thrive, and intellectual property rights (IPR) protection plays a key role in creating such an environment. IPR are certain creations of the human mind that are given the legal protection of property rights.<sup>25</sup> Article 27 (2) of the Universal Declaration of Human Rights provides a broader definition of IPR as “the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.”<sup>26</sup> Several distinct forms of IPR exist, including copyrights, patents, trademarks, plant variety protections, trade secrets, and geographical indications. These rights refer to the creator’s right to exclude others and thereby control the use, sale, application, and distribution of his or her creations for a fixed and determinable period of time. IPR are justified from two distinct perspectives: either as a personal right, or as an economic incentive for investment in creative activities.<sup>27</sup>

Protection of IPR has a deep history in the Philippines. Starting in 1947, through Republic Act No. 165, the country already provided protection for inventions, utility models, and industrial designs. The Philippine government has made intellectual property a state policy by incorporating it into the 1987 Constitution. The Philippine government likewise supported several international agreements that promote the use of IP. It became a member of the World Intellectual Property Organization (WIPO) in 1980. In 1992, it became a party to the Convention on Biological Diversity (CBD), which recognizes the sovereignty of countries over their genetic resources, which can be subject to IPR. In 1995, the Philippines joined the Association of Southeast Asian Nation (ASEAN) Framework Agreement on Intellectual Property Cooperation. It joined the World Trade Organization in 1995, and ratified the Trade-Related Aspects of Intellectual Property Rights

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24. FOOD & AGRICULTURE ORGANIZATION OF THE U.N., *THE STATE OF FOOD AND AGRICULTURE 2000* (2000) *available at* <http://www.fao.org/docrep/x4400e/x4400e00.htm> (follow “Food and Nutrition Security: Why Food Production Matters” hyperlink).

25. J. THOMAS MCCARTHY ET AL., *MCCARTHY’S DESK ENCYCLOPEDIA OF INTELLECTUAL PROPERTY* 308 (3d ed. 2004).

26. Universal Declaration of Human Rights, Art. 1, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) A (Dec. 10, 1948) [hereinafter *Universal Declaration*], *available at* <http://www.un.org/en/documents/udhr/>.

27. See WILLIAM LESSER, *Patenting of Plants and Animals: The Impacts on the Canadian Agri-Food Sector* (1995), *available at* <http://www.agr.gc.ca/policy/patent/lessers.html>.

(TRIPS) Agreement in 1996, which sets the IP standards of today. In 2004, the Philippines ratified the international seed treaty, the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA), and now implements the standard material transfer agreement (SMTA) for the transfer and exchange of biological and genetic resources. All of these international treaties must be reconciled with local legislation, and either complemented or supplemented by national laws and policies. The Philippines has promulgated several pieces of legislation, which parallel these treaties.

In 1998, the country's IP law, the Intellectual Property Code of the Philippines, was updated to comply with TRIPS provisions. The Philippine IP Code further strengthens protection of the rights of its inventors, trademark owners, authors, and other creators of intellectual property through patent, utility model, industrial design, copyright and other related rights, geographical indications, and trademark<sup>28</sup>. A pertinent provision of this legislation relates to the patentability of life forms, which specifically excludes the patenting of plant varieties, animal breeds, and essential biological processes for the production of plants and animals, while allowing for the patenting of microorganisms, non-biological, and microbiological processes. In response to TRIPS, the Philippines also enacted the 2002 Plant Variety Protection Act (RA 9268), patterned after The International Union for the Protection of New Varieties of Plants (UPOV), which provides *sui generis* (of its own kind) system protection for plants and gives rights to breeders. In 2002, Executive Order 247 was issued to prescribe the guidelines and a regulatory framework for the prospecting of biological and genetic resources, its by-products, and derivatives for scientific, commercial, and other purposes consistent with the CBD. Republic Act 9147 or the "Wildlife Resources Conservation and Protection Act" reinforced Executive Order 247. Several issuances by the Department of Environment and Natural Resources and the Department of Agriculture have likewise been released to regulate bio-prospecting in the country. In compliance to the CBD's Cartagena Protocol on Biosafety, the 2002 Administrative Order No. 8 of the Philippine Department of Agriculture was issued, which provides rules and regulations for the importation and release into the environment of plants and plant products derived from the use of modern biotechnology. Recently, the country has enacted the Philippine Technology Transfer Act, 2009 (RA No. 10055) similar to the 1980 US Bayh-Dole Act in the United States that sets rules on IP ownership and unifies national and institutional technology transfer efforts to strengthen the country's domestic industries. Table 1 presents the summary

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28. Intellectual Property Code of the Philippines, Rep. Act No. 8293, § 151(1)(c) (1997), available at [http://www.chanrobles.com/legal7intellectualpropertycodeofthephilippines.html#INTELLECTUAL\\_PROPERTY\\_CODE\\_OF\\_THE\\_PHILIPPINES](http://www.chanrobles.com/legal7intellectualpropertycodeofthephilippines.html#INTELLECTUAL_PROPERTY_CODE_OF_THE_PHILIPPINES).

of national IP legislation and membership of the Philippines in international agreements on IPR implementation.

At the institutional level, policies and offices for managing IP are being developed both at the department/ministry and agency levels: the Department of Agriculture and some of its attached agencies, such as PhilRice; the Philippine Center for Postharvest Development and Mechanization (PhilMech); the Bureau of Agriculture Research; the Department of Science and Technology; and the University of the Philippine System. These public sector institutions are actively leveraging on the country's IPR system to protect and commercialize inventions. The number of Philippine institutions wanting to improve capacity on IP has also increased (personal communication). A survey done by Payumo and Grimes (2011) among Philippine scientists and researchers revealed that a majority of them are aware on the concept of IPR and the developments and issues linking IPR with agriculture and agricultural biotechnology.<sup>29</sup>

### III. INTELLECTUAL PROPERTY RIGHTS AND RELEVANCE TO AGRICULTURE

Traditionally, IPR were not applied to agriculture. In recent times, this position has changed, especially with the ratification of the TRIPS Agreement, a compulsory requirement of the World Trade Organization (WTO). TRIPS,<sup>30</sup> central to stronger establishment of IPR around the world,<sup>31</sup> obliges WTO members to provide most of the existing types of IPR protection for all inventions, such as those with utility in agriculture.

The nature and scope of IPR for genetic resources, including plant varieties, are also discussed in two international treaties: the Convention on Biological Diversity (CBD) and the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA). Additional pressure to strengthen protection, especially for plant varieties in developing countries (beyond the minimum TRIPS requirements), is also being exerted in bilateral trade negotiations between developing countries and the United

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29. Jane Payumo & Howard Grimes, *Institutional Responses on Strengthened Intellectual Property Rights in Agriculture and Needs' Assessment on Intellectual Property Management of Public Research Institutions in Asian Developing Countries*, 42 J. RES. ADMIN. 42, 50 (2011).

30. TRIPS sets a minimum international standard for IPR protection and effective and appropriate enforcement mechanisms. MCCARTHY ET AL., *supra* note 25, at 628.

31. Daniele Archibugi & Andrea Filippetti, *The Globalization of Intellectual Property Rights: Four Learned Lessons and Four Theses*, 1 J. GLOBAL POL'Y 137, 138 (2010); *see also* Carlos Correa, *Reviewing the TRIPS Agreement*, in A POSITIVE AGENDA FOR DEVELOPING COUNTRIES: ISSUES FOR FUTURE TRADE NEGOTIATIONS 221, 221 (2000), available at [http://www.unctad.org/en/docs/itcdtsb10\\_en.pdf](http://www.unctad.org/en/docs/itcdtsb10_en.pdf); *see generally* KEITH E. MASKUS, *INTELLECTUAL PROPERTY RIGHTS IN THE GLOBAL ECONOMY* (2000).

States and Europe.<sup>32</sup> Member-countries of these international agreements allow the use of IPR to protect plants, varieties, genes, and a majority of tools and processes that can be used for agricultural research.

Patents, plant breeders' rights (PBRs) or plant variety protection (PVP), trademarks, geographical indications (GIs), and trade secrets are forms of IPR that are relevant to the agriculture sector. Patents are probably the most important IPR today for agricultural goods and services because they provide, wherever available, the strongest protection for patentable plants, animals, and biotechnological processes for their production. New varieties of crops produced through sexual reproduction (seed) or tuber propagation can be granted PVP, an alternative to a patent, if they are distinct, uniform, and stable. Trademarks (e.g., Roundup Ready®) are used to distinguish agricultural goods and services from similar goods and services and indicate their source or origin, thereby influencing consumers' decisions.

GIs are marks associated with products originating from a country, region, or locality where the quality, reputation or other characteristics of the product are essentially attributable to its geographical origin (e.g., Darjeeling tea of India, Cognac brandy of France, and Roquefort cheese of France, etc.). In addition to these four forms of IPR, trade secret law offers further protection relevant to plants. Trade secrets are important for hybrid varieties (e.g. corn varieties), where commercialized F1 seeds ensure hybrid vigor only for the first generation of plants. In this case, the valuable "information" is in the parent lines, which typically are not commercialized and which can be effectively protected by trade secret law.

The existence of above types of IPR protection has encouraged more investment in agriculture, especially from the private sector, which is now the largest investor for agricultural research worldwide<sup>33</sup>. The use and development of materials for which IPR protection is sought does not only apply in the commercial sectors. Public research universities, especially in developed nations such as the United States, European countries, and Japan, and now in developing countries such as China and Taiwan, have been rapidly patenting to encourage commercialization of research, such as in agricultural biotechnology, to enhance the impact of publicly-funded research and development (R& D), promote economic growth through the

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32. THE WORLD BANK, INTELLECTUAL PROPERTY RIGHTS: DESIGNING REGIMES TO SUPPORT PLANT BREEDING IN DEVELOPING COUNTRIES 1 (2006), available at [http://siteresources.worldbank.org/INTARD/Resources/IPR\\_ESW.pdf](http://siteresources.worldbank.org/INTARD/Resources/IPR_ESW.pdf).

33. Roughly, one third of the \$32 billion total public and private agricultural research investment worldwide comes from the private sector. See MAARTEN J. CHRISPEELS and DAVID E. SADAVA, PLANTS, GENES AND CROP BIOTECHNOLOGY 42, (2d ed. 2003). Gerard Barry and Robert Horsch, *Evolving Role of the Public and Private Sector in Agricultural Biotechnology for Developing Countries*, in AGRICULTURAL BIOTECHNOLOGY AND THE POOR: PROCEEDINGS OF AN INTERNATIONAL CONFERENCE 183 (G.J. Persley and M.M. Lantin, eds, 2000), available at [www.cgiar.org/biotech/rep0100/Barryh.pdf](http://www.cgiar.org/biotech/rep0100/Barryh.pdf).



creation of companies around academic technologies, create new jobs, and raise revenues that can be used to support academic research.

The expansion of IPR to agriculture, however, has caused mixed reactions over the past decades, and researchers have undertaken growing work to shed light on these debates, both from theoretical and empirical perspectives. Empirical findings support the conclusion that the expansion of IPR helps promote research investments and innovation, leading to significant economic activity and development.<sup>34</sup> Empirical studies also support the importance of IPR policies and the link of adequate IPR to agricultural development.<sup>35</sup> Findings of other studies, on the other hand, found that IPR elevate inequality across and within countries by mostly benefiting large private companies and rich countries, at the expense of small companies and poor countries, especially in the use of genetic resources.<sup>36</sup> They also claimed that IPR could potentially stifle R&D efforts of national research agencies. However, reviews of literature show there are limited studies on determining the practical implications of IPR in agriculture in specific countries, such as the Philippines. The next section presents some additional evidence that can fill some of these knowledge gaps under the Philippine setting.

#### IV. MANAGING INTELLECTUAL PROPERTY IN THE PHILIPPINE RICE SECTOR: CASE STUDIES

The expansion of IPR in agriculture, and its increasing influence in agriculture, has demanded new roles and opportunities for public research institutions in the Philippines. This section presents the experiences of two Philippine institutions under the country's Department of Agriculture, namely the Philippine Rice Research Institute (PhilRice) and the Philippine Center for Postharvest Development and Mechanization (PhilMECH). With main headquarters in Nueva Ecija, the Philippines' rice granary, these institutions have important roles in generating and disseminating

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34. Michele Boldrin & David Levine, *The Case Against Intellectual Property*, 92 *AMERICAN ECONOMIC REVIEW* 209 (2002); see also JAMES D. GAISFORD ET AL., *THE ECONOMICS OF BIOTECHNOLOGY* (2001). Sunil Kanwar, *Innovation and Intellectual Property Rights* (Ctr. for Dev. Econ., Delhi School of Econ., Univ. of Delhi, Working Paper No. 142, 2006). David M. Gould & William C. Gruben, *The Role of Intellectual Property Rights in Economic Growth*, 48 *J. OF DEV. ECON.* 323, 323-50 (1996).

35. Jane Payumo, Howard Grimes & Philip Wandschneider, *Status of National Intellectual Property Rights (IPR) Systems and Its Impact to Agricultural Development: A Time Series Cross Section Data Analysis of TRIPS Member-Countries*, 5 *INT'L J. FOR INTELL. PROP. MGMT.* 82, 82-99 (2012).

36. NRRDN is a formal and functional structure of 57 strategically located agencies around the country: two national centers, six branch stations representing the country's major rice-growing zones, 14 regional research centers, and 35 cooperating stations. *Partners*, PHILRICE, <http://www.philrice.gov.ph/?page=partners&page2=national> (last visited Sept. 17, 2012).

technological solutions for the rice sector. Cases were purposely drawn to acknowledge the efforts of these institutions as early adopters of IPR management for public research institutions in developing countries. These cases show the institutionalization of a sound institutional IP framework facilitates access and commercialization of technologies and tools such as seeds and machinery.

#### A. Case Study 1. Accessing Biotechnology: PhilRice's Experience

PhilRice, established in 1985 as a government instrumentality under the Philippine Department of Agriculture, leads the country's national rice efforts. It accomplishes this mission through research, technology development, policy advocacy, and knowledge transfer. The Institute's current efforts are focused on the development and deployment of sustainable agricultural innovations. Examples of such developments include new crop varieties and cropping systems with high-yield potential even in adverse agro-climatic conditions (drought and flooding) that requires less chemical inputs, but with enhanced pest, disease, and stress tolerance. Producing inexpensive machinery and tools for rice cultivation to further improve output and productivity of the rice sector is also included in the Institute's rice research and development (R&D) program. PhilRice works closely with members of the National Rice Research and Development Network (NRRDN)<sup>37</sup> and other national stakeholders across the Philippines. It also actively collaborates with global research and development (R&D) partners such as the International Rice Research Institute (IRRI) on rice varietal improvement, policy, and technology transfer, among others.

PhilRice embarked on a modest but organized effort to access and use modern biotechnology<sup>38</sup> to enhance its rice varietal improvement, one of its key R&D programs.<sup>39</sup> The institute implements the following biotechnology research:

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37. The Philippines advocates the safe and responsible use of modern biotechnology and is noted for being the first Asian country to commercialize planting of the genetically modified corn. Biotechnology research in the country is primarily being undertaken to address food security, equitable access to health services, sustainable and safe environment, and industry development, which are the four goals of the 1997 Agriculture and Fisheries Modernization Act (AFMA). Saturnina C. Halos, *Agricultural Biotechnology in the Philippines*, SEARCA BIOTECHNOLOGY INFORMATION CENTER 1-6, [http://bic.searca.org/seminar\\_proceedings/bangkok-2000/1-country\\_papers/halos.pdf](http://bic.searca.org/seminar_proceedings/bangkok-2000/1-country_papers/halos.pdf) (last visited Sept. 10, 2012).

38. Other PhilRice's R&D programs focuses on developing natural products and value-adding systems, impact evaluation, policy research and advocacy, and development of location-specific rice technologies for irrigated, rainfed, and upland areas. PHILRICE, *supra* note 36.

39. See generally JEROEN VAN WIJK, JOEL I. COHEN & JOHN KOMEN, *INTELLECTUAL PROPERTY RIGHTS FOR AGRICULTURAL BIOTECHNOLOGY: OPTIONS AND IMPLICATIONS FOR DEVELOPING COUNTRIES* (1993); Karim M. Maredia et al., *Technology Transfer and*

1. DNA marker technology to map agronomically important traits in rice such as yield components, seedling vigor, resistance to rice tungro virus, green leafhopper, brown planthopper, and blast; develop/apply molecular marker aided selection techniques for tungro and bacterial leaf blight (BLB); and analyze genetic diversity of rice germplasm;
2. *In vitro* techniques to improve grain quality and develop lines with tolerance to adverse conditions (cold, salinity, drought);
3. Map-based and expression-based techniques to clone agronomically important genes like tungro resistance; and
4. *Agrobacterium*-mediated transformation and particle-gun bombardment to produce rice plants with resistance to BLB, blast, sheath blight, stemborer, and tungro and with tolerance to drought and salinity.

Implementation of these projects and development of final biotechnology products require investment in facilities, manpower, and linkages, which PhilRice has built through the years with support from the national government and its international partners and donors. The acquisition of biotechnology tools is also very important. PhilRice has acquired these tools through various technology acquisition and transfer methods, which include: donations, material transfer agreements (MTAs), licensing arrangements, joint ventures, overseas training of technical staff, purchase of product and equipment, exchange of information at international meetings, and information in the public domain. Table 2 presents some of PhilRice's technology transfer arrangements involving biotech products particularly for transgenic rice research. This list excludes MTAs with IRRI. Most of the materials under these agreements are plasmid constructs, clone DNA sequences, promoters, vectors, selectable markers, and transgenic seeds. Several rice varieties produced using molecular marker and tissue culture technologies are currently being commercialized in the country.

However, the increasing proprietary nature of modern biotechnology and agriculture, its effects on material exchange, and how to deal with them have become major concerns of the Institute and its scientists. It is often said that currently, no biotechnology R&D project can be implemented without touching any IP issues. Access to new technologies and modern scientific methods covered by IPR, and their eventual commercialization, would now require formal and complex licensing agreements with corresponding royalty payments to the IP owners to avoid infringement of IPR.<sup>40</sup>

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*Licensing of Agricultural Biotechnologies in the International Arena*, 17 *AGBIOTECHNET* 1, 1-7 (1999).

40. World Health Organization (WHO), *Nutrition: Micronutrient deficiencies: Vitamin A deficiency* (2012), <http://www.who.int/nutrition/topics/vad/en/>.

Public research institutions in developing countries, such as PhilRice, have evolved in a world without IPR. It is against these backdrops that the Institute exerted major efforts to build its capacity to deal with IPR matters, starting in 1998 and going fully operational in 2003. In 2004, PhilRice was the first attached agency of the Philippine Department of Agriculture to initiate an IPR policy, which is focused on proactive generation, protection, and commercialization of IPR. PhilRice was also the agency which setup its own IP management office. The Institute has also embarked on continuing IP education programs for its scientists and staff, so they will be more aware on the concept of IP and understand the ever-evolving legal environment in the area of IPR, especially the areas that affect the use and access of biotech innovations and genetic resources. These IP awareness campaigns translated to high respect for IPR among PhilRice scientists and staff, lessened their fear of the unknown, and brought back their enthusiasm to exchange materials with their foreign counterparts. With IP policy and institutional mechanisms in place, any form of modern biotechnology, such as that of golden rice (discussed in the next section), should be within the reach of PhilRice and its scientists.

Guided by the IP policy, the institute proactively pursues protection of its research results and technologies (e.g., rice wine making process, engineering prototypes, varieties, and publications) through several forms of IPR, such as patents, PVP, copyright, and trademarks. The PhilRice's IPR portfolio, which includes biotechnology inventions, has grown throughout the years. In 2010, about PhP 3.5 million (USD 81,395) were generated as new sources of R&D money and incentives for researchers. The Institute had nine pending patent applications, and 23 knowledge products were deposited at the National Library and given with Certificates of Copyright Registration and Deposit. In terms of plant protection, TGMS varieties underwent two seasons of distinctness, uniformity, and stability testing. New applications were submitted for newly developed varieties including their female parents and for restorer lines. The institute also connects to the private sector to commercialize IP generated from its research activities.

### *1. The Golden Rice Project*

PhilRice, an active member of the Golden Rice Network, leads the development of new golden rice varieties tailored to specific rice-growing conditions in the Philippines. Golden rice is one potential tool to reduce vitamin A deficiency (VAD) in the Philippines and can contribute to food security needs of the country. Vitamin A deficiency increases the risk of death from certain common disease infections among young children<sup>41</sup>.

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41. Antonio A. Alfonso, Project Leader, Golden Rice, Powerpoint presentation at the Southeast Asian Regional Center for Graduate Study and Research in Agriculture

It is also the leading cause of blindness among children. VAD has been the cause of death of about 670,000 and blindness for 350,000 children around the world.<sup>42</sup> Approximately 90 million Southeast Asian children also suffer from VAD<sup>43</sup>. Deficiency in vitamin A also causes night blindness and increases risk of maternal mortality among pregnant and nursing women. In the Philippines, VAD is addressed through dietary diversification, vitamin A capsule supplementation, and food fortification. However, VAD continues to adversely affect many people, especially the last 10-20 percent in the hardest-to-reach areas in the Philippines. Hence, there is a need to develop and deploy new, improved tools to supplement existing measures and overcome vitamin A deficiency among at risk populations.

Developed by Ingo Potrykus (ETH-Zurich, Switzerland) and Peter Beyer (University of Freiburg, Germany), the vitamin A-enriched rice contains a gene maize and another gene from a common soil bacterium. Added through genetic transformation, the two genes completed the biosynthetic pathway for beta-carotene in the rice grains. Beta-carotene is a pro-vitamin A carotenoid that is converted into vitamin A in the body of humans and animals when that individual's vitamin A status is low or deficient. Unlike vitamin A, beta-carotene has no known toxicity level. Because rice is the country's main staple, golden rice has the potential to reach many Filipinos. It was estimated that eating about one cup a day of golden rice could provide half of an adult's vitamin A needs.

Putting together the golden rice technology platform, however, required the use of multiple inventions with complex IP ownership. The overall Freedom-to-Operate (FTO) analysis<sup>44</sup> and product deconstruction of golden rice tentatively identified 15 tangible property (TP) components and 70 patents (with 31 assignees) of potential relevance<sup>45</sup> (See Table 3 for the IPs relevant to golden rice). Syngenta (formerly AstraZeneca), the world's largest agricultural biotechnology company, has acquired the rights to golden rice from Greenovation (the company formed by the original inventors) and was able to negotiate access to all pieces of the puzzle necessary for the intended humanitarian purposes of the technology forming

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(SEARCA) Forum: Straight from the Scientists: Golden Rice: A Potential Tool to Address Vitamin A Deficiency in the Philippines (Aug. 26, 2011).

42. International Rice Research Institute (IRRI), *Golden Rice and vitamin A deficiency* (2012), [https://www.integratedbreeding.net/sites/default/files/attachments/golden\\_rice\\_project\\_brief\\_2012.pdf](https://www.integratedbreeding.net/sites/default/files/attachments/golden_rice_project_brief_2012.pdf).

43. FTO is defined as the ability to practice or use an innovation for a particular technology. See Richard C. Atkinson et al., *Public Sector Collaboration for Agricultural IP Management*, 301 SCIENCE 174, 174-75 (2003).

44. See generally R. DAVID KRYDER, STANLEY P. KOWALSKI & ANATOLE F. KRATTIGER, THE INTELLECTUAL AND TECHNICAL PROPERTY COMPONENTS OF PRO-VITAMIN A RICE (GOLDEN RICE™): A PRELIMINARY FREEDOM-TO-OPERATE REVIEW (2000).

45. Jorge E. Mayer, Peter Beyer & Ingo Potrykus, *The Golden Rice Project*, GOLDEN RICEPROJECT, [http://www.goldenrice.org/PDFs/The\\_Golden\\_Rice\\_Project\\_Mayer\\_et\\_al\\_2006.pdf](http://www.goldenrice.org/PDFs/The_Golden_Rice_Project_Mayer_et_al_2006.pdf) (last visited Sept. 10, 2012).

the golden rice patent pool.<sup>46</sup> The Golden Rice Humanitarian Board, which now provides strategic guidance to development and deployment of golden rice, manages sub-licensing arrangements on the use of the technology by breeding institutions in developing countries such as PhilRice and the International Rice Research Institution (IRRI). The golden rice research at PhilRice is being funded by the Bill and Melinda Gates Foundation (through research grants to the University of Freiburg and IRRI), Rockefeller Foundation, the United States Agency for International Development (USAID) (also through IRRI) and the Philippine Department of Agriculture. PhilRice also works closely with IRRI and the Helen Keller International, a nonprofit organization dedicated to preventing blindness and reducing malnutrition worldwide. Besides PhilRice, national institutions in India, Vietnam, Bangladesh, China, and Indonesia have sublicense rights to this technology to integrate it to local varieties. The International Services for the Acquisition of Agri-Biotech Applications was also an important player in helping to solve the IPR issues in golden rice and served as a technology broker to enable the transfer of golden rice to these countries.

The participation of PhilRice in the golden rice project is one of the best, and most clearly documented, examples of developing country access to biotechnology through IPR management and mechanisms. The Philippines has IPR protection mechanisms in place to allow protection for products and processes involving biotechnology, which prevents imitation and unauthorized use of these technologies. The country also continues to strengthen its IPR protection mechanisms to further encourage the private sector and investors to protect and transfer technologies to the Philippines.<sup>47</sup> The existence of patent protection on golden rice in the Philippines (Patent title: Method for improving the agronomic and nutritional value of plants Application No. 1-2000-00496) and the number and the legal provisions of the IP-related agreements (e.g., sublicensing agreement with Golden Rice Humanitarian Board<sup>48</sup>) that PhilRice need to accomplish did not discourage its research administrators and scientists to negotiate for access and use the technology for its rice improvement program. PhilRice's involvement in the golden rice project is driven by its national mandate, its existing manpower

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46. The Philippines was not considered in the Priority Watch List of the U.S. Trade Representative in 2010 due to its improving IPR enforcement mechanisms. See highlights of report at Press Release, Office of the United States Trade Representative, USTR Releases 2010 Special 301 Report on Intellectual Property Rights (Apr. 30, 2010), *available at* <http://www.ustr.gov/about-us/press-office/press-releases/2010/april/ustr-releases-2010-special-301-report-intellectual-p>.

47. For further explanation on the golden rice licensing agreements, see Golden Rice Project: Golden Rice Humanitarian Board, [http://www.goldenrice.org/Content1-Who/who4\\_IP.php](http://www.goldenrice.org/Content1-Who/who4_IP.php) (last visited Dec. 15, 2012).

48. The field testing of golden rice is now being evaluated using the same national regulatory policies that the country used to approve commercialization of GM (genetically modified) crops, starting as early as 2002 with the commercial planting of Bt (*Bacillus thuringiensis*) corn event MON810.

and facilities, and the well-established national regulatory policies on biosafety<sup>49</sup>. Despite golden rice becoming a *cause célèbre*<sup>50</sup> for years due to its technical and IPR issues, the golden rice research at PhilRice is moving forward, with the final product expected to be commercialized in the next two years. One popular rice variety currently being developed by PhilRice to have a Golden Rice counterpart is PSB Rc82 (Peñaranda), a popular, high-yielding, and widely grown rice variety. In accordance with regulatory requirements, PhilRice will conduct field and laboratory tests to generate regulatory data that will serve as basis for possible regulatory approval. PhilRice will subsequently conduct more extensive field tests to establish agronomic performance for varietal approval. PhilRice is also developing a '3-in-1' variety of golden rice, which will have resistance to the rice tungro disease and bacterial blight, two of the most devastating rice diseases in the country. The incorporation of pest resistance would reduce yield losses and is expected to drive farmer adoption.

#### B. Case Study 2. Commercialization of Mechanization Technologies PHilMech's Experience

Agricultural mechanization, as one of the major and important components of agricultural modernization, is one of the major thrusts of PHilMech. PHilMech, formerly the National Postharvest Institute for Research and Extension, then renamed to Bureau of Postharvest Research and Extension, was established in 1978 as a bureau under the Philippine Department of Agriculture. It was mandated to generate, extend, and commercialize appropriate and problem-oriented agriculture and fishery post-harvest and mechanization technologies.<sup>51</sup> It was tasked with spearheading the development of the country's post-harvest industry through dynamic orchestration, research, technology promotion, and policy advocacy. The institute's research, development, and extension (RD&E) thrusts focus on: 1) increasing the profitability through efficient drying and dehydration; 2) promoting appropriate handling, storage and processing techniques for increased food value; 3) preventing and controlling mycotoxin, pests and diseases toward food preservation and safety; and 4) empowering stakeholders toward profitable entrepreneurship.<sup>52</sup> Three departments implement PHilMech's R&D activities: post-harvest engineering, food protection, and post-harvest systems and analysis. The

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49. Golden rice, one of the products of genetically modified technology, and its promised benefits to prevent blindness and death from vitamin A deficiency in millions of children, has become an intimate public debate across the globe.

50. *About Us*, PHILMECH, <http://www.philmech.gov.ph/?page=aboutus> (last visited Dec. 15, 2012).

51. *Programs*, PHILMECH, <http://www.philmech.gov.ph/?page=programs> (last visited Dec. 15, 2012).

Training and Extension Department facilitates technology transfer of PHilMech's R&D outputs.

To support the Philippine Department of Agriculture's rice mechanization program in collaboration with some members of the national rice R&D network, PHilMech develops and deploys appropriate technologies, machinery, and systems to address the country's rice mechanization needs and provides practical solutions to the post-harvest and post-production problems faced by rice farmers. To help achieve the national rice sufficiency objectives by 2013, PHilMech was tasked by the national government to help increase rice production through farm mechanization by five percent and to reduce the country's postharvest losses from 15 percent to five percent.

Since the average Filipino rice farmer has very small, and often scattered, land holdings, averaging two or less hectares, PHilMech concentrates on developing and promoting modern tools and machinery for small to medium-scale rice farming operations. PHilMech's engineers adapt imported technologies to suit local farming conditions. Currently, PHilMech promotes four pieces of rice drying equipment, which use rice hull and biomass as a fuel. These pieces of equipment are distributed to rice producing provinces in central Philippines. Based on its nationwide assessment in July 2011, PHilMech's flatbed dryers have improved the earnings of farmers and farmer organizations because of the improved quality of their paddy and reduced postharvest losses.<sup>53</sup> Farmers who dry their harvest using flatbed dryers can sell their produce at prices of up to 100 percent higher than the rice dried on the pavement, streets or highways. Sun drying the harvested crop on these areas is a common practice in the country.

### *1. Sustaining R&D's Linkage to Industry: PHilMech's New Licensing Protocol*

PHilMech's more than 30 years of R&D involvement has led to significant research findings, such as prototypes of machinery, which are disseminated to the farming sector through a two-pronged approach. Farmers tend to adopt technologies they have witnessed working in their areas. Hence, the first approach (agricultural extension) involves technology promotion through demonstrations during field days and agricultural trade exhibits. Although this is a conventional technology transfer approach, the conduct of technology demonstrations has been proven to be one of the most appropriate extension strategies in promoting vital technologies in the

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52. *PhilMech Says Flatbed Dryers Boost Farmer Incomes*, MANILA TIMES (Aug. 29, 2011), <http://www.manilatimes.net/index.php/business/5857-philmech-says-flatbed-dryers-boost-farmer-incomes>.



farming sector. Technology demonstration activities also include advising farmers on the features and benefits of the new technologies and persuading them to try the new ones. Through this scheme, PHilMech transfers its technologies, generated information, and tacit knowledge on postharvest to the farmers for free. However, there are some PHilMech-generated technologies that cannot be directly transferred to farmers or in the marketplace; hence, support from intermediaries are needed for farmers and other stakeholders to easily access the technologies.

Meanwhile, some technologies and techniques generated by PHilMech require the support of the industrial community for them to be commercialized. Thus, the Institute's second approach, called industrial extension, is being implemented to transfer the technologies to the private sector, such as local agricultural machinery manufacturers. This group of PHilMech's partners plays critical roles in the mass fabrication of machines and operates on economies of scale to produce and sell the machines at a lower price. This approach relates to the new paradigm for technology transfer, shifting from the informal and free exchange of discoveries, innovative ideas, materials, and technologies, to the use of more formal and creative approaches tailored to commercialization agreements.

Under this second approach of technology transfer, manufacturers apply for PhilMech accreditation to get access and commercialize its machines. With three years of renewable accreditation, the technology commercialization agreement is done via a Memorandum of Agreement, which specifies procedures and policies stipulating that PhilMech's designs and technical assistance are made available to co-operating manufacturers. The commercialization involves two phases. The initial commercialization phase, which takes about one year, covers the period when the manufacturer produces commercial units to be used for government promotional activities. The full commercialization phase, called the utilization phase, is the stage when demand for the machine has already been established and the manufacturer takes full responsibility on the promotion, marketing, sales, and sales support for the machines.

The Industrial Promotion Program (PIPP) (formerly Industrial Extension Program), launched in 1989, implements the second strategy of commercializing the PHilMech's technologies. A major objective of the PIPP is to foster postharvest equipment manufacturing in the Philippines by providing manufacturers with designs of appropriate agricultural equipment and by extending technical assistance on fabrication, testing, marketing, and operation. PIPP serves as a linchpin between the technology generators (engineers, science research specialists, and designers) and the users of technology. Specifically, the program conducts socio-economic and demand surveys, identifies the right market location, conducts demonstration and pilot tests, and accredit local manufacturers. It also implements the following activities in support of these functions: provision of technical assistance to manufacturers; provision of assistance to initial adopters, such

as cooperatives, in securing easy loan packages so they can acquire PhiMech's technologies; and implementation of incentive awards program for top performing manufacturers to encourage the undertaking of joint machine development. Since the establishment of PIPP, the Center has a pool of accredited local manufacturers and fabricators, who develop and sell commercial units of improved maize shellers, moisture meters, mobile flash dryers, in-store dryers, and outdoor postharvest storage.

Despite the success of PIPP, gray areas on IPR remain unresolved, such as how to manage intellectual property (original designs of PHilMech's engineers and improvements made by the manufacturer) and how PHilMech as a Center, and its engineers, will acquire recognition for invention and receive monetary benefits from the process. The Department of Agriculture's national technology commercialization and the benefits gained by PhilRice in its IP and technology commercialization activities influenced PHilMech to organize itself to build its capability on IP management and licensing and promote public-private partnership to further disseminate its technologies. This attempt and initiative of PHilMech to initially support the management of institutional IP and technology commercialization started during the last quarter of 2005.

Currently, PIPP is institutionalizing other technology transfer modalities, like the execution of licensing agreements to fast track its technology commercialization activities. PIPP's technology licensing protocol (See Figure 4), implemented by the Technology Management and Training Division, institutionalizes a uniform procedure for the non-exclusive licensing of the institute's IP and equipment designs:

1. *Filing of application for a technology license.* All prospective licensees for PHilMech's technologies submit letter of intent to PHilMech Licensing Unit. The letter of intent comes with submission of several documents related to the applicant's business.
2. *Initial evaluation and notice of eligibility.* The Technology Management and Training Division evaluates the application, inspects the manufacturing capability and compliance of the manufacturer, and notifies the applicant if it meets all the requirements. Along with the notice is a confidentiality undertaking that the potential licensee needs to sign and a notice of payment of a non-refundable technology license fee.
3. *Release of engineering designs/drawings and fabrication by the company.* The engineering designs/drawings will then be released to the company's proprietor and, within a reasonable period of time, will be required to fabricate a prototype unit strictly in accordance with the specifications. Upon written request by the license applicant, technical assistance maybe provided by PHilMech.
4. *Testing/Evaluation of Prototype Unit.* Upon completion of the prototype unit, the license applicant shall request the conduct of testing

and evaluation by the PHilMech. The testing and evaluation shall cover the prototype unit's compliance with the technical design/drawing, fabrication specifications, if any, and performance standards.

5. *License Certificate/Contract.* Once the prototype unit has satisfactorily complied with the technical drawings, fabrication specifications, and performance standards, PHilMech shall cause the execution of a License Agreement and the issuance of a License Certificate to the qualified licensee. The licensing agreement, in particular, contains confidentiality provisions for how PHilMech's intellectual property will be handled by the licensee, improvements made in the design and provisions for joint intellectual property, and payment of royalty fees by licensee to PHilMech.

The new licensing protocol<sup>54</sup> requires the Center to apply for IPR protection for all its designs. The new process serves as venue to level the playing field among the manufacturers, who are interested in becoming PHilMech's licensee, which would allow them to use, make, sell, and/or lease the Center's generated technologies. This protocol also provides due recognition to the inventions and IP of PHilMech's employees and enables them to receive monetary entitlement to any technology commercialization activities. Recently, legal and policy developments in the country (e.g., Magna Carta for S&T workers,<sup>55</sup> and the Technology Transfer Act<sup>56</sup> patterned after the 1980 US Bayh-Dole Act) provide positive prospects for the continuous implementation of this technology commercialization protocol to fast track public-private sector partnerships and incentivize PHilMech's engineers.

## V. LESSONS LEARNED AND A WAY FORWARD

In recent years, the Philippines has made progress in its state of food and agriculture; however, food insecurity for the future remains a major concern and is associated with a number of specific challenges. The introduction and strengthening of intellectual property rights (IPR) in agriculture further constitutes a significant change in the policy environment for addressing food security. Although the Philippines has a long history of IPR implementation, the actual implications and magnitude of impact of the

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53. *PhilMech Technology Licensing Protocol*, PHILIPPINE CENTER FOR POSTHARVEST DEVELOPMENT AND MECHANIZATION, <http://www.philmec.gov.ph/Default.asp?page=licensing> (last visited Sept. 10, 2012).

54. Rep. Act No. 8439, An Act Providing A Magna Carta For Scientists, Engineers, Researchers and Other Science and Technology Personnel In Government, *available at* <http://www.chanrobles.com/republicactno8439.htm#.UM035-RQVe9>.

55. See Rep. Act. No. 10055, Philippine Technology Transfer Act of 2009, *available at* [http://www.senate.gov.ph/republic\\_acts/ra%2010055.pdf](http://www.senate.gov.ph/republic_acts/ra%2010055.pdf).

introduction of IPR in the agriculture, specifically to the rice sector, have yet to be ascertained. However, as presented in this paper, a number of points can already be made on how and why IP needs to be leveraged for food security and rice self-sufficiency.

The Philippine Rice Research Institute (PhilRice) and the Philippine Center for Postharvest Development and Mechanization (PHilMech), are among the first national research institutions in the Philippines that have established respective models to actively manage institutional innovations and intellectual property (IP). Both institutions have also advance technology commercialization programs in support of the country's food security and rice self-sufficiency objectives. The institutions implement activities to ensure that IP issues do not hinder research activities, and that research discoveries are properly managed, used, and transferred to the marketplace for the benefit of the rice industry. PhilRice and PHilMech also ensure that scientists and innovators receive appropriate recognition and necessary incentives.

Specifically, PhilRice's experience proves that strengthening IPR in agriculture, especially in agricultural biotechnology, did not impair its access to proprietary technologies needed for research. Although PhilRice's involvement with the transfer of golden rice technologies came later and was largely downstream, following the earlier crucial steps of identifying IPR constraints, the Institute has formed the requisite organizational, technical, and IP capacity to better understand the IP provisions and legal implications of the different agreements on golden rice, and accelerate golden rice research towards its deployment and future commercial availability. On the other hand, PHilMech's experience shows that with management, staff support, and enabling national policies, institutional IP that is developed using government funds can be protected and commercialized for the benefit of the institution and its scientists and engineers. Although the institution's technology licensing protocol can be further simplified, it recognizes that IP protection is one important way to bring technologies to the market and indicates a change in perception among government R&D institutions. PHilMech's experience shows that the old mindset on IPR as only important to the private sector is gradually changing.

Overall, the two cases demonstrate that the presence of national and institutional IP framework and implementation of strategic IP activities serve as valuable tools for public research institution, which used to evolve in a world without IPR. These initiatives are starting to help these institutions enhance networking capabilities and linkages, improve access to modern technologies, disseminate technologies on a wider scale, as well as reward the scientists and researchers. These benefits of IPR add value in fulfilling mission and commitment as public research institutions working for the country's food self-sufficiency and food security agenda.

PhilRice and PHilMech have taken the challenge and are taking strides in maximizing the advantages of IP to perform their public mission and deliver public goods. These government-funded research institutions in the Philippines may have its own set of circumstances (mission, goals, research focus and capacity, among others); however, these institutions both prove that embracing IP and technology commercialization can be advantageous not only to the public research institutes, but also in contributing to public mission to contribute to the country's goal of rice self-sufficiency and food security. With the insights gained from the cases, we suggest that PhilRice, PHilMech, and other agricultural institutions in the Philippines consider the following call for actions to further support the sensible introduction and diffusion of new agricultural practices and technologies:

Innovation needs collaboration and keeping collaboration from growing needs continuous institutional capacity building. Formation of partnerships between the technology suppliers, governments, and private entities that acquire and develop the technology, and the agriculturalists that deploy the technology should be actively nurtured. Several of these public-private collaborations have enabled transfer and access to some important innovations such as the golden rice. However, golden rice, albeit a success story in many ways, is also a wake-up call: reliance on external humanitarian entities to address critical food security issues could be limiting and unsustainable. Serious and committed capacity building efforts for developing countries should continue to foster sustainable improvement of absorptive capacity for innovations in agriculture. These efforts should focus on helping these economies move from being passive bystanders to becoming active participants in the technology transfer process necessary for the country's food security.

National agricultural research institutions, such as PhilRice and PHilMech, with existing IP management and technology commercialization capacity, should scale up IP management efforts, foster continuous learning especially on issues affecting genetic resources and germplasm, and step up to identify IP bottlenecks that can stifle access and commercialization of innovations. They need to take the lead in helping to build national IP portfolio (e.g., domestic filings), composed of local and indigenous innovations, and home-grown improvements on imported technologies to meet their particular agricultural needs. They also need to step and participate actively in technology access negotiations needed for food security. Lastly, national agricultural research institutions need to increase engagement in economic development activities by deploying research products using other avenues of technology commercialization (e.g., the formation of startup businesses) and expand market reach (e.g., the United States).

IP issues in agricultural research and embracing IP by public research institutions necessitate many complex decisions, significant challenges, and changes. These involve investments, resources, systems, procedures, and a

different mindset among its personnel. Other institutions, however, may not have the resources to develop and implement the same strategies and activities done by PhilRice and PHilMech. Both institutions along with other Philippine institutions with quite advance IP capacity should take active role in training a supportive “community of IP experts” in the agriculture sector, form smart coalitions to spread the importance of IP, understand and address its issues as it affects agricultural research, and help implement the necessary institutional changes. This may be as simple as consolidating institutional expertise and cost-sharing among agencies in the country. Many advanced institutions in developed nations, which have a long history of managing ideas and technology commercialization of agricultural products, also offer capability building support to help developing countries and their institutions further enhance their competency on managing IP. Some of their practices may be transferable or modified as appropriate for the Philippines.

Overall, IPR is an ‘enabler’ that can help drive delivery of innovative and productivity-increasing technologies crucial to agricultural and economic growth and achieving future needs for food security in countries such as the Philippines. The key is to match the proper IPR mechanisms with specific conditions, and to manage them effectively and efficiently for more extensive innovative research, technology transfer, and wealth creation.

Figures and Tables

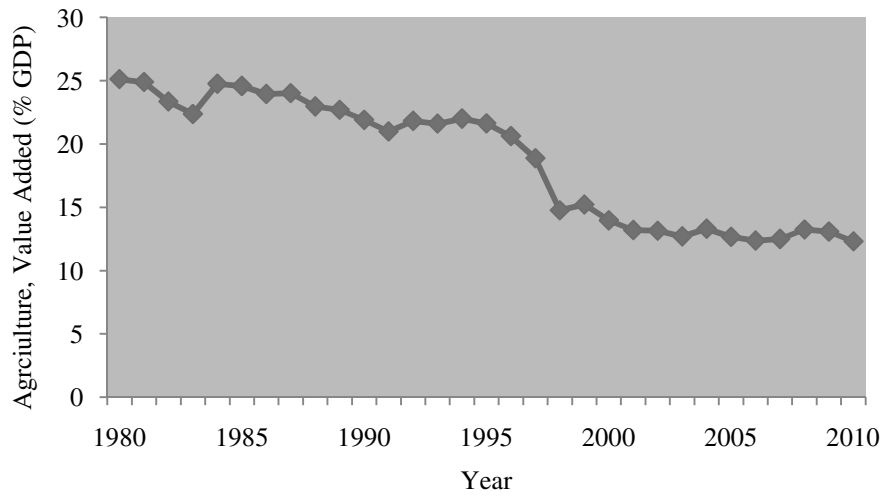


Figure 1. Gross value added, Agriculture, 1980—2010.  
Source: FAO (2012): *FAOSTAT-Agriculture*,  
<http://faostat.fao.org/site/339/default.aspx>

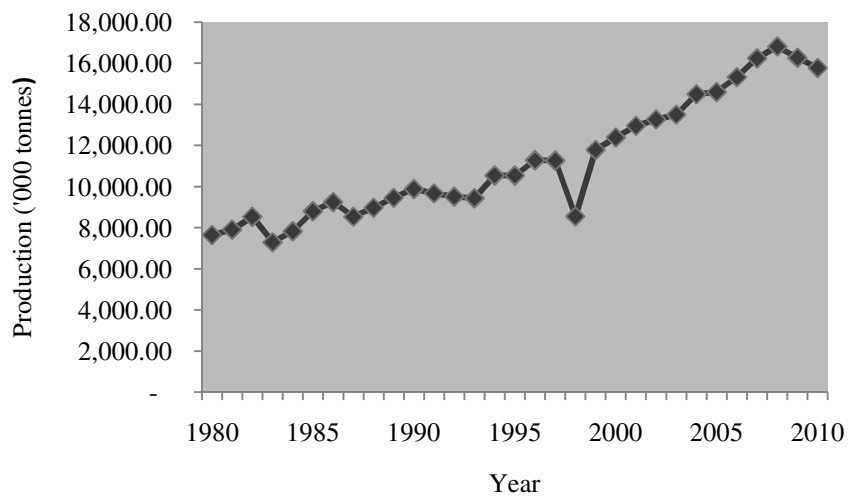


Figure 2. Rice Production in the Philippines, 1980—2010.  
Source: FAO (2012): *FAOSTAT-Agriculture*,  
<http://faostat.fao.org/site/339/default.aspx>.

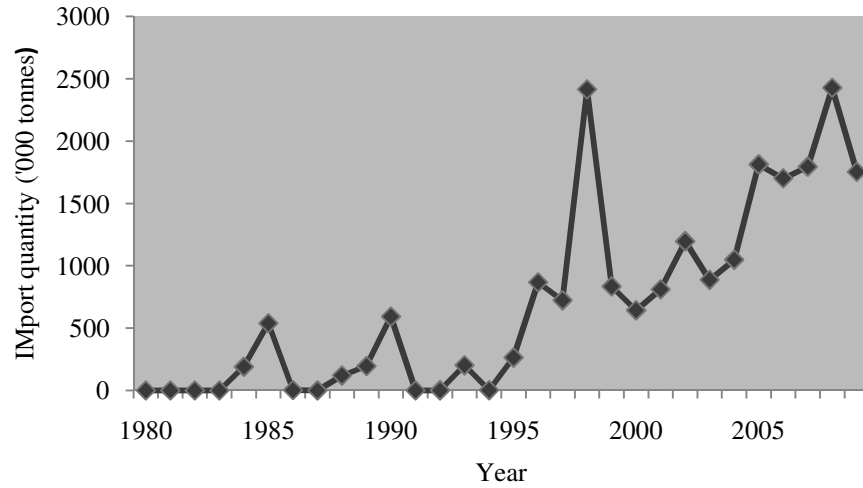


Figure 3. Import quantity, rice (milled). 1980—2009.  
Philippines. Source: FAO (2012): *FAOSTAT-Agriculture*  
<http://faostat.fao.org/site/339/default.aspx>



### LICENSING PROTOCOL FLOWCHART

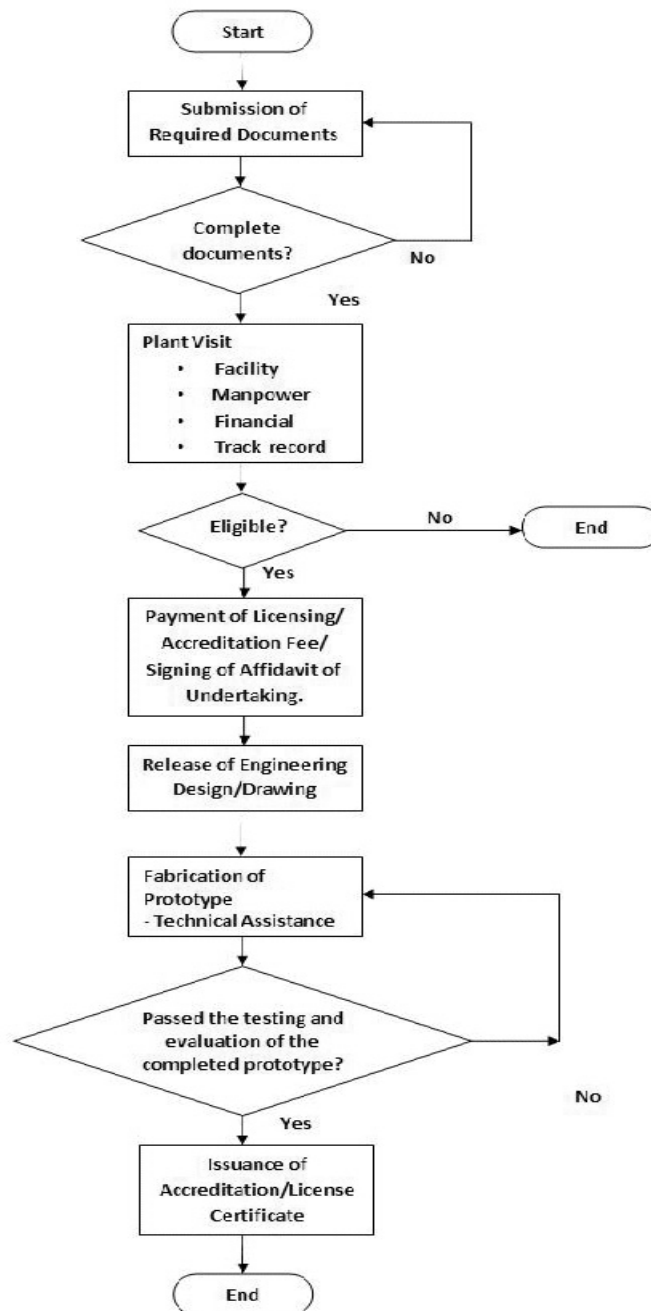


Figure 4. PHilMech - Licensing protocol flowchart. Source: PHilMech (2012). PHILMECH TECHNOLOGY LICENSING PROTOCOL (2012), <http://www.philmech.gov.ph/?page=protocol>.

Table 1. Basis of the Philippine IPR system.

National Laws
<ul style="list-style-type: none"> <li>▪ 1987 Constitution (Article XIV, Section 13)</li> <li>▪ 1997 Magna Carta for Science and Technology (S&amp;T) Workers</li> <li>▪ 1998 Intellectual Property Code</li> <li>▪ 2002 Plant Variety Protection Act               <ul style="list-style-type: none"> <li>▪ 2010 Technology Transfer Act</li> </ul> </li> </ul>
International Laws/Treaties
<ul style="list-style-type: none"> <li>▪ 1951 Berne Convention on Literary and Artistic Works</li> <li>▪ 1980 WIPO Convention</li> <li>▪ 1981 Budapest Treaty on Deposit of Microorganisms</li> <li>▪ 1984 Rome Convention on Performers, Phonograms and Broadcasting Organizations</li> <li>▪ 1992 Convention on Biological Diversity</li> <li>▪ 1995 Agreement on Trade-Related Aspects of Intellectual Property</li> <li>▪ 1995 Paris Convention on Industrial Property</li> <li>▪ 2001 Patent Cooperation Treaty</li> </ul>

Table 2. Biotechnology products and tools accessed by PhilRice from 1996 to 2004.

BIOTECHNOLOGY MATERIALS AND DESCRIPTION	INSTITUTION	NO. OF IP-RELATED PROVISIONS
1996		
1. pZ100 (plasmid construct)	Salk Institute for Biological Studies	2
1. PBY520 and pTW-a (includes potato <i>pin2</i> gene and <i>bar</i> gene for selection) and constructs' map	Cornell University	4
2. <i>hva1</i> -containing plasmid pBY520	Cornell University	4
1997		
1. Clone pC822-3 with Xa21 Leucine Rich repeat and clone pB822-1 containing Xa-21 kinase	University of California Davis	3

2003		
1. pCambia-SB-IR2. A rice genomic DNA insert cloned into pCAMBIA 1305 vector. Insert is the indica (IR64) gene orthologous to the japonica (Nipponbare gene)	Cornell Research Foundation	8
2. Genomic rice insert of 19 kb from IR64 cloned in Hd3 site of the pCAMBIA 1305.1 vector. The genomic insert comprises the homolog of the gene OSJNBa0017E08.19 found in the BAC OSJNBa0017E08 (AC068923) from Nipponbare	Cornell Research Foundation	8
3. pSMAB801 construct containing multimer of CaMV35S promoter	National Institute of Agrobiological Sciences, Tsukuba, Japan	9
4. PSMAB704 binary Ti plasmid vector carrying <i>bar</i> selectable marker gene	National Institute of Agrobiological Sciences, Tsukuba, Japan	9
5. Stress tolerant transgenic cereal plants by <i>hva1</i> genes	Cornell Research Foundation	9
6. Monocot having dicot wound inducible promoter	Cornell Research Foundation	9
2004		
1. Xa21 gene cloned to a modified pCambia 1300 vector w/c replaces hygromycin gene with PMI	University of California Davis	3
2. Golden rice	Prof. Potrykus and Syngenta	>15

Table 3. Intellectual Property Relevant to Golden Rice

PRODUCT COMPONENT	SOURCE OF COMPONENT
1. Rice germplasm transformed with gene constructs	Taipei 309, from IRRI
2. PGE <sub>m</sub> 4	Promega
3. PbluescriptKS	Stratagene
4. PCIB90 and AphIV gene: hygromycin phosphotransferase	Ciba-geigy Limited (Novartis Seeds AG)
5. CaMV35s promoter and	Monsanto

terminator	
6. PKSP -1 and GT1 Promoter: glutelin storage protein	Thomas Okita, Washington State University
7. PUCET4 and Pea Rubisco transit peptide Ctrl gene: phytoene desaturase	N. Misawa, Kirin Brewery Co., Ltd.
8. PPZP100	Pal Maliga, Rutgers University
9. pYPIET4	Clontech, now marketed by Life Tech.
10. Electroporation Apparatus and Microprojectile bombardment apparatus	Bio-Rad Corp., Gene Pulser II System

Source: R. David Kryder, Stanley P. Kowalski, and Anatole F. Krattinger, *The Intellectual and Technical Property Components pro-Vitamin A Rice (GoldenRice™): A Preliminary Freedom-To-Operate Review*, ISAAA Briefs 20, available at <http://www.isaaa.org/kc/Publications/pdfs/isaaabriefs/Briefs%2020.pdf>.

# PROTECTING WOMEN AND GIRLS FROM HUMAN TRAFFICKING IN THE DEMOCRATIC REPUBLIC OF CONGO: TOWARD JUSTICE FOR VICTIMS OF GENDER-BASED VIOLENCE

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## INTRODUCTION

The Democratic Republic of Congo (DRC)<sup>1</sup> is presently in a state of crisis.<sup>2</sup> The conflict began in 1996 and, in 2012, 1.7 million people were

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1. The Democratic Republic of Congo is located in central Africa. *See infra* map at Appendix II. On use of the term DRC, *see infra* Appendix I for a list of acronyms used in this Note.

still displaced due to armed conflict and human rights abuses.<sup>3</sup> According to Human Rights Watch, government soldiers continue to rape and pillage civilians,<sup>4</sup> often reducing them to forced labor or services.<sup>5</sup> In November 2012, the conflict intensified as the eastern city of Goma fell to the Rwandan-backed M23 rebels, displacing an additional 80,000 civilians and increasing the threat of widespread human rights abuses.<sup>6</sup> In addition to conflict, poverty has also worsened for the Congolese; the gross national income per capita plummeted more than 50% from 1990 to 2011.<sup>7</sup> Last year, the United Nations Development Programme ranked the DRC number 187 out of 187 countries in its annual calculation of the United Nations Human Development Index (UNHDI).<sup>8</sup> Poverty only increases the vulnerability of women and children to exploitation, such as trafficking in persons.<sup>9</sup>

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2. Human Rights Watch, *Country Summary Democratic Republic of Congo 1* (January 2012), [http://www.hrw.org/sites/default/files/related\\_material/drc\\_2012.pdf](http://www.hrw.org/sites/default/files/related_material/drc_2012.pdf) [hereinafter 2012 HRW Country Summary].

3. *Id.* at 2.

4. Throughout this Note, the term “civilians” will be used to include both unarmed, uninvolved persons caught in the cross fire of armed conflict and also persons forced to participate in armed conflict against their will through abduction, coercion, and other forms of exploitation, such as child soldiers and sex slaves. Discussion of sexual exploitation and human rights abuses is limited to these two categories of civilians, and does not cover abuses against willingly-conscripted armed soldiers by other armed individuals.

5. *Id.* Armed conflict between the government and the M23 rebels in eastern DRC led to concern about mass human rights abuses. See U. N. Human Rights Office of the High Commissioner (citing “Appalling” *Human Rights Record of Leaders of M23 Mutineers in DR Congo, Pillay Fears Further Abuses* (Jun. 19, 2012), [www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12251&LangID=E](http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12251&LangID=E)).

6. Human Rights Watch, *DR Congo: US Should Urge Rwanda to End M23 Support* (November 20, 2012), <http://www.hrw.org/news/2012/11/20/dr-congo-us-should-urge-rwanda-end-m23-support>. See also Chair of the United Nations Group of Experts on the Democratic Republic of Congo, *Addendum to the interim report of the Group of Experts on the Democratic Republic of the Congo (S/2012/348) concerning violations of the arms embargo and sanctions regime by the Government of Rwanda*, ¶ 2, S/2012/348/Add.1 (Jun. 21, 2012) (suggesting that the Rwandan government provided material support to M23 armed forces) [hereinafter Group of Experts Interim Report].

7. U.N. Development Program, *infra* note 8, at 2 (Table A indicates gross national income per capita of \$542 in 1990 decreasing to \$280 per capita in 2011, a cumulative drop of more than 51%).

8. U.N. News Service, *U.N. Human Development Rankings Place Norway at the Top and DRC Last*, UNITED NATIONS NEWS SERVICE (Nov. 2, 2011), [www.un.org/apps/news/printnewsAr.asp?nid=40290](http://www.un.org/apps/news/printnewsAr.asp?nid=40290). The UNHDI is based on life expectancy, literacy, and gross national income per capita. According to the most recent data, the poverty line is \$1.25 per day, with 59.2% of Congolese living on less daily. See U.N. Development Program, *Democratic Republic of the Congo: HDI Values and Rank Changes in the 2011 Human Development Report*, 2, 5, available at <http://hdrstats.undp.org/images/explanations/COD.pdf> (last visited Feb. 18, 2012).

9. G.A. Res. 55/25, Convention on Transnational Organized Crime, Annex II Protocol to Prevent Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Crime, art.

In eastern DRC, gender-based violence (GBV) is an extreme affront to Congolese women and children, with more than 200,000 victims subjected to sexual violence since 1996.<sup>10</sup> Even though the Congolese government, in 2006, ratified a new Constitution and passed a law criminalizing sexual violence offenses, perpetrators still exploit women and children with impunity, and victims remain largely unprotected.<sup>11</sup> The international community has condemned the sexual violence in the DRC and regional authorities call for “all the armed groups active in eastern DRC to *immediately* put a[n] end to the rape and all kinds of violence against women and children” and for “the DRC [G]overnment to take *all* necessary steps for the effective implementation of the 2006 laws on sexual abuse, including the pursuit and punishment of the perpetrators of rape and other acts of violence against women.”<sup>12</sup> Yet, the sexual violence still continues with relative impunity and women and children are unprotected.<sup>13</sup>

In addition to rape, the attacks on civilians have included “accompanying abduction, enforced prostitution and enslavement of victims.”<sup>14</sup> The United States has recognized these abuses as trafficking in persons, specifically manifested through forced conscription of child soldiers, labor trafficking, forced prostitution, and sexual slavery.<sup>15</sup> Due to the Congolese

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9(4), U.N. Doc. A/Res/55/25 (adopted Nov. 15, 2000; signed Jan. 8, 2001; entered into force Dec. 25, 2003), *available at* [http://www.uncjin.org/Documents/Conventions/dcatoc/final\\_documents\\_2/convention\\_%20traff\\_eng.pdf](http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_%20traff_eng.pdf) (listing poverty as a factor that makes women and children vulnerable to trafficking) [hereinafter Trafficking Protocol].

10. U.N. Secretary-General, *Report of the Secretary-General Pursuant to Security Council Resolution 1820*, ¶ 12, U.N. Doc. S/2009/362 (July 15, 2009) [hereinafter U.N. Doc. S/2009/362]. Some United Nations estimates from 2010 are as high as 500,000 victims, with an additional 1,100 women raped monthly. *See* discussion, *infra* at 6-8 for more details on GBV in the DRC.

11. *Id.* (“[S]exual violence continue[d] unabated in the Democratic Republic of Congo.”). *See also* Rashida Manjoo & Calleigh McRaith, *Gender-Based Violence and Justice in Conflict and Post-Conflict Areas*, 44 CORNELL INT’L L.J. 11, 26 (2011) (“[V]ery little has changed in the lives of most women, as both state and non-state actors continue to commit acts of GBV with impunity. In the [DRC] . . . GBV remains unchecked despite new national legislation.”).

12. African Commission on Human and Peoples’ Rights, Resolution on the Crimes Committed Against Women in the Democratic Republic of Congo, (Nov. 10-24, 2010) (emphasis added), *available at* <http://www.achpr.org/sessions/48th/resolutions/173/>. For the international response, see S.C. Res. 1960 (2010), ¶ 3, U.N. Doc. S/RES/1960 (2010) (Dec. 16, 2010) [hereinafter S.C. Res. 1960].

13. Human Rights Watch, *supra* note 2, at 2. *See generally* GLOBAL NETWORK OF WOMEN BUILDERS, SECURITY COUNCIL RESOLUTION 1325: CIVIL SOCIETY MONITORING REPORT 2011-DEMOCRATIC REPUBLIC OF CONGO 88, 91 (Annie Matundu Mbambi trans., 2011), *available at* <http://www.gnwp.org/wp-content/uploads/2010/02/DRC1.pdf>.

14. U.N. Doc. S/2009/362, *supra* note 9, at ¶ 13.

15. U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 2011 129-30 (June 2011), *available at* <http://www.state.gov/j/tip/rls/tiprpt/2011/> [hereinafter TIP REPORT 2011]. *See also* Rep. of the Preparatory Comm’n for the Int’l Criminal Courts, Preparatory Comm’n for the Int’l Crim. Court, Mar. 13-31, June 12-30, 2000, art. 7 (1) (g)-3, U.N. Doc. PCNICC/2000/1/Add.2 (Nov. 2, 2000) [hereinafter ICC Elements of Crimes]. For

government's failure to comply with the minimum standards to prevent trafficking, prosecute perpetrators, and protect victims, the United States Department of State Trafficking in Persons Report ranked the DRC as a Tier 3 country, the lowest level, in 2010, 2011, and 2012.<sup>16</sup>

This Note will analyze the current responses to gender-based violence in the conflict-ridden eastern DRC, and will show that incorporating efforts targeting gender-based violence as a form of human trafficking could lead to greater justice for victims by increasing prevention, prosecution, and protection as required by international human trafficking law. Part I summarizes the war in the DRC and demonstrates that conflict has led to rampant sexual violence. Part II discusses the existing international human rights-based laws designed to impose an obligation on the DRC to respond to sexual violence. Part III asserts the human rights-based approach is insufficient to protect victims and that international human trafficking laws should be utilized to help protect victims of a specific type of gender-based violence: sexual slavery. Part IV proposes that, in fulfillment of international obligations and with international support, victim-centered methods by the Congolese Government could help prevent further trafficking in persons, decrease impunity for perpetrators of sexual slavery, and protect victimized women and girls in the DRC.

## I. BACKGROUND: GENDER-BASED VIOLENCE IN THE CONGO CONFLICT

The Congo Wars have been characterized by the highest death toll in a humanitarian crisis since World War II.<sup>17</sup> Since 1998, between 3 million and 5.4 million Congolese have died because of the conflict in the DRC.<sup>18</sup> This deadly violence has been accompanied by the rampant use of rape as a tool

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information on the definition of forced prostitution under national law 06/018, see *infra* note 151 and accompanying text. In contrast, sexual slavery is characterized by (1) enslavement of another person (2) for one or more acts of a sexual nature. See ICC Elements of Crimes, art. 7 (1) (g)-2.

16. U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 2012 126 (June 2012) [hereinafter TIP REPORT 2012]. For background on Tier Rankings, see *Trafficking in Persons Report 2011 Tiers: Placement, Guide, and Penalties for Tier 3 Countries*, U.S. DEPT. OF STATE, [www.state.gov/j/tip/rls/tiprpt/2011/164221.htm](http://www.state.gov/j/tip/rls/tiprpt/2011/164221.htm) (last visited Dec. 27, 2012) (Tier 3 is the lowest ranking, reserved for countries who completely fail to comply with the minimum standards set by the U.S. government for preventing, prosecuting and, protecting people from human trafficking); see also Memorandum on Steps to Combat Violence Against Women and Trafficking in Women and Girls, *infra* note 186.

17. See INT'L RESCUE COMM., MORTALITY IN THE DEMOCRATIC REPUBLIC OF CONGO: AN ONGOING CRISIS I (2007), available at [http://www.rescue.org/sites/default/files/migrated/resources/2007/2006-7\\_congomortalitysurvey.pdf](http://www.rescue.org/sites/default/files/migrated/resources/2007/2006-7_congomortalitysurvey.pdf) [hereinafter MORTALITY IN THE DEMOCRATIC REPUBLIC OF CONGO] (an estimated 5.4 million deaths between 1998 and 2007, with 2.1 million since then end of the formal war in 2002).

18. MORTALITY IN THE DEMOCRATIC REPUBLIC OF CONGO, *supra* note 16, at ii. But see *DR Congo War Deaths 'Exaggerated'*, BBC NEWS, Jan. 20, 2010, available at <http://news.bbc.co.uk/2/hi/africa/8471147.stm>.



of war, which continues to deteriorate today throughout eastern DRC.<sup>19</sup> Because of the need to protect civilians and stabilize the eastern part of the country, the mandate of U.N. Peacekeeping personnel on the ground has been extended to June 2013,<sup>20</sup> with the 19,154 total uniformed personnel presently on the ground.<sup>21</sup>

#### A. Conflict in the Congo

From the very inception of the war, international actors have played an integral role in escalating the conflict.<sup>22</sup> In what is now known as the First

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19. S.C. Res. 2053 (2012), pmb1, U.N. Doc. S/RES/2053(2012) (Jun. 27, 2012) [hereinafter S.C. Res. 2053] (“Expressing deep concern at the deteriorating security situation in the eastern provinces of the Democratic Republic of the Congo, including attacks by armed groups” and

*Remaining* greatly concerned by the humanitarian situation and the persistent high levels of violence and human rights abuses and violations against civilians, *condemning* in particular the targeted attacks against civilians, widespread sexual and gender-based violence, recruitment and use of children by parties to the conflict, in particular the mutineers of ex-Congrès National pour la Défense du Peuple (ex-CNDP) and the 23 March Movement (M23)).

20. *Id.* at ¶ 1. Since 2000, peacekeeping troops deployed in the DRC have had the mandate to “take the necessary action, in the areas of deployment of its infantry battalions and as it deems it within its capabilities, to . . . protect civilians under imminent threat of physical violence.” S.C. Res. 1291, ¶ 8, S/RES/1291 (2000) (Feb. 24, 2000). *See generally* S.C. Res. 1291, ¶7(g), S/RES/1291 (2010) (May 28, 2010) (discussing the comprehensive mandate of MONUC Phase II).

21. MONUSCO- UNITED NATIONS ORGANIZATION STABILIZATION MISSION IN THE DR CONGO, Facts and Figures, <http://www.un.org/en/peacekeeping/missions/monusco/facts.shtml> (last visited Dec. 27, 2012) [hereinafter MONUSCO](providing an accounting of initial and current mission deployments in the DRC). It must be noted that the initial mandate established the U.N. Organization Mission to the Democratic Republic of Congo (*see* S.C. Res. 1279 (1999), S/RES/1279 (Nov. 30, 1999)), but then name was changed to MONUSCO in 2010 (*see* S.C. Res. 1925 (2010), S/RES/ 1925 (Jul. 10, 2010)). *Id.* at MONUSCO Background, <http://www.un.org/en/peacekeeping/missions/monusco/background.shtml>.

22. The causes of the conflict in DRC are multitudinous, but many can be traced to the dynamics following the genocide of 800,000 Rwandan Tutsi and moderate Hutus in the bordering country of Rwanda. *See generally* JASON K. STEARNS, DANCING IN THE GLORY OF MONSTERS: THE COLLAPSE OF THE CONGO AND THE GREAT WAR OF AFRICA 13 (2011) (“The conflict in the Congo has many causes, but the most immediate ones came across the border from Rwanda . . . This genocide helped create the conditions for another cataclysm in neighboring Congo.”). After the genocide in Rwanda, the instability spread to the DRC. *See* MONUSCO, *supra* note 21, at MONUSCO Background. The beginning of the war in the DRC is a classic example of the principle that “[a] failed state’s civil wars may spark widespread human rights violations, starvation, and disease that prompt destabilizing refugee movements to neighboring countries.” John Yoo, *Fixing Failed States*, 99 CALIF. L. REV. 95, 106-07 (2011). “Failed states may lack the means to prevent ethnic groups from attacking each other; the violence may not only reach genocidal proportions - as it did in Rwanda - but may also spread to nearby countries with similar tribal, ethnic, or religious fault lines, for

Congo War, Rwanda and Uganda supported rebel leader Laurent Kabila as he launched an attack to topple the regime of Mobutu Sese Seko.<sup>23</sup> Mr. Kabila took power and founded the Democratic Republic of the Congo (formerly, Zaire) in May 1997, but soon fell out of favor with Rwanda for failing to exterminate the Hutu people, whom Rwanda considered to be enemy *genocidaires*, within the borders of the new DRC.<sup>24</sup> The Second Congo War began in 1998 when the Rwandan-led coalition of African powers launched an offensive raid to expel Laurent Kabila from power.<sup>25</sup> Five regional states and the DRC signed the Lusaka Peace Accords in 1999, and the U.N. Organization Mission to the DRC was established.<sup>26</sup> However, the conflict continued as Joseph Kabila took power after the death of his father in 2001, and the second war formally ended in 2002.<sup>27</sup>

Even the recent national elections have been unable to bring stability to the region. After highly contested elections, President Joseph Kabila was elected for a second term in December 2011.<sup>28</sup> According to Jason Stearns, long-time political activist and journalist in the DRC, President Kabila “is wary about creating a strong rule of law that could tie his hands.”<sup>29</sup> Positing the president’s political motives for his actions, he states, “[e]ven the violence in the Kivus region, which continues until today, has not prompted major reforms in his army or police; he has preferred to co-opt dissent rather than to promote an impartial, disciplined security force.”<sup>30</sup> As indicated above, political motivations and the ongoing impact of international conflict has resulted in societal collapse and governmental failure to protect its citizens from violence.

#### B. Gender-based violence against women and girls

Since the beginning of the war in 1997, Gender-based violence (“GBV”) has been used as a tool of war in order to subjugate the local population and maintain power over them.<sup>31</sup> Because females are more often displaced by

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example, when the Rwandan genocide spilled over into the civil war in the Democratic Republic of Congo.” *Id.*

23. STEARNS, *supra* note 22, at 8. *See also* MONUSCO, *supra* note 20, at MONUSCO Background.

24. Stearns, *supra* note 22, at 8.

25. *Id.*

26. MONUSCO, *supra* note 21.

27. *Id.*

28. *DR Congo Election: Court Confirms Joseph Kabila Win*. BBC NEWS, Dec. 16, 2011, available at <http://www.bbc.co.uk/news/world-africa-16229372> (the elections were held in November, but were contested vehemently until December 16).

29. STEARNS *supra* note 22, at 331-32.

30. *Id.* at 332.

31. U.N. Office of the High Comm’r on Human Rights, Report of the Mapping Exercise Documenting the Most Serious Violations of Human Rights and International Humanitarian Law Committed Within the Territory of the Democratic Republic of the Congo

conflict and are responsible for collecting water, food, and firewood to ensure the family's survival, "women and girls are the main victims of rape, mutilation, abduction into sexual slavery, and sexual exploitation during times of conflict."<sup>32</sup> The epic proportions of sexual violence have recently been exposed in South Kivu through a United Nations report mapping human rights violations in the DRC from 1997-2003.<sup>33</sup>

The ongoing relationship between the Congo conflict and GBV is cyclical, with conflict leading to GBV and GBV, in turn, contributing to the destabilization of the region and its people.<sup>34</sup> According to MONUSCO, the mass perpetration of sexual violence in the DRC since 1996 has consequences that continue today: "physical, emotional and economic consequences continue to pervade and reinforce instability particularly in the East."<sup>35</sup> Acts of GBV continue to permanently traumatize victims' lives and destabilize the DRC.<sup>36</sup> According to Amnesty International, on June 11,

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Between March 1993 and June 2003, ¶ 631 (2010) (unofficial translation from French original), available at [http://www.ohchr.org/Documents/Countries/ZR/DRC\\_MAPPING\\_REPORT\\_FINAL\\_EN.pdf](http://www.ohchr.org/Documents/Countries/ZR/DRC_MAPPING_REPORT_FINAL_EN.pdf) [hereinafter Mapping Exercise] ("Sexual violence was frequently used to terrorise (*sic*) and subjugate the population. The different armed groups committed acts of sexual violence that could be likened to veritable campaigns of terror.").

32. *Confronting Rape and Other Forms of Violence Against Women in Conflict Zones Spotlight: DRC and Sudan: Hearing Before the Subcomm. on Afr. Affairs, Subcomm. on Int'l Operations & Orgs., Human Rights, Democracy, & Global Women's Issues of the Comm. on Foreign Relations*, 111th Cong. 45 (2009) [hereinafter Hearing: Confronting Rape] (statement of Robert Warwick, Director, International Rescue Committee).

33. Mapping Exercise, *supra* note 31, ¶ 611 ("All [armed forces] had one thing in common, however: the use of sexual violence. This violence took place under cover of a climate of widespread impunity and insecurity, and the perpetrators were often difficult to identify. The cases are too numerous to mention and the level of violence unspeakable.").

34. The DRC Government explained in a recent report that conflict leads to large scale rape of women in the DRC, which causes "incalculable damage" in society. *See* Comm. on the Elimination of Discrimination Against Women, Consideration of Reports Submitted by States Parties Under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women Combined sixth and seventh periodic report of States Parties: Democratic Republic of the Congo, 23, U.N. Doc. CEDAW/C/COD/6-7 (Dec. 21, 2011) [hereinafter 2011 Periodic Report].

35. MONUSCO, *supra* note 21, at MONUSCO Background.

36. Rape as a tool of war destroys the lives of its victims. One Congolese mother wrote poetically about her feelings on the horror:

My bones are weak/ can't protect my daughter no more/my voice is gone/ can't scream any louder/ my eyes are getting weaker/ Tears easily flowing out/ . . . Sons that are turned into these monsters/ Joining armies of abusers and rapists/ Taught to destroy their mothers/ Kill their fathers/ Abuse their sisters with no remorse/ And that's why/ I would prefer a bullet in the head/ Over another gang rape/ a knife on my throat/ over another political instability/A trail of tears over another sexual violence[.]

2011, 100 women were raped by government forces in an attack on the village of Nyakiele near Fizi town.<sup>37</sup> This was the fourth incident of mass rapes by armed forces in eastern DRC in the last 18 months.<sup>38</sup>

The scope of the continuing perpetration of GBV in eastern DRC is massive. In contrast to more conservative U.N. estimates, a 2011 international health study indicated the actual number of victims could be as high as 407,397 to 433,785 *in the preceding 12 months alone*, particularly in North Kivu in eastern DRC.<sup>39</sup> According to the report, there may be as many as 2 million victims of sexual violence throughout the DRC.<sup>40</sup> Congolese Government and civil society has long believed the perpetrators of these heinous rapes are foreign-armed militia.<sup>41</sup> Yet, according to expert Margot Wallström,<sup>42</sup> the Congolese government's lack of control over its own armed forces contributes heavily to the proliferation of GBV in the region.<sup>43</sup>

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FBM FIDEL MWENDAMBALI NSHOMBO, *ROUTE TO PEACE 2: A LIFE FOR LIVES* 36-37 (2011) (emphasis added). *See infra* Appendix III for a poetic rendition of the rape of a mother in the eastern DRC and her cry for the world to help her.

37. *New Mass Rapes in DRC are Result of Horrific Failure of Justice*, AMNESTY INTERNATIONAL (June 23, 2011), <http://www.amnesty.org/en/news-and-updates/new-mass-rapes-drc-are-result-horrific-failure-justice-2011-06-23>.

38. Mapping Exercise, *supra* note 31, at 318-24.

39. Amber Peterman et al., *Estimates and Determinants of Sexual Violence Against Women in the Democratic Republic of Congo*, 101 AM. J. PUB. HEALTH 1030, 1060-67 (2011).

40. *Id.*; *see also* Jeffrey Gettleman, *Rapes Total in Millions in Congo, Study Finds*, N. Y. TIMES, May 12, 2011, at A-4, *available at* <http://www.nytimes.com/2011/05/12/world/africa/12congo.html> (republished online as *Congo Study Sets Estimate for Rapes Much Higher*).

41. Hearing: *Confronting Rape*, *supra* note 32, at 40 (asserting that 500,000 women have been raped in the conflict and that “there will be security when the FDLR returns to Rwanda.”) (quoting Chouchou Namegabe Nabinto, Founder, South Kivu Women’s Media Association, Democratic Republic of the Congo). The foreign-armed groups that civil society believes perpetrate the most GBV include the Lord’s Resistance Army (LRA) of Uganda and the Democratic Forces for the Liberation of Rwanda (FDLR). Until June 2012, the extent of foreign involvement in arming militias was largely speculative, but an interim U.N. Report has shown that the Rwandan Defense Minister and Uganda government officials have directly armed and trained the M23 armed faction that recently took power in the eastern city of Goma. *See* Group of Experts Interim Report, *supra* note 6, at ¶ 2; *see also* Johnny Hogg, *Congo Demands Sanctions on Rwanda, Uganda*, Reuters (Oct. 17, 2012), [www.reuters.com/assets/print?aid=USBRE89G1LQ20121017](http://www.reuters.com/assets/print?aid=USBRE89G1LQ20121017). Both foreign governments vehemently deny any involvement with the mutinous faction. *See Uganda and Rwanda Deny Supporting DRC Rebels*, Al-Jazeera English- Africa (Oct. 17, 2012), [www.aljazeera.com/news/africa/2012/10/2012101714443887755.html](http://www.aljazeera.com/news/africa/2012/10/2012101714443887755.html).

42. U.N. Secretary-General’s Special Representative on Sexual Violence in Conflict since early 2010. Press Release, U.N. Secretary-General, *Secretary-General Appoints Margot Wallström of Sweden as Special Representative on Sexual Violence in Conflict*, U.N. Press Release SG/A/1220 (Feb. 2, 2012), <http://www.un.org/News/Press/docs/2010/sga1220.doc.htm>.

43. Margot Wallström, *When Protectors Turn Predators: Army Reforms Needed to Counter Sexual Violence in the Congo*, AFR. RENEWAL ONLINE (Jan. 16, 2012),

As explained above, the conflict in the DRC is characterized by extensive GBV, which continues to destabilize the eastern regions of the DRC and exacerbate the conflict. In the eastern DRC, an especially prevalent and destructive form of GBV is conflict-based sexual slavery of women and girls.<sup>44</sup> Accordingly, the subsequent sections will explore the strengths and weaknesses of the current international and national responses to this form of GBV in the DRC.

## II. HUMAN RIGHTS-BASED RESPONSES TO GBV IN THE CONGO

As the following analysis will detail, under international law, the government of the DRC has the primary responsibility to create and enforce laws that protect its civilians.<sup>45</sup> As the United Nations Security Council has repeatedly stated in its resolutions regarding the crisis in the DRC, the State has a responsibility “to prevent sexual violence and to combat impunity and enforce accountability,” to prosecute perpetrators, and provide holistically for the protection and reintegration needs of victims of sexual violence.<sup>46</sup> Moreover, in conflicts, the United Nations has consistently affirmed that national governments have the primary obligation to protect the most vulnerable among their civilians: “*Stressing* the primary role of national Governments [*sic*] in providing effective protection and relief to all children affected by armed conflicts [and] *Recalling* the responsibilities of States to end impunity and to prosecute those responsible for genocide, crimes against humanity, war crimes, and other egregious crimes perpetrated against children[.]”<sup>47</sup>

International law must impose obligations on national governments to combat impunity and protect victims.<sup>48</sup> Based on these obligations, and with

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<http://www.un.org/africarenewal/web-features/when-protectors-turn-predators> (it is critical to note that through the U.N. disarmament and demobilization process, the majority of the former forces of the twenty rebel forces have been integrated into the national army, a fact which may account for the lack of governmental control over the national army).

44. 2011 Periodic Report, *supra* note 34, at 23 (“With regard to the recent causes of most of the occurrences of sexual violence, it has been established that rapes, mutilations, sexual slavery and forced pregnancies have been used as a military weapon and have mainly been linked with conflicts and uniformed combatants.”).

45. While the obligation exists, it must be noted that international compliance measures are limited both in the human rights-based and human trafficking laws. *See infra* Part II.

46. S.C. Res. 1960, *supra* note 12, at 1-2.

47. S.C. Res. 1612 (2005), U.N. Doc. S/RES/1612 (2005), at 1 (July 26, 2005).

48. While outside the scope of this Note, regional law may in some cases be more efficient, particularly in recently post-colonial societies within Africa. For instance, the International Conference on the Great Lakes Region recognized that, while national, regional, and international involvement is necessary to ending impunity for sexual violence perpetrators, the regional protocols and projects “provide efficient and adequate framework for the prevention and fight against [GBV], and the prosecution and punishment of the perpetrators . . . .” International Conference on the Great Lakes Region, June 16-18, 2008,

the support of external nongovernmental and intergovernmental agencies, national laws must be enacted and then, effectively implemented by local law enforcement and legal professionals.<sup>49</sup> Although obligations and relevant laws do exist, they do not appear to be enforced for the protection of individual victims.<sup>50</sup> If not effectively enforced, to what extent do these international human rights standards and obligations impact women and girl victims of sexual slavery and other GBV in the DRC? Part II will explore the international human rights-based responses and how they have impacted national efforts to protect victims of GBV in the DRC.

#### A. United Nations Interventions: Peacekeeping and Monitoring Initiatives

The United Nations, as the largest intergovernmental founded to protect peace and human rights, is the primary source for international obligations for national governments to protect their vulnerable populations.<sup>51</sup> By passing Resolution 1325 in 2000, the United Nations Security Council for the first time acknowledged that “women and children account for the vast majority of those adversely affected by armed conflict . . . .”<sup>52</sup> Moreover, Resolution 1325, entitled *The Resolution on Women, Peace, and Security*, “call[ed] on all parties to armed conflict to take special measures to protect women and girls from gender-based violence, particularly rape and other forms of sexual abuse.”<sup>53</sup> Resolution 1325 led to numerous other Security Council actions, including Resolution 1960, which sought the to improve implementation of Resolution 1325 by (1) admonishing states to immediately cease the practice of impunity for perpetrators of sexual violence in conflict zones and (2) increasing international communication, support, and monitoring of sexual violence against women and children in conflict.<sup>54</sup> In particular, Resolution 1960 recognized the

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*The Goma Declaration on Eradicating Sexual Violence and Ending Impunity in the Great Lakes Region*, at 1, 7-8 (June 18, 2008) (listing eleven actions to be executed on the regional level to promote stability, protect victims, and punish perpetrators).

49. Office of the Senior Sexual Violence Adviser and Coordinator, *Comprehensive Strategy on Combating Sexual Violence in DRC: Executive Summary*, at 1 (Mar. 18, 2009), <http://monusco.unmissions.org/Portals/MONUC/ACTIVITIES/Sexual%20Violence/KeyDocuments/Comprehensive%20Strategy%20Executive%20Summary.pdf> [hereinafter *MONUC Strategy*].

50. This conclusion is based on the continuing scourge of GBV, specifically sexual slavery, in the DRC despite the passage of laws and the existence of obligations to enforce the laws.

51. U.N. Charter pmb.; see also official website of the United Nations, *U.N. at a glance* (last visited Dec. 27, 2012), <http://www.un.org/en/aboutun/index.shtml> (193 member states committed to achieving peace and human rights).

52. S.C. Res. 1325, at 2, U.N. Doc. S/RES/1325 (Oct. 31, 2000).

53. *Id.* ¶ 10.

54. U.N. Doc. S/2009/362, *supra* note 10, pmb.

[r]esponsibilities of States to end impunity and to prosecute those responsible for genocide, crimes against humanity, war crimes, and other egregious crimes perpetrated against civilians and, in this regard, noting with concern that only limited numbers of perpetrators of sexual violence have been brought to justice, while recognizing that in conflict and in post-conflict situations national justice systems may be significantly weakened.<sup>55</sup>

These Resolutions have led to increased pressure on the Congolese Government to develop a national action plan to combat sexual violence and have also shaped the specific efforts of MONUSCO to assist the national government in ending impunity.<sup>56</sup> Moreover, the Resolutions have been partly enforced by the creation of Special Rapporteur on Sexual Violence in Conflict, which monitors and advocates for greater state efforts to combat impunity and protect victims.<sup>57</sup>

The United Nations has most directly intervened in the conflict in the DRC by deploying its peacekeeping mission through MONUSCO, which bears an “obligation to protect.”<sup>58</sup> The MONUSCO operation has also taken strides to support the national government in ending sexual violence and other exploitation against women and children.<sup>59</sup> Recently, the Security Council extended the MONUSCO mandate until June 30, 2013, with its stated primary focus to protect civilians using new and “innovative measures.”<sup>60</sup> These innovative measures include admonishing the government of the DRC to work toward security sector reform<sup>61</sup> and expressing concern over “the promotion within the Congolese security forces of well-known individuals responsible for serious human rights

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55. *Id.*

56. *See* MONUSCO, *supra* note 21.

57. S.C. Res. 1888, ¶¶ 4-7, U.N. Doc. S/RES/1888 (Sept. 30, 2009).

58. *See generally* SIOBHÁN WILLS, PROTECTING CIVILIAN: THE OBLIGATION OF PEACEKEEPERS 56-61 (2009) (providing an overview of the U.N. Mission to the DRC from inception to 2007). Sadly, in its early days, MONUC officers harmed civilians rather than protecting them when four U.N. peacekeepers raped 19 Congolese women in South Kivu by threatening their safety and then coercing their silence with food (bread, eggs, milk). *Id.* at 274-75. According to the international definition of human trafficking, these deplorable acts could be considered human trafficking for forced prostitution, since coercion allowed the soldiers to exploit the women sexually. In more recent years, the peacekeepers have been accused of standing by during massacres, rapes, and kidnappings. *See, e.g.*, Mungabo, *infra* note 175. “No one intervened to help the victims [of the massacre] despite their many appeals to FARDC soldiers present in the region. The same goes for the MONUC contingents, though there are plenty of them in Kaniola.” *Id.*

59. *See* MONUSCO, *supra* note 21.

60. S.C. Res. 2053, *supra* note 19, at ¶ 1 (“reaffirm[ing] that the protection of civilians must be given priority in decisions about the use of available capacity and resources and encourages further the use of innovative measures implemented by MONUSCO in the protection of civilians.”).

61. *Id.* ¶ 6.

abuses.”<sup>62</sup> Most significantly, the innovative measures have led to the formulation of the Comprehensive Strategy for Combatting Sexual Violence in Conflict (“Strategy”), including the provision of assistance and monitoring of the National Action Plan to Combat Sexual Violence.<sup>63</sup> The overall goal of the strategy is to “strengthen prevention, protection and the response to sexual violence.”<sup>64</sup> The four objectives are: (1) combating impunity for cases of sexual violence, (2) preventing and protecting victims of sexual violence, (3) reforming of the security sector and sexual violence, and (4) providing multi-sectoral response for survivors of sexual violence.<sup>65</sup> However, the major actors in the Strategy are U.N. institutions and committees, with the DRC government arguably taking on the role of beneficiary rather than lead participant.

United Nations charter-based resolutions and interventions have helped promote peace in the region and have urged the protection of vulnerable populations. Significantly, the U.N. field offices have created a model holistic approach to respond GBV in the DRC. Yet, implementation has been limited thus far. The next section examines the international treaty-based human rights responses to GBV and whether they actually protect victims of sexual slavery in the DRC.

#### B. International Human Rights Laws addressing Sexual Violence

Particularly when vulnerable victims’ voices are not being heard by nations, “international law is ultimately a tool for change: It seeks to positively influence the behavior of States.”<sup>66</sup> Collaboration is required between intergovernmental and national institutions to end sexual violence, particularly in light of ongoing instability. The international community has recognized this need: “Deputy Secretary-General Asha-Rose Migiro [today] stressed that efforts to restore peace and stability in Africa’s Great Lakes region will not come to fruition unless the scourge of sexual violence is completely eradicated and justice systems are strengthened to end impunity.”<sup>67</sup> Given the vulnerability of victims, the multitude of causes, and the long-term impact of the crimes, international human rights law

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62. *Id.* ¶ 11.

63. MONUC Strategy, *supra* note 49.

64. *Id.*

65. *Id.* at 2-3.

66. ANNE T. GALLAGHER, THE INTERNATIONAL LAW OF HUMAN TRAFFICKING 11 (2010) [hereinafter THE INTERNATIONAL LAW OF HUMAN TRAFFICKING].

67. *UN officials Urge Eradication of Sexual Violence in Africa’s Great Lakes Region*, UN NEWS CENTRE (Dec. 15, 2011), <http://www.un.org/apps/news/story.asp?NewsID=40748&Cr=&Cr1=#.UG71GZg0WSo>.



significantly contributes to keeping the focus on the victims' rights and rehabilitation.<sup>68</sup>

As will be shown below, the relevant international human rights treaties and resolutions prohibiting gender-based discrimination and sexual violence neither extend protections to all victims, nor do they cover enslavement as a tool of war such as sexual slavery. International human rights laws, thus, fall short of imposing obligations to provide full protection for victims of sexual slavery.

### 1. *International Bill of Human Rights*

Each of the foundational documents within international human rights law not only claim the "inherent dignity" and "right to liberty" of all persons, but also prohibit slavery.<sup>69</sup> These foundational documents include the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social, and Cultural Rights. The Universal Declaration is an unenforceable non-treaty document, and the Covenant on Economic, Social, and Cultural Rights possesses no expressly enforceable provision related to slavery. In contrast, Article 8 of the ICCPR, prohibiting slavery,<sup>70</sup> is enforceable on States Parties through the individual complaint mechanism. Unfortunately, the Human Rights Commission has not issued a single view

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68. In addition to international human rights law, in the DRC, where sexual exploitation occurs throughout post-conflict and active conflict zones, international humanitarian law, like the Geneva Convention and its Protocols I and II, plays a role in defining the obligations on armed combatants. However, while prohibiting inhumane treatment, including rape, international humanitarian law contains no overt reference to enslavement as a crime of war. *See* Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Dec. 7, 1978, 1125 U.N.T.S. 3, art. 75. *See also* Protocol Additional to the Geneva Conventions of Aug. 12, 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Dec. 7, 1978, 1125 U.N.T.S.609 art. 4. *See also*, THE INTERNATIONAL LAW OF HUMAN TRAFFICKING, *supra* note 66, at 209-10.

69. Universal Declaration of Human Rights, G.A. Res. 217A (III), art. 1, 4, U.N. Doc. A/810 at 71 (1948) [hereinafter Universal Declaration of Human Rights] (borrowing terms from the International Slavery Convention of 1926, *infra* note 178: "No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms"); International Covenant on Social, Economic, and Cultural Rights, G.A. Res. 2200A (XXI), art.7, U.N. Doc. A/6316 (1966) (entered into force Jan. 3, 1976) ("right of everyone to enjoy just and favorable conditions of work."); International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 8, U.N. Doc. A/6316 (1966) (entered into force Jan. 3, 1976) ("(1) No one shall be held in slavery; slavery and the slave trade in all their forms shall be prohibited. (2) No one shall be held in servitude. (3)(a) No one shall be required to perform forced or compulsory labor.").

70. "No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited." ICCPR, *supra* note 69, art. 8.

on state compliance with Article 8 based on an individual complaint (known as a communication).<sup>71</sup>

The government of the DRC evinces a desire to abide by international human rights law. For instance, the DRC incorporated the Universal Declaration of Human Rights and all international human rights law into its 2005 Constitution.<sup>72</sup> Furthermore, the DRC has ratified the ICCPR and its optional protocol.<sup>73</sup> Even if an individual in the DRC were to file a communication, which is authorized under the Optional Protocol, the likelihood of a prompt remedy for the violation is miniscule given the final outcome of such complaints: consent from the offending nation for the committee to review the complaint and present its views thereon.<sup>74</sup>

While the founding documents of international human rights law principally establish the general dignity and rights of people, two additional human rights treaties have been particularly influential in shaping international responses to GBV, including sexual slavery, in conflict zones such as the eastern DRC. The subsequent sections will analyze effects of the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child (CRC) and its two optional protocols, on the situation in the DRC.

## 2. *Convention on the Elimination of all forms of Discrimination Against Women*

The Convention on the Elimination of all forms of Discrimination Against Women (“CEDAW”), an international human rights treaty, condemns violence against women as an aspect of discrimination against women.<sup>75</sup> Significantly, the General Recommendation, a statement of how

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71. U.N. General Assembly Rep. of the Human Rights Committee, Mar. 17, 2008 – Apr. 4, 2008, U.N. Doc. A/63/40; GAOR, 92nd Sess., Supp. No. 40 (2008).

72. THE CONSTITUTION OF THE DEMOCRATIC REPUBLIC OF THE CONGO 2005, pmb1. [hereinafter CONSTITUTION OF THE DEMOCRATIC REPUBLIC OF THE CONGO] (reaffirming its adherence to the Universal Declaration of Human Rights and “to the international instruments relating to the protection and promotion of human rights.”).

73. International Covenant on Civil and Political Rights, Dec. 16, 1966, *available at* [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en); Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 16, 1966, *available at* [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-5&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&lang=en).

74. Optional Protocol to the International Covenant on Civil and Political Rights, arts. 4, 5 (entered into force Mar. 23, 1976), 999 U.N.T.S. 302 (requiring the Council to alert the offending State and give opportunity for State response to the complaint, followed by the Council’s consideration and submission of its “view” on the alleged violation).

75. Convention on the Elimination of Discrimination Against Women, art. 6, G.A. Res. 34/180 (Dec. 18, 1979; entered into force Sept. 3, 1981), *available at* <http://www.unhcr.org/refworld/docid/3ae6b3970.html> [hereinafter CEDAW]. *See also* Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 19, ¶¶ 1-7, Jan. 29, 1992, U.N. Doc. A/47/38 [hereinafter CEDAW General

the treaty should be interpreted, states that “[a]rmed conflicts and the occupation of territories often lead to increased prostitution, trafficking in women and sexual assault of women, which require specific protective and punitive measures.”<sup>76</sup> Moreover, all parties to the agreement (“States Parties”) have expressly condemned all discrimination that harms women, including the trafficking of women, in CEDAW.<sup>77</sup> The General Recommendation expounds on Article 6, which condemns trafficking in women by confirming that trafficking is a form of gender-based violence and discrimination against women.<sup>78</sup> When the article prohibiting trafficking is combined with Article 24, all States Parties are obligated to work toward the fulfillment of women’s right to be free from trafficking within their borders.<sup>79</sup> As interpreted, the Convention requires States Parties to: (1) condemn discrimination against women, (2) adopt a policy against discrimination, (3) enforce equal protection of the law, and (4) “[t]ake action to prevent private as well as public acts of discrimination.”<sup>80</sup>

The DRC government ratified CEDAW in 1986, prior to the onset of the war and the change in government.<sup>81</sup> In 2006, the DRC submitted its Fourth and Fifth Periodic Reports on the implementation of CEDAW and, in response, the Committee on the Discrimination Against Women recognized the ongoing existence of sexual violence against women and admonished the government to protect women immediately:

The Committee is deeply concerned about the continuing occurrence of rapes and other forms of *sexual violence against women and the ingrained culture of impunity for such crimes*, which constitute grave and systematic violations of women’s human rights. It is concerned about the insufficient efforts to conduct thorough investigations, the absence of protection measures for witnesses, victims and victims’ families. The Committee

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Recommendation] (“Gender-based violence, which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions, is discrimination within the meaning of article 1 of the Convention”).

76. *Id.* art. 6 (interpreting ¶ 6 of CEDAW).

77. CEDAW, *supra* note 75, at art. 6 (“State parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.”). It is important to note that, according to expert Anne Gallagher, “[o]f all the human rights bodies, the CEDAW Committee has been most explicit in identifying trafficking as a form of gender-based violence and therefore as unlawful discrimination.” *THE INTERNATIONAL LAW OF HUMAN TRAFFICKING*, *supra* note 66, at 195.

78. CEDAW General Recommendation, *supra* note 75, ¶¶ 13-16 (interpreting Article 6 of CEDAW).

79. CEDAW, *supra* note 75, at art. 24 (“States parties undertake to adopt all necessary measures at the national level aimed at achieving the full realization of the rights recognized in the present Covenant.” The right includes protection from trafficking from, to, or through the country where the woman resides.).

80. *THE INTERNATIONAL LAW OF HUMAN TRAFFICKING*, *supra* note 66, at 191-92.

81. Convention on the Elimination of All Forms of Discrimination Against Women, *supra* note 75. (DRC signed Jul. 17, 1980, and ratified Oct. 17, 1986 with no reservations.).

urges the State party to *take without delay all necessary measures to put an end to all forms of violence against women and the impunity of perpetrators*. The State party *should draft and adopt a law on violence against women*. The Committee requests the State party to provide in its next periodic report detailed information on the causes, scope and extent of all forms of violence against women and on the impact of measures taken to prevent such violence, to investigate occurrences, to prosecute and punish perpetrators and to provide protection, relief and remedies, including appropriate compensation, to victims and their families.<sup>82</sup>

Only months after that report, and more than twenty years after ratification, the CEDAW provisions were directly incorporated into the Congolese Law 06/018, which criminalized sexual violence, including sexual slavery.<sup>83</sup> Since then, the Congolese Government has demonstrated its intention to protect women from sexual violence in compliance with its obligations under CEDAW.<sup>84</sup> However, the most recent report elucidates the position of the DRC Government that sexual slavery is not a form of trafficking in women covered under Article 6 of CEDAW.<sup>85</sup>

Thus, CEDAW has positively influenced the creation of law in the DRC and has opened the door to a degree of international monitoring of the national implementation of protections against GBV and trafficking in women. Unfortunately, Law 06/018, condemning sexual slavery and other GBV, has remained unenforced in the national courts.<sup>86</sup> Moreover, since the 2006 committee review of the DRC's report, follow up monitoring has been mixed.<sup>87</sup> There is hope for greater implementation of governmental

82. Comm. on the Elimination of Discrimination Against Women, Concluding Comments of the Committee on the Elimination of Discrimination Against Women: Democratic Republic of the Congo, ¶¶ 13-14, U.N. Doc. CEDAW/C/COD/CO/5 (Aug. 25, 2006) (emphasis added).

83. CODE CIVIL [C. CIV.] art. 06/018 pmbl. (Dem. Rep. Congo).

84. The Congolese government submitted its combined sixth and seventh periodic report to the Committee, with a focus on sexual violence is the "Problem of the Moment." See 2011 Periodic Report, *supra* note 34, at 21.

85. Compare 2011 Periodic Report, *supra* note 84, at 11 (reporting on implementation of art. 6, claiming "Trafficking in women is not a widespread phenomenon in the Democratic Republic of the Congo") with *id.* at 21-22 (more than one million cases of sexual violence reported in 2009, including "[v]iolence linked to armed conflict (inter alia, rape, [and] sexual slavery)").

86. TIP REPORT 2011, *supra* note 15, at 130-31 ("Law 06/018 specifically prohibits sexual slavery, sex trafficking, child and forced prostitution . . . . The government has not applied this law to suspected trafficking cases.") (listing numerous cases where investigation ensued but the defendants escaped before trial). See *infra* Part IV for a detailed discussion of causes of impunity for perpetrators of sexual slavery in the DRC.

87. As evidenced by DRC's lack of submission of a follow up report or review at the 2008 session. See Office of the U.N. High Comm'r for Human Rights, Comm. on the Elimination of Discrimination Against Women, Follow up Report (last visited Dec. 28, 2012), <http://www2.ohchr.org/english/bodies/cedaw/followup.htm>. Yet, the DRC has submitted its 2011 Periodic Report, *supra* note 84, which will be reviewed at the 55th Session, July 2013. See Office of the U.N. High Comm'r for Human Rights, Comm. on the

protection of victims because of the CEDAW Committee, which has repeatedly requested that the DRC “submit an exceptional report on alleged rape and other forms of sexual violence perpetrated against women in the context of the conflict.”<sup>88</sup> The CEDAW Committee specifically request information about the Government’s actions to stop violence, provide remedies, and prosecute perpetrators, especially by State security forces.<sup>89</sup> Finally, a study on the impact of trafficking in women has also been requested.<sup>90</sup>

### 3. *Convention on the Rights of the Child*

Providing more specific protections for children than CEDAW provided for women, the Convention on the Rights of the Child (CRC) expressly admonishes States Parties to protect children from sexual exploitation.<sup>91</sup> The CRC also protects children from economic exploitation,<sup>92</sup> all other forms of exploitation of children,<sup>93</sup> and engagement in armed conflicts as soldiers or civilians.<sup>94</sup> Article 19 makes sweeping requirements of States Parties, asserting that members

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Elimination of Discrimination Against Women, 55th Session (July 2013) (last visited Dec. 28, 2012), <http://www2.ohchr.org/english/bodies/cedaw/cedaws55.htm>.

88. Comm. on the Elimination of Discrimination Against Women, List of Issues and Questions with regard to the Consideration of Periodic Reports, ¶ 2, U.N. Doc. CEDAW/C/COD/Q/6-7 (Nov. 2, 2012) (to be discussed at the 55th Session in July 2013).

89. *Id.* ¶¶ 1, 2, 3.

90. *Id.* ¶ 10 (“a study to investigate the scope, extent, and causes of human trafficking and forced prostitution, particularly women and girls” and also requiring development of a “comprehensive national strategy to address trafficking in women.”) It is the author’s hope that such a study will reveal to the Congolese Government the nature of conflict-based sexual slavery and other conflict-based exploitative GBV as forms of human trafficking.

91. Convention on the Rights of the Child, G.A. Res. 44/25, art. 34, U.N. Doc. A/RES/44/25 (Nov. 20, 1989)

(States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

- (a) The inducement or coercion of a child to engage in any unlawful sexual activity;
- (b) The exploitative use of children in prostitution or other unlawful sexual practices;
- (c) The exploitative use of children in pornographic performances and materials.)

[hereinafter Convention on the Rights of the Child].

92. *Id.* art. 32.

93. *Id.* art. 36.

94. *Id.* art. 38(3).

shall take *all* appropriate legislative, administrative, social and educational measures to protect the child from *all* forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or *exploitation*, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.<sup>95</sup>

Similarly, the CRC contains an article requiring state action to prevent child trafficking: “States Parties *shall take* all appropriate national, bilateral, and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.”<sup>96</sup> By their express language, both of these latter provisions have significant potential to increase the level of obligation upon states to protect children from sexual exploitation.

Supplementing the Convention, two optional protocols have been passed addressing the issue of trafficking in children, first for conscription into armed forces and, second, for sexual exploitation.<sup>97</sup> The first optional protocol to the CRC recognizes the unique vulnerabilities of children in armed conflict<sup>98</sup> and includes reporting, monitoring, and implementing provisions overseen by the Committee on the Rights of the Child.<sup>99</sup> The Preamble of the second optional protocol seemingly draws all three treaties together:

Believing that the elimination of the sale of children, child prostitution and child pornography will be facilitated by adopting a holistic approach, addressing the contributing factors, including underdevelopment, poverty, economic disparities, inequitable socio-economic structure, dysfunctioning families, lack of education, urban-rural migration, gender discrimination, irresponsible adult sexual behaviour (*sic*), harmful traditional practices, *armed conflicts* and *trafficking in children*.<sup>100</sup>

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95. *Id.* art. 19 (emphasis added).

96. *Id.* art. 35 (emphasis added).

97. Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts, G.A. Res. 54/263, U.N. Doc. A/RES/54/263 (Feb. 12, 2002) [hereinafter Conflict Protocol]; Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, G.A. Res. 54/263, U.N. Doc. A/54/263 (Jan. 18, 2002) [hereinafter Sale of Children Protocol].

98. Conflict Protocol, *supra* note 97, pmb. (“Disturbed by the harmful and widespread impact of armed conflict on children and the long-term consequences it has for durable peace, security and development . . .”).

99. *Id.* art. 8 (requiring state report on implementation within two years of state entry and ongoing reports at the request of the committee).

100. Sale of Children Protocol, *supra* note 97, pmb. (emphasis added). *See also id.* art. 2 (defining three varieties of child trafficking as: “(a) Sale of children means any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration; (b) Child prostitution means the use of a child in sexual activities for remuneration or any other form of consideration; (c) Child pornography means any representation, by whatever means, of a child engaged in real or simulated

While the second optional protocol clearly addresses only trafficking in children, as opposed to women and children, for sexual exploitation, this protocol may benefit all victims because of the detailed standards it sets for criminal investigation, prosecution, and protection of victims through national legal systems with support from the international community.<sup>101</sup> This protocol includes nearly an identical provision as the CRC regarding reporting and monitoring by the Committee.<sup>102</sup>

The DRC has actively participated in the drafting of the CRC and has signed and ratified the Convention and the two optional protocols, although it lessened the impact of the first protocol by the terms of its declaration upon its accession to the CRC.<sup>103</sup> The DRC has submitted its initial and second reports on implementation of the Convention to the Committee, with the latter being submitted ten years after the deadline.<sup>104</sup> In its second report, the Congolese government acknowledged the link made in the second optional protocol<sup>105</sup> between violence against children and all forms of sexual exploitation of women and children in times of war. It alleged that that Congolese Law 06/018, prohibiting sexual slavery, was

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explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes.”).

101. *Id.* art. 3-10 (covering procedural and substantive issues such as legislation for criminalization, jurisdiction, extradition, multilateral assistance in international investigations, restitution, protection of interests of the child in prosecution, evidentiary concerns, confidentiality, financial reparation for damages caused, and “international cooperation to assist child victims in their physical and psychological recovery, social reintegration and repatriation.”).

102. *Id.* art. 12.

103. U.N. Treaty Document Sys., Convention on the Rights of the Child (status as of Oct. 26, 2012) (signed May 20, 1990; ratified Sept. 27, 1990, without reservations), available at [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en) [hereinafter Country Declarations of the Convention on the Rights of the Child]; U.N. Treaty Document Sys., Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (status as of Oct. 26, 2012) (stating that the DRC joined by accession Nov. 11, 2001 without reservations)

(“[p]ursuant to article 3, paragraph 2, of the Protocol, the Democratic Republic of the Congo undertakes to implement the principle of prohibiting the recruitment of children into the armed forces, in accordance with Decree-Law No. 066 of 9 June 2000 on the *demobilization and rehabilitation of vulnerable groups on active service in the armed forces*, and to take all *feasible* measures to ensure that persons who have not yet attained the age of 18 years are not recruited in any way into the Congolese armed forces or into any other public or private armed group throughout the territory of the Democratic Republic of the Congo.”) (emphasis added); U.N. Treaty Document Sys., Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography (status as of Oct. 26, 2012), available at [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11-c&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-c&chapter=4&lang=en).

104. Comm. on the Rights of the Child, Consideration of Reports Submitted by States Parties Under Article 44 of the Convention: Second Periodic Report of States Parties due in 1997: Democratic Republic of the Congo, U.N. Doc. CRC/C/COD/2 (July 24, 2008) (showing report due in 1997, submitted Oct. 23, 2007).

105. *See id.*

passed in response to more than 30,000 female victims of sexual violence reported in eastern DRC between mid-2005 and mid-2006.<sup>106</sup> The government expressly stated the definitions and interpretations of offenses were directly drawn from international law sources, including the Convention on the Rights of the Child and its two optional protocols.<sup>107</sup> The report also details the passage of both new laws related to sexual violence in the DRC: (1) Law 06/018, which defines the offenses of sexual violence, and (2) Law 06/019, which proscribes expedited and improved legal responses to sexual offenses under 06/018.<sup>108</sup> Finally, the Congolese government explained the joint objectives of the national and international response to sexual violence, one of which is “[l]egal aid, by establishing legal clinics (orienting victims to judicial organs and providing legal assistance), including reform of the judicial system (*combating impunity, strengthening capacities among magistrates*).”<sup>109</sup>

Therefore, the CRC and its two optional protocols have been effective tools in influencing the Congolese laws against sexual violence and monitoring implementation of those laws to protect child victims.<sup>110</sup> Further, the CRC is an influential international law due to the almost universal national ratification of the treaties.<sup>111</sup> Finally, the monitoring committee has been active in overseeing country conditions and works closely with relevant U.N. agencies to increase the effective implementation of programs that help keep children safe from exploitation and violence.<sup>112</sup> The biggest drawback to this international tool is the narrowness of its express scope: females over age 18 are not protected.<sup>113</sup>

In summary, international human rights laws and rights-based responses have achieved some positive results in the DRC. Specifically, they have influenced the national constitution and the sexual violence laws. As demonstrated above, the U.N. peacekeeping mission has helped to monitor and draw attention to the abuses. The CEDAW and CRC Committees have

106. *Id.* ¶ 157-58.

107. *Id.* ¶ 160 (“Thus, the definition of rape now encompasses several situations which had heretofore been characterized simply as indecent assault. Mention should be made of the following new offenses: . . . forced prostitution . . . *sexual slavery* . . . sexual trafficking and exploitation of children . . .”) (emphasis added).

108. *Id.* ¶ 159-69 (explaining the broad awareness-raising and advocacy by coalitions of local, national, regional, and international bodies to curb sexual violence in eastern DRC).

109. *Id.* ¶ 164(e) (emphasis added).

110. *Id.* ¶ 160.

111. Country Declarations of the Convention on the Rights of the Child, *supra* note 103 (showing only the United States and Somalia have not ratified the CRC).

112. See Comm. on the Rights of the Child, *Consideration of Reports Submitted by States Parties under Article 44 of the Convention: Concluding Observations: Democratic Republic of Congo*, ¶¶ 41, 42, CRC/C/COD/CO/2 (Feb. 10, 2009) (urging regional and national partnership in complying with U.N. study on violence against children).

113. Conflict Protocol, *supra* note 97, pmb. (“promotion and protection of the rights of the *child*.”) (emphasis added).



also increased monitoring and reporting on GBV in eastern DRC. However, these responses are insufficient to confront the scope of the exploitation and GBV perpetrated in the eastern DRC.<sup>114</sup> As an example, human rights treaties apply only to member states, thus, their impact is limited. Moreover, the impact is substantially inhibited, even within member states, by the narrow scope of the two most relevant treaties, with one focusing on women, while the other focuses on children. These gaps in coverage illustrate that a more comprehensive and holistic approach is needed in the DRC.

Analyzing the offenses in the DRC as part of a broader scheme of trafficking will allow for an improved response bearing greater justice for victims. The “[c]omposite nature of the trafficking phenomenon guarantees that it does not sit comfortably within existing categories and boundaries of international law.”<sup>115</sup>

Thus, a multi-pronged approach, drawing on various branches of international law, such as human rights, humanitarian, human trafficking, and criminal law will enable a more effective response to sexual slavery in the DRC.

### III. RESPONDING TO SEXUAL SLAVERY IN THE DRC AS HUMAN TRAFFICKING

While there has been expansive study of the GBV perpetrated throughout the DRC,<sup>116</sup> relatively few reports or scholarly works analyze the scope of human trafficking in the context of the DRC conflict.<sup>117</sup> Similarly, according

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114. This in no way suggests that the human rights-based responses are not necessary or should be altogether avoided. In fact, they seem to play an important role in shaping national actions and enforcement. In other words, they are necessary but not sufficient. Many scholars believe that the human rights-based response and the human trafficking-based response are complementary. See Anne T. Gallagher, *Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway*, 49 VA. J. INT'L L. 789 (2009). Not all scholars believe that the approaches are compatible. See, e.g., James C. Hathaway, *The Human Rights Quagmire of “Human Trafficking,”* 49 VA. J. INT'L L. 1, 4 (2008) (“My own view, in contrast, is that the fight against human trafficking is more fundamentally in tension with core human rights goals than has generally been recognized.”).

115. THE INTERNATIONAL LAW OF HUMAN TRAFFICKING, *supra* note 66, at 8-9 (“[I]nternational criminal law, international humanitarian law, labor law, migration law, and refugee law are all relevant.”).

116. Gaëlle Breton-Le Goff, *Ending Sexual Violence in the Democratic Republic of the Congo*, 34 FLETCHER F. WORLD. AFF. 13 (2010) [hereinafter *Ending Sexual Violence in the Democratic Republic of the Congo*]; Hearing: *Confronting Rape*, *supra* note 32 (describing U.S. Senate hearing on combatting rape as a tool of war in the DRC and Darfur, Sudan); Manjoo & McRath, *supra* note 11, at 30 (“The reality of GBV in conflict and post-conflict situations demands that the focus now shift toward the effective implementation of legal instruments that exist to combat violence against women.”); Navanethem Pillay, *Sexual Violence: Standing by the Victim*, 42 CASE W. RES. J. INT'L L. 459 (2009).

117. *But see* Manjoo & McRath, *supra* note 11, at 12-13 (preliminarily suggesting that GBV could include trafficking, abduction, and slavery in conflict zones). Further, several

to the author of the first legal treatise on human trafficking, little research exists to show that trafficking in the context of armed conflict is prohibited by international law.<sup>118</sup>

Yet, according to emerging international and Congolese national standards, much of the GBV occurring in the DRC is also human trafficking;<sup>119</sup> as such, the response to GBV in the DRC should employ the methods and tools of international trafficking in persons laws to prevent violations, prosecute the perpetrators, and protect the victims. Acknowledging that trafficking in persons is related to human rights and that national governments must combat the crime, the Human Rights Council appointed a Special Rapporteur on Trafficking in Persons. The Special Rapporteur has stated that “[u]nless Governments and law enforcement agencies take the necessary steps to address trafficking in persons from both a human rights as well as a law enforcement perspective, the majority of trafficking cases will continue to go uncounted, the victims uncared for, and the traffickers unpunished.”<sup>120</sup> The Trafficking Protocol expressly acknowledges the deficiencies of international human rights instruments in responding to crimes of trafficking: “*taking into account* the fact that, despite the existence of ‘a variety of’ international instruments containing rules and practical measures to combat exploitation of persons, especially women and children, there is no universal instrument that addresses all aspects of trafficking in persons.”<sup>121</sup>

#### A. Prevalence of Human Trafficking in the DRC

Based on the history of the abolition of the slave trade, the global community has affirmed its commitment to end trafficking in persons and has dedicated the resources to sustain the commitment.<sup>122</sup> Since 2000, international law has defined human trafficking as:

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nongovernmental reports describe human trafficking in the context of the Congo conflict. See, e.g., *The Congo Report: Slavery in Conflict Minerals*, FREE THE SLAVES (June 2011), www.freetheslaves.net [hereinafter FREE THE SLAVES].

118. See THE INTERNATIONAL LAW OF HUMAN TRAFFICKING, *supra* note 66, at 209-10; “A consideration of trafficking in international humanitarian law (IHL) and international criminal law (addressing individual criminal responsibility for the most serious of all crimes often, but not always, associated with situations of armed conflict) must therefore proceed indirectly via an examination of related prohibitions including those that cover practices such as enslavement and sexual violence.” *Id.*

119. See DONJA DE RUITER, SEXUAL OFFENSES IN INTERNATIONAL CRIMINAL LAW 7 (2011); “GBV not only involves rape, but also other forms of violence, such as . . . sex trafficking” and “[s]exual violence may also evidence the ownership and control necessary to establish the crime against humanity of slavery.” *Id.*

120. U.N. Doc. A/HRC/10/16, *infra* note 137, at 7, ¶ 13.

121. Trafficking Protocol, *supra* note 9, at pmb1.

122. See generally 1926 Slavery Convention, *infra* note 178 and text at 40.

[t]he recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour (*sic*) or services, slavery or practices similar to slavery, servitude or the removal of organs.<sup>123</sup>

The United States has narrowed the international definition of human trafficking to specify the kinds of exploitation of human beings using the means of “force, fraud or coercion.”<sup>124</sup>

Human trafficking often occurs during and after conflicts, and international laws were developed to confront this sad reality. For instance, in 2005, the U.S. government recognized that during and after armed conflict, “indigenous populations face increased security challenges . . . which result in myriad forms of violence, including trafficking for sexual and labor exploitation.”<sup>125</sup> This recognition conforms with scholarly works that demonstrate the connection between conflict-driven instability and criminal enterprises like human trafficking.<sup>126</sup> Because the international human trafficking laws took into account enforcement in conflict zones when developed, these laws may be aptly applied to protect victims suffering in situations of conflict. Moreover, the tools go beyond only protection for victims of sexual slavery; rather, they comprehensively apply to all forms and stages of human trafficking in every country.<sup>127</sup>

### *1. Trafficking in persons in DRC: Trafficking for sex and labor exploitation*

Before turning to sexual slavery, the primary type of human trafficking examined in this article, it is important to note that many other forms of human trafficking are also prevalent in the DRC today. Some of these types

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123. Trafficking Protocol, *supra* note 9, at art. 3(a).

124. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000).

125. Unless the victim is a minor and the exploitation is sexual, then no proof of force fraud or coercion is required. Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558 (2006).

126. *See, e.g.,* Yoo, *supra* note 22, at 107 (“The lack of central control can also allow criminal organizations to flourish, leading to the spread of drug smuggling, small arms trade, and human trafficking.”); *see also* Manjoo & McRaith, *supra* note 11, at 12-13 (suggesting that GBV after conflicts include “slavery, rape, forced impregnation/miscarriages, [and] kidnapping/trafficking.”).

127. Trafficking Protocol, *supra* note 9, at pmb. (“[E]ffective action to prevent and combat trafficking in persons, especially women and children, requires a *comprehensive international approach* in the countries of origin, transit, and destination”) (emphasis added).

of trafficking include labor trafficking in illicit mining projects, forced conscription into armed forces, and forced prostitution.<sup>128</sup> Furthermore, human trafficking assumes a wide range of forms, as evidenced by the international definition of human trafficking. This definition indicates that both sexual and labor services can constitute human trafficking when the trafficker has an exploitative purpose.<sup>129</sup> These forms of human trafficking are, in fact, interrelated: “individuals may be enslaved within more than one type [of trafficking] simultaneously. It is not uncommon, for example, for members of armed groups to force an individual to work in the mines during the day and sexually exploit the same person at night.”<sup>130</sup>

Labor trafficking of civilians by armed groups for the production and transportation of minerals is rife in eastern DRC.<sup>131</sup> In the mining regions of the Kivus and Katanga Provinces, for example, a 2010 report found that of 742 persons working in and around the mines, more than 40 per cent were enslaved, with some victims being as young as five years old.<sup>132</sup> According to the United Nations, in the Rwandan-held mines, civilians are “conscripted by Rwandan forces to carry out mining under forced labour conditions.”<sup>133</sup> Nongovernmental research studies indicate, however, that even after the government declared mining illegal in DRC, in the Kivus, “FARDC soldiers reportedly initiated forced recruitment of miners in nighttime raids on the town of Ndjingala.”<sup>134</sup> The penalties for slaves unwilling or unable to work for the Congolese Army in the mines ranges from torture

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128. TIP REPORT 2011, *supra* note 15, at 129-30. Compare TIP REPORT 2012, *supra* note 16, at 125-27 (showing substantial similarity to 2011 country narrative), available at <http://www.state.gov/documents/organization/192594.pdf>.

129. See Trafficking Protocol, *supra* note 9, at art. 3 (stating the international definition of human trafficking).

130. FREE THE SLAVES, *supra* note 117, at 11.

131. See generally U.N. S.C. Panel of Experts on the Democratic Republic of the Congo, Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, 18-19, S/2002/1146 (Oct. 16, 2002) [hereinafter *Illegal Exploitation Report*].

132. Even children are forced to work in the mines and to militarily defend the territory of the Rwandan forces. See, e.g., Free the Slaves, *supra* note 117, at 10-12 (reporting that two thirds of the children interviewed near the mines were enslaved).

133. *Illegal Exploitation Report*, *supra* note 131; see also Group of Experts Interim Report, *supra* note 6, at ¶ 2. The rebellion is led by General Ntaganda, who is wanted by the ICC for crimes against humanity, including enslavement and sexual slavery. See *Rwanda Defence [sic] Chief Leads DR Congo rebels*, *UN Report Says*, BBC NEWS (Oct. 17, 2012), <http://www.bbc.co.uk/news/world-africa-19973366>; see also TIP REPORT 2011, *supra* note 15, at 125 (armed forces in eastern DRC “routinely used threats and coercion to force men and children to mine for minerals [and] turn over their mineral production”).

134. FREE THE SLAVES, *supra* note 117, at 12-13. Note: FARDC are the national Congolese Army.

to steep fines, which often lead to prolonged slavery through debt-bondage.<sup>135</sup>

According to the U.S. State Department's 2011 Trafficking in Persons (TIP) Report and nongovernmental sources, additional forms of internal human trafficking exist in the DRC, such as child slavery to repay family debts,<sup>136</sup> forced prostitution near mines and internally displaced persons camps,<sup>137</sup> forced labor for armed forces,<sup>138</sup> and forced conscription of men, women, and children into the armed forces.<sup>139</sup> The State Department repeatedly emphasized in its 2011 TIP Report that "[e]lements of the national army increasingly perpetrated severe human trafficking abuses during the year . . ." <sup>140</sup> The offenses perpetrated by the national army in 2010 included labor trafficking, forced conscription of child soldiers, and sex trafficking, *i.e.*, sexual slavery, in the wake of massacres.<sup>141</sup>

The issue of labor trafficking in the "conflict minerals" industry is a good example of the strong political will and public awareness about trafficking in persons. The exertion of political will resulted in legislative and financial interventions by the United Nations and the U.S. government to stop labor trafficking in mining to fund the conflict in the DRC.<sup>142</sup>

135. *Id.*; see also TIP REPORT 2011, *supra* note 15, at 129: "miners . . . are exploited in situations of debt bondage... forced to continue to work to repay constantly accumulating debts that are virtually impossible to repay."

136. TIP REPORT 2011, *supra* note 15, at 129.

137. See, *e.g.*, *id.* ("Congolese girls are forcibly prostituted in tent- or hut- based brothels or informal camps- including in markets and mining areas.").

138. See *id.* ("between July 30 and August 2010, a coalition of [armed militias] and FARDC abducted 116 civilians from 13 villages in the Walikale area and subjected them to forced labor.").

139. See *id.* ("In 2010, the FARDC actively recruited, at time through force, men and children for use as combatants... [f]rom September to December 2010... there were 121 confirmed cases of unlawful child soldier recruitment . . .").

140. *Id.* at 130.

141. TIP REPORT 2011, *supra* note 15, at 129-32.

142. See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010). The Act states:

It is the sense of Congress that the exploitation and trade of conflict minerals originating in the Democratic Republic of the Congo is helping to finance conflict characterized by extreme levels of violence in the eastern Democratic Republic of the Congo, particularly sexual- and gender-based violence, and contributing to an emergency humanitarian situation therein, warranting the provisions of section 13(p) of the Securities Exchange Act of 1934, as added by subsection (b).

*Id.* sec. 1502(a). On the United Nations response, see S.C. Res. 1457, ¶ 2, U.N. Doc. S/RES/1457(2003) (Jan. 24, 2003) ("Strongly condemn[ing] the illegal exploitation of natural resources of the Democratic Republic of the Congo"). This resolution was based on a report by a panel of experts, commissioned by the U.N. Secretary-General, to study and report on the degree and consequences of exploitation of mineral resources in the DRC. *Id.* ¶ 1. See Illegal Exploitation Report, *supra* note 131.

Significant public pressure precipitated these responses,<sup>143</sup> and the result was greater enforcement of existing laws and development of new international responses.<sup>144</sup> Public pressure of this level could also lead to greater enforcement of laws condemning other forms of human trafficking, such as sexual slavery.

## 2. *Sexual Slavery as a form of human trafficking and GBV*

Since the beginning of the war in 1996, sexual slavery has been prevalent in the DRC.<sup>145</sup> Often, young children are raped before being conscripted into the armed forces only to be forced into ongoing sexual violence after conscription.<sup>146</sup> The United Nations Commission on Human Rights established the existence of sex slavery during armed conflict in the Special Rapporteur's 1998 report.<sup>147</sup> In 2003, the Commission reported the high

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143. *Conflict Minerals: Overview*, ENOUGH PROJECT, <http://www.enoughproject.org/conflict-minerals> (last visited Apr. 22, 2012); *Conflict Minerals*, RAISE HOPE FOR CONGO, <http://www.raisehopeforcongo.org/content/initiatives/conflict-minerals> (last visited Apr. 22, 2012); *Congo Week Showcases Conflict Minerals Debate*, CONFLICT MINERALS (Nov. 7, 2012), <http://conflictminerals.org/>; *Conflict Minerals*, GLOBAL WITNESS, <http://www.globalwitness.org/campaigns/conflict/conflict-minerals> (last visited Apr. 22, 2012); Mary Beth Sheridan, *U.S. Financial Reform Bill Also Targets 'Conflict Minerals' From Congo*, THE WASHINGTON POST, Jul. 21, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/20/AR2010072006212.html>. Enough: The project to end genocide and crimes against humanity, *Conflict minerals*, official website at <http://www.enoughproject.org/conflict-minerals> (last visited April 22, 2012); Raise Hope for Congo, official website at <http://www.raisehopeforcongo.org/content/initiatives/conflict-minerals> (last visited April 22, 2012); Conflict Minerals: The Truth Underlying the Systematic Looting of Congo's Minerals, official website at <http://conflictminerals.org/> (published Nov. 7, 2011) (last visited April 22, 2012); Global Witness: Conflict Minerals, official website at <http://www.globalwitness.org/campaigns/conflict/conflict-minerals> (last visited April 22, 2012); Mary Beth Sheridan, "U.S. financial reform bill also targets 'conflict minerals' from Congo," in THE WASHINGTON POST (Jul. 21, 2010), available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/20/AR2010072006212.html> (last visited April 22, 2012).

144. It must be noted that many critique the response of the United States to the issue of conflict minerals. See, e.g., David Aronson, *How Congress Devastated Congo*, N.Y. TIMES, Aug. 7, 2011, available at [www.nytimes.com/2011/08/08/opinion/how-congress-devastated-congo.html?\\_r=2&pagewanted=print](http://www.nytimes.com/2011/08/08/opinion/how-congress-devastated-congo.html?_r=2&pagewanted=print) (asserting that "[t]he provision came about in no small part because of the work of high-profile advocacy groups like the Enough Project and Global Witness, which have been working for an end to what they call 'conflict minerals.' Unfortunately, the Dodd-Frank law has had unintended and devastating consequences . . .").

145. See *Ending Sexual Violence in the Democratic Republic of the Congo*, *supra* note 116, at 16-17.

146. *Id.* ("Sexual slaves were very badly treated; they were often tied up, locked in huts or holes in the ground filled with water, and frequently punished.").

147. Special Rapporteur, U.N. Comm'n on Human Rights. *Contemporary Forms of Slavery, Systematic Rape, Sexual Slavery and Slavery-Like Practices During Armed Conflict: Final Report submitted by Ms. Gay J. McDougall*, Special Rapporteur, Sub-Comm'n on

incidence and destabilizing impact of sexual slavery in the armed conflict in DRC.<sup>148</sup>

While all forms of GBV ravage society and subjugate its victims,<sup>149</sup> sexual slavery has the ultimate destabilizing impact by displacing victims from their communities, depriving them of their liberty, and then repeatedly degrading them with sexual violence. Sexual slavery has imposed years of bondage on many women and young girls<sup>150</sup> throughout the conflict. In eastern DRC, virtually all armed factions in the region have perpetrated sexual slavery.<sup>151</sup>

One poignant example of sexual slavery in the DRC is the story of Sophie, a child abducted at the age of thirteen. A group of soldiers held her at gunpoint during a village massacre forced her to become their “wife,” raping her each night and forcing her into daily labor servitude.<sup>152</sup> Under the international definition of human trafficking, it is clear that Sophie was (a) recruited, transported, and harbored, (b) by use of force, (c) for the purpose of exploitation, including sexual slavery and forced labor. Thus, through her subjugation to sexual and labor slavery, Sophie became a victim of human trafficking.

The international community has declared sexual slavery to be a manifestation of trafficking in persons<sup>153</sup> and an international crime.<sup>154</sup> Upon the founding of the International Criminal Court (ICC) with the ratification of the Rome Statute, a clear definition of sexual slavery emerged as both a crime against humanity and a war crime.<sup>155</sup> The ICC Elements of Crimes—like an international penal code exclusively governing genocide, crimes of war, and crimes against humanity—defines the elements of sexual slavery as:

Prevention of Discrimination and Protection of Minorities, U.N. Doc. E/CN. 4/Sub. 2/1998/13 (June 22, 1998).

148. Special Rapporteur, *Rep. on the Situation of Human Rights in the Democratic Republic of the Congo, Submitted by the Special Rapporteur Ms. Iulia Motoc, in Accordance with Comm’n on Human Rights Res.*, U.N. Comm’n on Human Rights, U.N. Doc. E/CN.4/2003/43 (Apr. 14, 2003).

149. Mapping Exercise, *supra* note 31, at 318, 329.

150. “Used as an instrument of terror, on the basis of ethnicity or to torture and humiliate, sexual violence often targeted young girls and children, some no more than five years old.” *Id.* at 331, ¶ 669.

151. *Id.* at 321-22, ¶¶ 641-42 (“Children were particularly affected by slavery and sexual slavery, a practice allegedly widespread among the Mayi-Mayi, ex-FAR/Interahamwe/ALiR/FDLR, UPC, and armed Ugandan (ADF/NALU) and Burundian (CNDD-FDD and FNL) groups.”). In recent years, the Congolese Army has increasingly perpetrated sexual violence in eastern DRC. *See* Wallström, *supra* note 34.

152. FREE THE SLAVES, *supra* note 117, at 19.

153. Trafficking in persons is also known by the name “human trafficking.”

154. *See* Rome Statute of the International Criminal Court, A/CONF.183/9, 1998, arts. 7(1)(g), 8(2)(b)(xxii), 8(2)(e)(vi), (July 1, 2002) [hereinafter Rome Statute].

155. *Id.*; *see also* ICC Elements of Crimes, *supra* note 15, Add. Pt. II.

(1) the perpetrator exercised any or all powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering a persons or persons, or *by imposing on them a similar deprivation of liberty* [and] (2) The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.<sup>156</sup>

Due to the contentions of the drafters about the seeming requirement of commercial transaction in order to constitute sexual slavery, a footnote was added to the first element, stating:

It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices similar to Slavery of 1956. It is also understood that the conduct described in this element *includes trafficking in persons, particularly women and children*.<sup>157</sup>

Under international criminal law, the elements of sexual slavery may be simplified to: (1) the enslavement of a person, (2) which caused the victim to engage in sexual acts.<sup>158</sup> Furthermore, the U.N. Human Rights Council's definition of the scope of human trafficking includes sexual slavery of women and children in armed conflict.<sup>159</sup>

In 2005, the newly ratified Constitution of the DRC incorporated the international legal understandings about sexual slavery, stating: "sexual violence committed against any person *with the intention to destabilize* or to displace a family and to make a whole people disappear is established as a crime against humanity."<sup>160</sup> Moreover, Article 16 prohibits all types of slavery: "No one may be held in slavery or in a similar condition."<sup>161</sup> The Constitution, thus, appears to forbid slavery and adopt the international definitions contained in the treaties that it has ratified.

156. ICC Elements of Crimes, *supra* note 15, art. 7(1)(g)-2 (emphasis added).

157. *Id.* art. 7(1)(g)-2 n. 18 (emphasis added); *see also* Valerie Oosterveld, *Sexual Slavery and the International Criminal Court: Advancing International Law*, 25 MICH. J. INT'L L. 605, 642 (2004).

158. DE RUITER, *supra* note 119, at 14. It should be noted, however, that under the Rome Statute, there is a distinction between "enslavement," categorized as a crime against humanity, and "sexual slavery," categorized as both a crime against humanity and a war crime. *See* THE INTERNATIONAL LAW OF HUMAN TRAFFICKING, *supra* note 66, at 213-14.

159. Special Rapporteur on Trafficking in Persons, Especially Women and Children, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, ¶ 16(1), U.N. Doc. A/HRC/10/16 (Feb. 20, 2009) (Joy Ngozi Ezeilo) [hereinafter U.N. Doc. A/HRC/10/16] (defining human trafficking to include "participation in armed conflict- mercenaries/ child soldiers, sex slaves").

160. CONSTITUTION OF THE DEMOCRATIC REPUBLIC OF THE CONGO, *supra* note 72, art. 15 (emphasis added).

161. *Id.* art. 16.



Similarly, Law 06/018<sup>162</sup> integrates the international definitions from the ICC Elements of Crimes, and expressly criminalizes forced prostitution,<sup>163</sup> sexual slavery,<sup>164</sup> forced marriage,<sup>165</sup> sex trafficking and exploitation of children,<sup>166</sup> and child prostitution.<sup>167</sup> Each crime in Law 06/018 has a unique definition under national and international law, although all are crimes of sexual violence that also are acts of human trafficking. Congolese law provides harsh criminal sanctions for commission of sex trafficking, including sexual slavery.<sup>168</sup>

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162. *Loi no. 06/018 Modifiant et Complétant le Décret du 30 Janvier 1940 Portant Code Penal Congolais*, 15 Journal Officiel de la République Démocratique du Congo (Jul. 20, 2006) [hereinafter Law 06/018].

163. *Id.* art.3, ¶ 3. Forced prostitution is defined as:

Quiconque aura amené une ou plusieurs personnes à accomplir un acte ou plusieurs actes de nature sexuelle, par la force, par la menace de la force ou de la coercition ou encore en profitant de l'incapacité desdites personnes à donner librement leur consentement en vue d'obtenir un avantage pécuniaire ou autre.

*Id.* (paraphrased translation: Whoever uses force, threat of force, coercion, or exploitation of a position of vulnerability to cause one or more persons to commit one or more acts of a sexual nature against such person or persons will and for the pecuniary gain of another person.) *Compare*, with ICC Elements of Crimes, *supra* note 15, art. 7(1)(g)-3:

1. The perpetrator caused one or more persons to engage in one or more acts of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.

2. The perpetrator or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature.

164. Law 06/018, *supra* note 162, art. 3, ¶ 5. Sexual slavery is defined under national law as:

[Q]uiconque aura exercé un ou l'ensemble des pouvoirs associés au droit de propriété sur une personne, notamment en détenant ou en imposant une privation similaire de liberté ou en achetant, vendant, prêtant, troquant ladite personne pour des fins sexuelles, et l'aura contrainte à accomplir un ou plusieurs actes de nature sexuelle.

*Id.* (paraphrased translation of the definition is: Whoever exercises independently or in association with others the right of property over a person, namely detention or a similar deprivation of liberty, such as by purchasing, selling, lending or trading a person for sexual ends, and who caused the person to carry out one or more sexual acts); *contra* ICC Elements of Crimes, *supra* note 15 and text at page 30. It is clear from this comparison that the DRC adopted the definition of the ICC almost verbatim in Law 06/018 defining sexual slavery.

165. Law 06/018, *supra* note 162, art. 3, ¶ 6.

166. *Id.* art. 3, ¶ 10.

167. *Id.* art. 3, ¶ 14.

168. TIP REPORT 2011, *supra* note 15, at 130-31.

Yet, in 2007, after the passage of the new constitution and sexual violence laws, sexual slavery continued unabated in the eastern DRC.<sup>169</sup> In the village of Kaniola, located in the South Kivu province of the DRC, a group of Rwandan soldiers came from the neighboring forest to attack a family, looting their home and abducting three teenaged girls, including one named Nadine.<sup>170</sup> The three girls were bound and hauled into the forest, forced to carry the possessions stolen from their home and told that they will soon become the soldiers' "wives."<sup>171</sup> Congolese soldiers, in the company of the girls' brother and father, burst in and rescued them from rape and servitude.<sup>172</sup> Sadly, the Rwandan soldiers returned for Nadine in six months. She never returned home after that time.<sup>173</sup> One month later, the soldiers massacred eighteen people in Kaniola; that day, "twenty-five [were] tied up and taken into the forest," some as young as twelve years old.<sup>174</sup> However, that time, surviving civilians said that the perpetrators of murder and abduction were soldiers from the Congolese Army.<sup>175</sup>

In addition to the continuing perpetration of abuses by the army, governmental barriers to justice still exist. The International Federation for Human Rights, represented by various Congolese civil society organizations, asserts that the government barriers to accessing justice remain high: "legal costs are often very high; arrest warrants are often not executed; especially those against high-ranking soldiers in the national army; and the freedom of the accused can be bought or negotiated throughout the justice process, from the police station, to the courts, to the prisons."<sup>176</sup> Furthermore, this civil society association asserts that, in order to bring justice and reconciliation to victims of sexual violence in the DRC,

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169. 2012 HRW Country Summary, *supra* note 2, at 2-3.

170. LISA J. SHANNON, *A THOUSAND SISTERS: MY JOURNEY TO THE WORST PLACE ON EARTH TO BE A WOMAN* 261-62 (2011).

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.* at 302-03.

175. *Id.*; see also Magellan Luanda Mungabo, *DR Congo: A Detailed Report of a Visit to the Site of the Kaniola Massacre*, AFRICA FILES (Marie Dowler, trans., June 7, 2007), <http://www.africafiles.org/printableversion.asp?id=15323> ("The sight is sickening and revolting: skulls smashed, throats cut, bellies cut open, women raped with knives, mutilated bodies soaked in blood, the atrocity of men, women, and children forced into perverse sexual acts or carried off into the Mugaba forest towards Ninja in the Kabare region."). According to human rights personnel on the ground in Kaniola, there is "an obvious complicity between the Congolese authorities and these foreign troops operating in South Kivu." *Id.* Shortly after the massacre, evidence emerged that the Congolese Army had been collaborating with the FDLR and other militia to accomplish local objectives in the Kivus. See *DR Congo Hutu Front 'Helps' Army*, BBC NEWS, Oct. 2, 2007, available at <http://news.bbc.co.uk/2/hi/africa/7023708.stm>.

176. INTERNATIONAL FEDERATION FOR HUMAN RIGHTS [FIDH], *DEMOCRATIC REPUBLIC OF THE CONGO: BREAKING THE CYCLE OF IMPUNITY* 10 (2008).

“the international community [must] call[] upon and support[] the Congolese authorities to fight impunity for the most serious crimes.”<sup>177</sup>

As shown above, sexual slavery is a form of human trafficking and laws criminalizing it exist in the DRC, but are not currently being enforced. The next section will demonstrate that greater enforcement of laws, monitoring, and support could be provided through international human trafficking laws to enable national and local governments to achieve justice and protection for all victims of sexual slavery.

### B. International Human Trafficking Laws

Beginning with the Slavery Convention of 1926, the world has acknowledged the need to abolish slavery as a pressing international issue. Early on, the international community so valued the purpose of “prevent[ing] and suppress[ing] the slave trade” and “bring[ing] about, progressively and as soon as possible, the complete abolition of slavery in all its forms”<sup>178</sup> that all signatories undertook the commitment to provide assistance to all other nations in abolishing slavery and the slave trade.<sup>179</sup> In 1957, the Supplementary Slavery Convention came into force “to intensify national as well as international efforts towards the abolition of slavery, the slave trade and institutions and practices similar to slavery.”<sup>180</sup> While modern definitions of slavery have evolved, the spirit of abolishing slavery and the slave trade, in all its forms, is equally clear in the modern international law against human trafficking: The Trafficking Protocol supplementing the Convention on Transnational Organized Crime (COTC).<sup>181</sup>

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177. *Id.* at 12.

178. 1926 Slavery Convention, art. 2, Sept. 25, 1926, available at <http://www2.ohchr.org/english/law/slavery.htm> (entered into force Mar. 9, 1927) [hereinafter 1926 Slavery Convention].

179. *Id.* art. 4 (“The High Contracting Parties shall give to one another *every assistance* with the object of securing the abolition of slavery and the slave trade.”) (emphasis added).

180. Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery pmb., Sept. 7, 1956, 3822 U.N.T.S. 40 (entered into force Apr. 30, 1957).

181. Trafficking Protocol, *supra* note 9, at pmb. To date, there are 124 parties to the Trafficking Protocol, committing that “State parties shall take or strengthen measures . . . to alleviate the factors that make persons, especially women and children, vulnerable to trafficking.” *Id.* at Art. 9(4); see U.N. Office on Drugs and Crime, Signatories to the CTOC Trafficking Protocol: Status as at Sept. 26, 2008 at 11:45 A.M., <http://www.unodc.org/unodc/en/treaties/CTOC/countrylist-traffickingprotocol.html> (last visited Dec. 27, 2012) [hereinafter Signatories to the Trafficking Protocol].

### 1. *The Trafficking Protocol*

The Trafficking Protocol is an international convention that has become the preeminent tool in international law that defines and addresses human trafficking holistically.<sup>182</sup> Indeed, the Trafficking Protocol developed out of “the need for a holistic approach where the crime control aspects of trafficking were addressed along with traditional human rights concerns.”<sup>183</sup> The threefold purpose of the Trafficking Protocol is to (1) “prevent and combat trafficking in persons, paying particular attention to the protection of women and children”; (2) “protect and assist victims of [] trafficking”; and (3) facilitate cooperation among the States.<sup>184</sup> To implement these purposes, it specifically requires all States Parties to criminalize all forms of human trafficking;<sup>185</sup> protect victims under domestic law;<sup>186</sup> prevent vulnerability and revictimization through trafficking;<sup>187</sup> and “provide or strengthen training for law enforcement, immigration, and other relevant personnel aimed at preventing trafficking as well as prosecuting traffickers and protecting the rights of victims.”<sup>188</sup> Thus, the primary responsibility to enforce the protocol rests upon the member states.

The Trafficking Protocol imposes obligations on States Parties to take positive steps, including “legislative reform, *provision of remedies*, and *protection*” to actually reduce the incidents of trafficking in persons within state borders.<sup>189</sup> Specifically pertinent to decreasing legal impunity for GBV trafficking offenses, under international law, states must provide reparation or redress to individual victims where the State has been “directly or

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182. THE INTERNATIONAL LAW OF HUMAN TRAFFICKING, *supra* note 66, at 78.

183. *Id.*

184. Trafficking Protocol, *supra* note 9, art. 2; *see also* THE INTERNATIONAL LAW OF HUMAN TRAFFICKING, *supra* note 66, at 79. The Trafficking Protocol’s approach is often referred to as the Three P’s: Prevention, Prosecution, and Protection.

185. Trafficking Protocol, *supra* note 9, art. 5 (including commission of trafficking, as well as attempt, conspiracy and accomplice to commit crimes of trafficking).

186. *Id.* art. 6 (including physical safety and “ensur[ing] that its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damages suffered.”).

187. *Id.* art. 9(1).

188. THE INTERNATIONAL LAW OF HUMAN TRAFFICKING, *supra* note 66, at 88. *See also* Trafficking Protocol, *supra* note 9, art. 10(2).

189. THE INTERNATIONAL LAW OF HUMAN TRAFFICKING, *supra* note 66, at 273 (emphasis added); *see also* Anne T. Gallagher, *Commentary to the Recommended Principles and Guidelines on Human Rights and Human Trafficking*, 75-79, SELECTEDWORKS, Dec. 2010, available at [http://works.bepress.com/anne\\_gallagher/15](http://works.bepress.com/anne_gallagher/15) [hereinafter *Commentary*] (commentary on Principle 2). These obligations differ from the international human rights-based obligations on states to “take all appropriate . . . measures” to, for example, “protect the child from all forms of . . . exploitation.” Convention on the Rights of the Child, *supra* note 91, art. 19(2) (requiring states to “provide necessary support for the child,” but criminal punishment is not a component of the obligations imposed).

indirectly involved” in committing the crime.<sup>190</sup> Significantly, under the international Trafficking Protocol, this could involve either the state ensuring compensation from the offender or “requir[ing] the State itself to provide compensation, particularly in situations where the state has fallen short of the due diligence standard when it comes to preventing trafficking, investigating and prosecuting traffickers, and protecting victims.”<sup>191</sup> In summary, international human trafficking law defines wrongful acts for which States are accountable, including failure to prevent and protect victims, and also obligates cessation and reparation.<sup>192</sup>

Enforcement of the Trafficking Protocol among member states remains somewhat weak, but is rapidly improving. For instance, the initial member state compliance mechanisms contained in the Trafficking Protocol included only negotiation and arbitration of disputes between states within six months of a request for arbitration of the dispute.<sup>193</sup> However, the Protocol supplements the COTC, which established a Conference of Parties (COP) to “improve the capacity of States to combat transnational organized crime and to promote and review the implementation of the Convention.”<sup>194</sup> The COP, which is overseen by the U.N. Office on Drugs and Crime (UNODC), may increase implementation of the COTC by reviewing state actions and providing recommendations; facilitating trainings and providing technical assistance; and overseeing the interpretation of the COTC and its protocols.<sup>195</sup> Thus, the COP may request reports from States Parties, hold regular meetings of member states, and compile a Global Report on trafficking.<sup>196</sup> Since the first session of the COP, the compliance measures contained in the Convention have also been applied to all of its supplemental protocols, including the Trafficking Protocol.<sup>197</sup> Even given

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190. THE INTERNATIONAL LAW OF HUMAN TRAFFICKING, *supra* note 66, at 369 (“if a State is directly or indirectly involved in the violation of an individual’s right then that same State must make a genuine attempt to provide the injured person with some measure of reparation or redress.”).

191. *Id.*; *see also id.* at 223-31 (commentary on Principle 17).

192. *See* THE INTERNATIONAL LAW OF HUMAN TRAFFICKING, *supra* note 66, at 222-23. The reparation required by the Trafficking Protocol would only apply to states to whom the trafficking can be attributed and who breached their due diligence requirement to protect. *Id.* at 223.

193. Trafficking Protocol, *supra* note 9, art. 15(1)-(2).

194. Convention on Transnational Crime, G.A. Res. 55/25, art. 32(1) (Jan. 8, 2001), A/RES/55/25 [hereinafter COTC].

195. *Id.* art. 32(3); *see also* THE INTERNATIONAL LAW OF HUMAN TRAFFICKING, *supra* note 66, at 467-73 (analyzing compliance measures within the Convention and its Protocols).

196. *See id.* at 467. One edition of the Global Report on Trafficking has been issued thus far. *See* U.N. Office on Drugs and Crime, Global Report on Trafficking in Persons, at 122 (2009) [hereinafter U.N. Global Report on Trafficking].

197. Conference of Parties to the United Nations Convention on Transnational Organized Crime, Vienna, Austria, June 28 – 8 July, 2004, *Report of the Conference of Parties to the United Nations Convention Against Transnational Organized Crime on its*

the application of these compliance measures to the Trafficking Protocol, experts assert that enforcement is weak because “the reporting procedure is a relatively crude mechanism for promoting or measuring compliance.”<sup>198</sup>

In an effort to improve implementation of the Trafficking Protocol by member states, the UNODC commissioned a working group on trafficking in persons in 2009. The working group has met twice and issued a report with its recommendations following its January 2010 meeting.<sup>199</sup> The recommendations included admonitions to all States Parties to respect the human rights of victims and to “increase their efforts to investigate and prosecute cases involving trafficking in persons.”<sup>200</sup> Although the Trafficking Protocol has only been in force for less than a decade the efforts at implementation have increased rapidly through monitoring by the COP and the working group’s interpretation of the States Parties’ obligations.<sup>201</sup>

In 2005, the DRC became a party to the CTOC and Trafficking Protocol through accession, making no reservations to either instrument.<sup>202</sup> The DRC submitted its initial state report to the COP in 2008, answering the trafficking questionnaire regarding appropriate legislation criminalizing trafficking in persons.<sup>203</sup> The DRC government’s responses at that time indicated the existence of domestic legislation criminalizing all actions under the protocol, except for recruiting for exploitation.<sup>204</sup> While the 2009

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*First Session, Held in Vienna from Jun. 28 to Jul. 8, 2004*, 5, U.N. Doc. CTOC/COP/2004/6 (Sept. 23, 2004).

198. THE INTERNATIONAL LAW OF HUMAN TRAFFICKING, *supra* note 66, at 469 (using an assessment based on lack of opportunity to dialogue about state reports between states parties and COP). Furthermore, there is no individualized complaint mechanism under the CTOC and the “prospect of States Parties to the [CTOC] and its Trafficking Protocol being made subject to a rigorous oversight mechanism- or even a procedure capable of evaluating their performance of key obligations- appears to be remote.” *Id.* at 472.

199. See Conference of the Parties to the United Nations Convention on Transnational Organized Crime, Vienna, Austria, Jan. 27-29, 2010, *Report on the meeting of the Working Group on Trafficking in Persons held in Vienna, January 27 to January 29, 2010*, U.N. Doc. COTC/COP/WG.4/2010/6 (Feb. 17, 2010).

200. *Id.* ¶¶ 12-13.

201. See THE INTERNATIONAL LAW OF HUMAN TRAFFICKING, *supra* note 66, at 470.

202. Signatories to the Trafficking Protocol, *supra* note 181 (showing that the DRC became a state party on Oct. 28, 2005, by accession, making no reservations).

203. Report of the Secretariat, Conference of the Parties to the Convention Against Transnational Organized Crime, *Implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime: Consolidated Information Received from States for the First Reporting Cycle*, Annex, U.N. Doc. CTOC/COP/2005/3/Rev.2 (Aug. 28, 2008) [hereinafter *Implementation of the Protocol 2008*]; see also Note by the Secretariat, Conference of the Parties to the U.N. Convention Against Transnational Organized Crime, *Information Submitted by States in Their Responses to the Checklist/Questionnaire on the Implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime for the First Reporting Cycle*, U.N. Doc. CTOC/COP/2008/CRP.8 (Oct. 6, 2008).

204. *Implementation of the Protocol 2008*, *supra* note 203, ¶ 6.

joint UNODC and U.N. Global Initiative to Fight Trafficking in Persons (UNGIFT) Global Report contains a page on trafficking in DRC, there has been minimal interaction between the COP, or its trafficking in persons working group, and the DRC in furtherance of implementing the Trafficking Protocol.<sup>205</sup>

Semantic differences could account for varying conceptions of whether or not DRC has a law criminalizing human trafficking. In contrast to the state report submitted by the DRC, which indicated the existence of a law criminalizing human trafficking, the Global Report's independent research through UNGIFT and UNODC asserts that there is no law explicitly criminalizing "human trafficking," although the sexual violence statute prohibits pimping, sexual exploitation of minors, and forced prostitution.<sup>206</sup> The Global Report does note, however, that arrests and convictions have been made for sexual slavery under the jurisdiction of the ICC.<sup>207</sup>

Part of the reason cases have been brought before the ICC, as opposed to Congolese courts, is not due to the lack of laws, but rather because of the significant barriers to enforcing laws in the DRC.<sup>208</sup> While not directly referring to the enforcement of the Trafficking Protocol, another UNODC report on instability in Central Africa found that the current instability in the DRC makes the investigation and prosecution of rape and trafficking challenging.<sup>209</sup> As that report points out, governmental instability and low technical capacity, characterized by rampant impunity for violent crimes, inhibits state action in Central Africa and fosters impunity.<sup>210</sup>

Combined with concerted efforts to end the conflict in eastern DRC, the recent inception of new tools to increase enforcement of the Trafficking Protocol could lead to improved protection of victims of sexual slavery in the DRC. To help low capacity governments improve their enforcement

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205. U.N. Global Report on Trafficking, *supra* note 196, at 122.

206. *Id.*

207. *Id.* ("Arrests and convictions related to trafficking in persons were recorded for 'unlawful recruitment of child soldiers' and for war crimes and crimes against humanity in connection with the recruitment of child soldiers and sexual slavery. In the latter case, these episodes are under the jurisdiction of the International Criminal Court."). This statement may refer to the arrest and trial of Thomas Lubanga for crimes against humanity and war crimes including sexual slavery, conscription of child soldiers, and other crimes.

208. The question of whether the ICC is an appropriate venue for certain cases of war crimes and crimes against humanity, such as slavery, is outside the scope of this Note. The author intends, rather, to improve the ability of the national government to protect its people.

209. U.N. Office on Drugs and Crime, *Organized Crime and Instability in Central Africa: A Threat Assessment*, 9, Oct. 2011, available at [http://www.unodc.org/documents/data-and-analysis/Studies/Central\\_Africa\\_Report\\_2011\\_web.pdf](http://www.unodc.org/documents/data-and-analysis/Studies/Central_Africa_Report_2011_web.pdf) ("The remaining instability and violence, which predominantly affect the Eastern DRC, seem to be increasingly the result of criminal acts in a context of persistent lawlessness and weak state institutions, rather than the product of war. This context makes it difficult to provide the criminal justice response that crimes such as murder, rape and trafficking in children require.").

210. *Id.*

ability, the UNODC has recently elaborated the International Framework for Action to Implement the Trafficking in Persons Protocol.<sup>211</sup> The DRC would likely be included in the vast number of states with limited “capacity . . . to fully implement existing or future measures in the areas under discussion,” which led to this effort to help “States to develop effective and multidisciplinary anti-trafficking strategies and build dedicated and sustainable resources to implement such strategies.”<sup>212</sup> While compliance with the Trafficking Protocol has thus far been limited by ongoing instability and low capacity in the DRC, the Framework for Action and the COP’s trafficking in person working group will enable increasing monitoring of compliance within the DRC.

In the same way that international human rights law has influenced national laws in the DRC, the Trafficking Protocol has the potential to positively influence the drafting of new laws. In addition, it is the author’s opinion that the criminal provisions and obligations imposed on the DRC by its membership in the Trafficking Protocol provide the most comprehensive potential remedies for victims of GBV forms of human trafficking, as well as all other forms of human trafficking in the DRC.<sup>213</sup>

In addition to the international Trafficking Protocol, a second law supplements its advances by tightly monitoring human trafficking in every nation. The United States Trafficking Victims Protection Act, a U.S. law that established global support for efforts to combat trafficking in persons, unilaterally monitors and provides for enforcement of the same model as the Trafficking Protocol: Prevention, Prosecution, and Protection.<sup>214</sup>

## 2. *The United States Trafficking Victims Protection Act*

Due to high political will to combat modern-day slavery, the United States was instrumental in the development of the international Trafficking Protocol.<sup>215</sup> Furthermore, in the United States, the Trafficking Victims

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211. U.N. Office on Drugs and Crime, *International Framework for Action to Implement the Trafficking in Persons Protocol*, 3 (2009) (“The Framework for Action is a technical assistance tool that assists United Nations Member States in the effective implementation of the Protocol . . . [by] identifying gaps and putting in place additional measures they may need, in conformity with international standards.”).

212. *Id.* at 4 (citing U.N. Doc. CTOC/COP/2006/6/Rev.1).

213. This opinion is based on the more comprehensive scope of coverage of the Trafficking Protocol (including all ages and genders, and all exploitation of both sexual and labor services), as well as the holistic criminal and rights-based protections for victims.

214. Trafficking Victims Protection Act of 2000, 22 U.S.C. § 7101 (2000) [hereinafter TVPA 2000].

215. THE INTERNATIONAL LAW OF HUMAN TRAFFICKING, *supra* note 66, at 78: “A general awareness was also developing among an influential group of States of the need for a holistic approach where the crime control aspects of trafficking were addressed along with traditional human rights concerns.” In 1998, upon commending CEDAW to the Senate for ratification, President Bill Clinton declared the importance of passing a law criminalizing human trafficking and protecting victims internationally. *See* Administration of William J.



Protection Act (TVPA) was passed on October 28, 2000, and aimed to be a comprehensive approach to human trafficking domestically and internationally by preventing human trafficking, prosecuting perpetrators, and protecting victims.<sup>216</sup> On the international level, the law begins by stating findings on the international scope and particularities of human trafficking.<sup>217</sup> These findings contributed to the swelling knowledge of the scope of human trafficking internationally.<sup>218</sup>

The TVPA also identified the multitude of factors that make individuals vulnerable to becoming victims of human trafficking, such as armed conflict. The Trafficking Victims Protection Reauthorization Act of 2005 (“TVPRA 2005”) amended the TVPA to include subsection (h): “PREVENTION OF TRAFFICKING IN CONJUNCTION WITH POST-CONFLICT AND HUMANITARIAN EMERGENCY ASSISTANCE,” which required a joint study of vulnerabilities to trafficking caused by conflict within 180 days.<sup>219</sup> However, the study has yet to be published. More importantly, the amendment required the U.S. Agency for International Development, Department of State, and Department of Defense to “incorporate anti-trafficking and protection measures for vulnerable populations, particularly women and children, into their post-conflict and humanitarian emergency assistance and program activities.”<sup>220</sup> Significantly, the amendment added to the findings sections (7) and (8), which explain the high risk of vulnerability to trafficking in conflict zones.<sup>221</sup>

The TVPA<sup>222</sup> has done more than define and clarify the particular nature and vulnerabilities to human trafficking. The TVPA authorized the annual Trafficking in Persons Report (TIP Report) to provide global monitoring of

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Clinton, *Memorandum from President W.J. Clinton on Steps to Combat Violence Against Women and Trafficking in Women and Girls*, U.S. GOV. PRINTING OFFICE, Mar. 11, 1998, available at <http://www.gpo.gov/fdsys/pkg/WCPD-1998-03-16/pdf/WCPD-1998-03-16-Pg412.pdf>.

216. TVPA 2000, *supra* note 214, § 7101 (stating that the purposes of the act are to “combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominantly women and children, to ensure just and effective punishment of traffickers, and to protect their victims.”).

217. *Id.* § 7101(b). See Appendix IV for a reproduction of the relevant congressional findings on global trafficking in persons.

218. See *id.* § 7101(b)(1) (for an example of the concrete contribution of knowledge about the scope of human trafficking, see finding (1): “As the 21st century begins, the degrading institution of slavery continues throughout the world. Trafficking in persons is a modern form of slavery, and it is the largest manifestation of slavery today. At least 700,000 persons annually, primarily women and children, are trafficked within or across international borders.”).

219. Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, § 101(a) (2006) (amending 22 U.S.C. § 7104(h)) [hereinafter Trafficking Victims Protection Reauthorization Act of 2005].

220. *Id.*

221. *Id.*

222. The author also includes within the term “TVPA” all of the subsequent reauthorizations: 2003, 2005, 2008, 2011.

the implementation of the prevention, prosecution, and protection model.<sup>223</sup> In 2010, the current head of the congressionally-mandated Office to Monitor Combat Global Trafficking in Persons stated:

The annual trafficking report remains the United States' principal diplomatic tool to engage foreign governments on the issue of modern slavery, and we feel that it is the world's most comprehensive resource on anti-trafficking efforts by governments. It has prompted legislation, national action plans, and the implementation of policies and programs.<sup>224</sup>

To accomplish these important diplomatic purposes, the TIP Report provides a comprehensive summary of human trafficking in every country during the preceding year. The Report unilaterally assigns rankings from Tier 1 to Tier 3 to each country based on their compliance with indicia dictated by the TVPA to measure governmental efforts to prevent, prosecute, and protect. The tiers reflect compliance with the minimum standards for the prevention, prosecution, and protection for victims of human trafficking, as required by international law. Tier 3 is the worst ranking and is reserved for “[c]ountries whose governments do not fully comply with the minimum standards and are not making significant efforts to do so.”<sup>225</sup> According to the leading expert on international human trafficking, “there can be no doubt that the TIP reports have radically altered the terms of any discussion on compliance with the international law of human trafficking.”<sup>226</sup>

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223. Trafficking Victims Protection Reauthorization Act of 2005, *supra* note 219, § 2151(n); Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, §104(a)-(b) (authorizing annual reports and rankings based on human trafficking within all countries receiving foreign aid from the United States). It must be noted that international and American scholars differ as to their opinions on the United States State Department's unilateral global monitoring. *See, e.g.*, Janie Chuang, *The United States as Global Sheriff: Using Unilateral Sanctions to Combat Human Trafficking*, 27 MICH. J. OF INT'L L. 437, 449 (2006) (asserting that the U.S. approach in the TVPA is comparable with many other unilateral sanctions that the U.S. has utilized in order to “reinvent and unilaterally define a set of anti-trafficking standards with international purchase.”). Chuang bases her argument largely on differences between the U.S. norms and the international norms set by the Trafficking Protocol. *Id.* at 466-70.

224. *Out of the Shadows: The Global Fight Against Human Trafficking Hearing Before the Comm. on Foreign Affairs*, 111th Cong., 10-11 (2010) (statement of Luis CdeBaca, Ambassador-At-Large, Office to Monitor and Combat Trafficking in Persons, U.S. Department of State).

225. *Trafficking in Persons Report 2011 Tiers: Placement, Guide, and Penalties for Tier 3 Countries*, U.S. DEPT. OF STATE, [www.state.gov/j/tip/rls/tiprpt/2011/164221.htm](http://www.state.gov/j/tip/rls/tiprpt/2011/164221.htm) (last visited Feb. 2, 2012) (stating that tier 3 ranking may result in economic sanctions for the country, which may be waived by Presidential declaration only).

226. THE INTERNATIONAL LAW OF HUMAN TRAFFICKING, *supra* note 66, at 486. Gallagher also acknowledges that the “U.S. mechanism explicitly recognizes that governments bear a responsibility to prevent trafficking, to prosecute traffickers, and to protect victims.” *Id.*

Indicating its failure to comply with the minimum standards to prevent trafficking, prosecute traffickers, and protect victims within its borders, the DRC has been ranked as Tier 3 in the 2010, 2011, and 2012 TIP reports.<sup>227</sup> In 2010, President Obama waived the sanctions for the DRC, both for its Tier 3 ranking and for its use of child soldiers.<sup>228</sup> After three years ranked as Tier 3, there may be sanctions for the DRC in 2012. In 2010, the United States funded programs in the DRC to fight trafficking by increasing the rule of law in eastern DRC, including through projects that identify and reintegrate women and child survivors of sex trafficking and abduction.<sup>229</sup> The U.S. Agency for International Development asserted that “impunity for gender-based violence crimes is still pervasive,” but also reported that the U.S. government has sought to decrease it by providing funding for a rule of law anti-trafficking initiative through the International Organization for Migration.<sup>230</sup> All of these efforts have evolved from the passage of the TVPA.

The TVPA has resulted in positive change in the DRC by increasing the awareness, public will, and professional involvement in preventing, prosecuting, and protecting global victims. Due in part to the awareness raised by the TVPA, the American Bar Association’s (ABA) Rule of Law Initiative, in 2008, began programs to prevent trafficking and to end impunity for GBV crimes in the DRC through criminal law reform, training within the legal community, and other mechanisms to decrease impunity and increase access to justice for victims of sexual violence.<sup>231</sup> In particular, the Mobile Courts Program has led to convictions of four Congolese Army officers for raping fifty women and girls and abducting several into sexual slavery in 2010.<sup>232</sup> These convictions occurred through collaboration with the national and local governments in the DRC, as well as through

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227. See TIP REPORT 2011, *supra* note 15, at 129-33.

228. ALISON SISKIN & LIANA SUN WYLER, TRAFFICKING IN PERSONS: U.S. POLICY AND ISSUES FOR CONGRESS 14-15 (2010), available at <http://www.fas.org/sgp/crs/misc/RL34317.pdf>.

229. *The Democratic Republic of the Congo: Securing Peace in the Midst of Tragedy: Hearing Before the Subcomm. on Africa, Global Health, and Human Rights of the H. Comm. on Foreign Affairs*, 112th Cong. 4 (2011) (statement of Rajakumari Jandhyala, U.S. Agency for International Development Deputy Assistant Administrator for Africa).

230. *Id.* at 3-4.

231. Michael Maya, *Reflections on ABA ROLI’s Efforts to Combat the Rape Crisis in War-Torn Eastern Congo*, AMERICANBAR.ORG (June 2011), [http://www.americanbar.org/advocacy/rule\\_of\\_law/where\\_we\\_work/africa/democratic\\_republic\\_congo/news/news\\_dr\\_c\\_reflections\\_aba\\_rol\\_i\\_efforts\\_to\\_combat\\_the\\_rape\\_crisis\\_0611.html](http://www.americanbar.org/advocacy/rule_of_law/where_we_work/africa/democratic_republic_congo/news/news_dr_c_reflections_aba_rol_i_efforts_to_combat_the_rape_crisis_0611.html).

232. *Id.* (“[F]our high level officers, including Lt. Colonel Kibibi Mutware, were among those convicted. They received 20 year sentences, while soldiers who reported to them received 10–15 year sentences.”). The convictions of Congolese national army officers were not carried out under the sexual violence law, but rather under military law and through mobile military tribunals. *Id.*

international support and assistance.<sup>233</sup> Based on these advances in combating impunity, and counting on the continued dedication of Congo Special Representative to the U.N. and the U.S. government, the American Bar Association boldly asserts, there is reason to be hopeful that the tide is turning with regard to impunity for rape in eastern Congo.<sup>234</sup> The work of the ABA Rule of Law Initiative demonstrates the vast impact of public awareness and will to stop trafficking in persons.

In summary, because the international laws against human trafficking encompass criminal sanctions and victim vulnerabilities, like conflict and gender, these laws may be most appropriate to impose comprehensive obligations on states. Specifically, the TVPA monitors the global enforcement of the prevention, prosecution, protection model, and contributes to the creation of public awareness, political will, and resources to combat human trafficking.

#### CONCLUSION: EFFECTIVELY COMBATting SEXUAL SLAVERY IN THE DRC

Because the sexual slavery perpetrated in the DRC is both a form of human trafficking and GBV, it is prohibited by international and national laws that address either crime. By labeling these offenses as both human trafficking and GBV, the number of available protections and remedies for victims increases.

International human trafficking law is a more appropriate tool than human rights law to encourage the protection of women and girls from sexual slavery in the DRC because the advantages of the three-pronged approach found in the international human trafficking laws.<sup>235</sup> Specifically, the international human trafficking law, the Trafficking Protocol, includes criminal sanctions and responds to the offenses as part of a broader scheme of criminal violations and infringement of rights.<sup>236</sup> The Trafficking Protocol is more appropriate because it applies to *all* victims of trafficking regardless of age or gender, and, with the monitoring

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233. See Tessa Khan & Jim Wormington, *Mobile Courts in the DRC: Lessons From Development for International Criminal Justice* 2-3 (Oxford Transitional Justice Research Working Papers Series) available at <http://www.csls.ox.ac.uk/documents/OTJR-KhanandWormington-MOBILECOURTSINTHE DRC-LESSONSFROMDEVELOPMENTFORINTERNATIONALCRIMINALJU.pdf> (last accessed Dec. 28, 2012) (cited as a working paper with permission from the authors).

234. *Id.* (noting that funding for these initiatives was provided in part by the U.S. Agency for International Development and the U.S. Department of State).

235. See Trafficking Protocol, *supra* note 9 (discussing the three-fold purpose of the Protocol).

236. *Id.* arts. 6, 9(1).

through the TVPA, can be applied to all nations regardless of membership in international treaties.<sup>237</sup>

Indeed, the DRC's Constitution and recent laws have been positively influenced by international human rights-based laws and by human rights monitoring. International human trafficking laws and their enforcement mechanisms<sup>238</sup> should use these positive gains as a model to influence laws and increase monitoring. Moreover, collaborative progress toward protecting victims is possible because the DRC has recognized its obligation to respond to GBV crimes like sexual slavery, particularly in conflict zones where the rule of law is relatively weak.<sup>239</sup>

It is the opinion of the author that the best way to "stand by the victims" of GBV in the DRC is to help the government implement its obligations under international human trafficking law.<sup>240</sup> There are three principal means for the DRC to fulfill its obligations to prevent, prosecute, and protect under international human trafficking law: (1) improve enforcement of the existing law, (2) draft new laws that fully comply with international human trafficking standards, and (3) provide for greater training and capacity to enact and support programs that provide protection for victims and prevent vulnerable populations from being trafficked. International pressure, improved monitoring,<sup>241</sup> and increased technical assistance and support will allow the DRC accomplish these goals.

First, by improving the enforcement of existing national laws that criminalize GBV and human trafficking, the DRC government will take a major step toward fulfilling its international obligations with integrity. As explained above, Law 06/018 defines various forms of GBV in a way that meets the international definition of human trafficking. This law, thus, can be used to implement human trafficking criminal obligations on states.

The DRC could accomplish the second means by introducing new provisions in the national penal code with the help of international pressure

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237. TIP Report 2012, *supra* note 16, at 33-36 (describing the scope of victims and types of trafficking covered by "trafficking in persons," as defined by the Palermo Protocol and the TVPA). The Trafficking Protocol is also known as the Palermo Protocol. *See id.* at 7.

238. *See* TIP REPORT 2011, *supra* note 15.

239. The Constitution of the DRC states: "public authorities are responsible for the elimination of sexual violence used as an instrument in the destabilization and displacement of families. International treaties and agreements notwithstanding, any sexual violence committed against any person with the intention to destabilize or to displace a family and to make a whole people disappear is *established as a crime against humanity punishable by law.*" CONSTITUTION OF THE DEMOCRATIC REPUBLIC OF THE CONGO, *supra* note 72, art. 15 (emphasis added).

240. Pillay, *supra* note 116, at 459 (suggesting that as a global community we must stand by the victims of sexual violence in conflict by incorporating all existing forms of international law to protect them).

241. In particular, monitoring of compliance with the Trafficking Protocol's obligations on states to prevent, prosecute, and protect. While the TIP Report has increased monitoring, global accountability, recommendations, and consequences must be brought to bear upon the DRC.

and assistance.<sup>242</sup> Law 06/018 is a suitable starting point to draft national laws that also provide for prevention and protection services for victims, as well as increased law enforcement and judicial personnel.

The third principal means for the DRC to implement international human trafficking law is to increase the institutional capacity and support for protection of victims and prevention of trafficking. In 2010, there was a governmental police division in charge of violence against women; however, this Special Victims Unit in South Kivu province has but one officer, Major Honorine Munyole.<sup>243</sup> A soldier, who had raped more women in South Kivu than he could count, admitted in an interview that even if there were a law to put him in jail for raping the women, it would not stop him. In his words, there are “no police here, so the law does not matter.”<sup>244</sup> The international community has recognized the dire need for improved law enforcement and control of national armed forces in conflict zones. The U.N. Security Council in 2010 urged security sector reform, admonishing

parties to armed conflict to make and implement specific and time-bound commitments to combat sexual violence, which should include, inter alia, issuance of clear orders through chains of command prohibiting sexual violence and the prohibition of sexual violence in Codes of Conduct, military field manuals, or equivalent; and *further calls upon* those parties to make and implement specific commitments on timely investigation of alleged abuses in order to hold perpetrators accountable.<sup>245</sup>

In conclusion, without a determined national effort to implement the existing laws, create new laws, and provide greater support to victims, the international recommendations will perform only a pedagogical function in the doctrine of international human rights law. The fulfillment of all three means mentioned above is primarily the responsibility of the government of the DRC; yet, the international community has a role to play. Protecting victims will require continued international involvement through financial support, technical assistance, monitoring, and international pressure. International human trafficking-based approaches come with high global political will and financial resources, which must be channeled to increase national and local commitments to end human trafficking in eastern DRC. Notwithstanding its current crisis, in order to fulfill its international obligations, the DRC must stand by the victims of sexual slavery within its borders.

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242. Regional bodies and laws also have a substantial role to play in exerting pressure on the DRC to improve its laws and enforcement mechanisms.

243. Lisa F. Jackson, *The Greatest Silence: Rape in the Congo* (Women Who Make Movies, 2007), available at <http://thegreatestsilence.org/about>.

244. *Id.* (translated in the source from the original Kiswahili).

245. S.C. Res. 1960, *supra* note 12, ¶ 5.

## APPENDIX I: Terminology

DRC: Democratic Republic of the Congo (formerly Zaire)

UNHDI: United Nations Human Development Index

MONUC: French acronym for the United Nations Mission in the Democratic Republic of Congo

MONUSCO: new name of MONUC, effective August 2010; French acronym meaning United Nations Mission for Organization Stabilization in the Democratic Republic of the Congo

TIP Report: Trafficking in Persons report of the U.S. State Department

GBV: Gender-based Violence

LRA: Lord's Resistance Army (Uganda)

FDLR: Democratic Forces for the Liberation of Rwanda

*Interhamwe*: Rwandan militia that carried out the 1994 genocide and currently control regions of the DRC

FARDC: Congolese Army

ICC: International Criminal Court

ICCPR: International Covenant on Civil and Political Rights

ICESCR: International Covenant on Economic, Social, and Cultural Rights

CEDAW: Convention on the Elimination of all forms of Discrimination Against Women

CRC: Convention on the Rights of the Child

COTC: Convention on Transnational Organized Crime

COP: Conference of Parties (to the COTC)

UNODC: United Nations Office on Drugs and Crime

UNGIFT: United Nations Global Initiative to Fight Trafficking

TVPA: United States law- Trafficking Victims Protection Act (with reauthorizations called TVPRA's)

## APPENDIX II: Map of the Democratic Republic of the Congo



Image by Wars in the World, (last visited Dec. 28, 2012), <http://www.warsintheworld.com/index.php/2012/07/12/democratic-republic-of-congo-un-and-government-troops-have-shelled-m23-rebel-positions/>.



## APPENDIX III: "Make Rape a War Crime"

<i>With her heart beating three times faster than normal Tears dripping but this time from the inside She bleeds from the inside as well Before she is even touched</i>	<i>After ten men had wounded and raped her As her kids com[e] down from hiding Trying their best to console her Tears in her eyes Shame covering her face No room for love Beside that of her kids</i>
<i>Poor woman is pushing kids up in the roof Before the door can get broke As it's being kicked hard by men in camouflage</i>	<i>She asks: "Why, Why, Why" to God But even God cannot justify her pain She feels like she lives in sin city Congo has turned into a ghost town</i>
<i>Her mind has gone blank Her body is fighting to get free From the man that's on top of her</i>	<i>Since rape is not recognized as a war crime Poor mother has no other dream Than her daughters to stay at large from these villains Until God restores this part of the world</i>
<i>She gets so weak It's the third time this week That she's been raped</i>	
<i>Her body's abused her mind's misused The first time she got raped Her husband called her a disgrace Abandoned her with four kids</i>	
<i>She screamed in agony But not as loud as the screech of her neighbor That's undergoing the same abuse With her daughters next to her Her husband bleeding in the corner Shot in the head eyes open</i>	<i>As she regains consciousness Looking with shame in the eyes of her kids And then looking up in the sky And says a prayer: "Thank you God for what has just happened You have protected my kids once again Let me die a victim of rape As long as my daughters do not go through it after I am gone for"</i>
<i>No reason to fight No one to help No place to hide No other choice But concede</i>	

*Poor mother went unconscious*

*The world has forsaken us  
By not condemning rape as a  
crime of war.<sup>246</sup>*

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246. FIDEL NSHOMBO, ROUTE TO PEACE 2 A LIFE FOR LIVES 47-49 (2011). The author grew up in the eastern DRC and witnessed his mother raped by the armed forces for years until he and his siblings were sent away to a refugee camp in a neighboring country. *Id.* at Preface.

APPENDIX IV: TVPA Relevant Congressional Findings on Trafficking  
in Persons

\*\*\* Current through PL 112-60, approved 11/23/11 \*\*\*

*22 USCS § 7101*

§ 7101. Purposes and findings

(b) Findings. Congress finds that:

(1) As the 21st century begins, the degrading institution of slavery continues throughout the world. Trafficking in persons is a modern form of slavery, and it is the largest manifestation of slavery today. At least 700,000 persons annually, primarily women and children, are trafficked within or across international borders. Approximately 50,000 women and children are trafficked into the United States each year.

(2) Many of these persons are trafficked into the international sex trade, often by force, fraud, or coercion. The sex industry has rapidly expanded over the past several decades. It involves sexual exploitation of persons, predominantly women and girls, involving activities related to prostitution, pornography, sex tourism, and other commercial sexual services. The low status of women in many parts of the world has contributed to a burgeoning of the trafficking industry.

(3) Trafficking in persons is not limited to the sex industry. This growing transnational crime also includes forced labor and involves significant violations of labor, public health, and human rights standards worldwide.

(4) Traffickers primarily target women and girls, who are disproportionately affected by poverty, the lack of access to education, chronic unemployment, discrimination, and the lack of economic opportunities in countries of origin. Traffickers lure women and girls into their networks through false promises of decent working conditions at relatively good pay as nannies, maids, dancers, factory workers, restaurant workers, sales clerks, or models. Traffickers also buy children from poor families and sell them into prostitution or into various types of forced or bonded labor.

(5) Traffickers often transport victims from their home communities to unfamiliar destinations, including foreign countries away from family and friends, religious institutions, and other sources of protection and support, leaving the victims defenseless and vulnerable.

(6) Victims are often forced through physical violence to engage in sex acts or perform slavery-like labor. Such force includes rape and other forms of sexual abuse, torture, starvation, imprisonment, threats, psychological abuse, and coercion.

(7) Traffickers often make representations to their victims that physical harm may occur to them or others should the victim escape or attempt to escape. Such representations can have the same coercive effects on victims as direct threats to inflict such harm.

(8) Trafficking in persons is increasingly perpetrated by organized, sophisticated criminal enterprises. Such trafficking is the fastest growing source of profits for organized criminal enterprises worldwide. Profits from the trafficking industry contribute to the expansion of organized crime in the United States and worldwide. Trafficking in persons is often aided by official corruption in countries of origin, transit, and destination, thereby threatening the rule of law.

(9) Trafficking includes all the elements of the crime of forcible rape when it involves the involuntary participation of another person in sex acts by means of fraud, force, or coercion.

(10) Trafficking also involves violations of other laws, including labor and immigration codes and laws against kidnapping, slavery, false imprisonment, assault, battery, pandering, fraud, and extortion.

(11) Trafficking exposes victims to serious health risks. Women and children trafficked in the sex industry are exposed to deadly diseases, including HIV and AIDS. Trafficking victims are sometimes worked or physically brutalized to death.

(12) Trafficking in persons substantially affects interstate and foreign commerce. Trafficking for such purposes as involuntary servitude, peonage, and other forms of forced labor has an impact on the nationwide employment network and labor market. Within the context of slavery, servitude, and labor or services which are obtained or maintained through coercive conduct that amounts to a condition of servitude, victims are subjected to a range of violations.

...

(14) *Existing legislation and law enforcement in the United States and other countries are inadequate to deter trafficking and bring traffickers to justice, failing to reflect the gravity of the offenses involved. No comprehensive law exists in the United States that penalizes the range of*

offenses involved in the trafficking scheme. Instead, even the most brutal instances of trafficking in the sex industry are often punished under laws that also apply to lesser offenses, so that traffickers typically escape deserved punishment.

...

(16) In some countries, enforcement against traffickers is also hindered by official indifference, by corruption, and sometimes even by official participation in trafficking.

(17) Existing laws often fail to protect victims of trafficking, and because victims are often illegal immigrants in the destination country, they are repeatedly punished more harshly than the traffickers themselves.

...

(19) Victims of severe forms of trafficking should not be inappropriately incarcerated, fined, or otherwise penalized solely for unlawful acts committed as a direct result of being trafficked, such as using false documents, entering the country without documentation, or working without documentation.

(20) Because victims of trafficking are frequently unfamiliar with the laws, cultures, and languages of the countries into which they have been trafficked, because they are often subjected to coercion and intimidation including physical detention and debt bondage, and because they often fear retribution and forcible removal to countries in which they will face retribution or other hardship, these victims often find it difficult or impossible to report the crimes committed against them or to assist in the investigation and prosecution of such crimes.

(21) Trafficking in persons is an evil requiring concerted and vigorous action by countries of origin, transit or destination, and by international organizations.

(22) One of the founding documents of the United States, the Declaration of Independence, recognizes the inherent dignity and worth of all people. It states that all men are created equal and that they are endowed by their Creator with certain unalienable rights. The right to be free from slavery and involuntary servitude is among those unalienable rights. Acknowledging this fact, the United States outlawed slavery and involuntary servitude in 1865, recognizing them as evil institutions that must be abolished. Current practices of sexual slavery and trafficking of women and children are

similarly abhorrent to the principles upon which the United States was founded.

(23) The United States and the international community agree that trafficking in persons involves grave violations of human rights and is a matter of pressing international concern. The international community has repeatedly condemned slavery and involuntary servitude, violence against women, and other elements of trafficking, through declarations, treaties, and United Nations resolutions and reports, including the Universal Declaration of Human Rights; the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery; the 1948 American Declaration on the Rights and Duties of Man; the 1957 Abolition of Forced Labor Convention; the *International Covenant on Civil and Political Rights*; the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*; United Nations General Assembly Resolutions 50/167, 51/66, and 52/98; the Final Report of the World Congress against Sexual Exploitation of Children (Stockholm, 1996); the Fourth World Conference on Women (Beijing, 1995); and the 1991 Moscow Document of the Organization for Security and Cooperation in Europe.

(24) Trafficking in persons is a transnational crime with national implications. To deter international trafficking and bring its perpetrators to justice, nations including the United States must recognize that trafficking is a serious offense. This is done by prescribing appropriate punishment, giving priority to the prosecution of trafficking offenses, and protecting rather than punishing the victims of such offenses. The United States must work bilaterally and multilaterally to abolish the trafficking industry by taking steps to promote cooperation among countries linked together by international trafficking routes. The United States must also urge the international community to take strong action in multilateral fora to engage recalcitrant countries in serious and sustained efforts to eliminate trafficking and protect trafficking victims.<sup>247</sup>

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247. Trafficking Victims Protection Reauthorization Act of 2005, *supra* note 219, § 7101(b) (emphasis added) (findings irrelevant to international scope omitted).

# HEAVEN OR HELL?: THE PLIGHT OF FORMER WARTIME INTERPRETERS OF THE IRAQ AND AFGHANISTAN CONFLICTS LIVING IN THE U.S.

*Ben Juvinall*

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*“Give me your tired, your poor, your huddled masses yearning to breathe free.”<sup>1</sup>*

## INTRODUCTION

To respond to the need for communicating with civilians during the Iraq War, the United States military hired Iraqis to work as interpreters for troops on the ground.<sup>2</sup> These interpreters not only risked their own lives

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1. EMMA LAZARUS, *The New Colossus*, in *SELECTED POEMS* 58 (John Hollander, ed., 2005).

2. See Maiken Scott, *Iraqi Interpreter’s Story Sheds Light on Plight of Those Left Behind*, NEWSWORKS (Sept. 16, 2011), <http://www.newsworks.org/index.php/health-science/item/26662-iraqi-interpreters-story-sheds-light-on-plight-of-those-left-behind> (last visited Apr. 4, 2012).

performing this task, but also the lives of their family members, because taking on this role was seen by many Iraqi extremists as collaborating with the enemy.<sup>3</sup> To reward the sacrifices made by interpreters, Congress took action to authorize a significant number of Special Immigrant Visas (“SIVs”) to interpreters so that they could live comfortably in the U.S.<sup>4</sup> Unfortunately, the effects of these actions have been minimal. Many former interpreters currently face the decision to either remain in the U.S. with little opportunity to support themselves and their families or to return to Iraq where they risk being murdered for their assistance to U.S. forces.<sup>5</sup>

To provide assistance to veterans of the Iraq and Afghanistan conflicts, Congress passed the Vow to Hire Heroes Act (“VHHA”) on November 10, 2011.<sup>6</sup> The VHHA provides incentives to private businesses that hire veterans, issues grants to non-profit organizations that provide training and placement to veterans, and extends rehabilitation and vocational benefits to veterans with severe injuries or illnesses.<sup>7</sup> Despite Congressional knowledge of the difficulties facing the former interpreters who were fortunate enough to obtain SIVs, the VHHA, however, provides no incentives to businesses that hire interpreters who served alongside U.S. troops during the conflicts in the Middle East. There is very limited data indicating intentional discrimination against the former interpreters. However, Congress’ actions show otherwise.

Because it is well-known that interpreters struggle to survive economically in the U.S., the VHHA is a violation of former interpreters’ equal protection and civil rights.<sup>8</sup> Part I of this Note will explain the extreme sacrifices made by interpreters in the Middle East and Congress’ response to interpreters’ work for U.S. troops.<sup>9</sup> Part II will discuss the history and Congressional intent behind the VHHA.<sup>10</sup> Part III will explore

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3. *Id.*

4. See National Defense Authorization Act of 2008, H.R. 1585, 110th Cong. §§ 1241- 49 (1st Sess. 2008); Relocation Empowerment and Placement Assistance for Iraqi Refugees Act of 2007, H.R. 3824, 110th Cong. §§ 3, 7 (2007); Deborah Amos, *Lawmakers Lobby to Bring Iraqi Translators to U.S.*, NPR (Nov. 27, 2007), <http://www.npr.org/templates/story/story.php?storyId=16650437>.

5. See Anna King, *Former Iraqi Interpreter Tries to Make It in a Down Economy*, OPB NEWS (Jan. 5, 2009, 10:09 PM), <http://news.opb.org/article/former-iraqi-interpreter-tries-make-it-down-economy>.

6. See Press Release, Senator Patty Murray, Veterans: Senator Murray’s Landmark Veterans Employment Bill Passes Senate (Nov. 10, 2011), available at [http://www.murray.senate.gov/public/index.cfm/newsreleases?ContentRecord\\_id=74ff2a37-d6a1-4387-87e2-81ad6016c766](http://www.murray.senate.gov/public/index.cfm/newsreleases?ContentRecord_id=74ff2a37-d6a1-4387-87e2-81ad6016c766) [hereinafter Murray]; Repeal of Imposition of 3 Percent Withholding on Certain Payments Made to Vendors by Government Entities, H.R. Con. Res. 674, 112th Cong. (2011) (enacted) (pointing specifically to Title Two, “VOW to Hire Heroes Act of 2011”).

7. See H.R. Con. Res. 674 at §§ 225, 232, 234.

8. See *infra* pp. 10-22.

9. See *infra* pp. 2-5.

10. See *infra* pp. 5-9.



the Equal Protection Clause of the Fourteenth Amendment and describe how it applies to former interpreters.<sup>11</sup> Part III also discusses how the strict discriminatory purpose requirement to the Equal Protection Clause can be met to prove a violation of interpreters' rights. Finally, Part IV will discuss a potential civil rights claim that former interpreters could make against the government under Title VI of the 1964 Civil Rights Act.<sup>12</sup>

#### I. THE SACRIFICES OF MILITARY INTERPRETERS AND THEIR "REWARD"

*"[It's] like you live in heaven but you cannot touch anything in it, so what is the use of it?"*<sup>13</sup>

In order to rebuild Iraq and take on an insurgency, the U.S. military employed thousands of Iraqi interpreters to accompany U.S. troops on missions abroad.<sup>14</sup> Iraqi interpreters operated alongside U.S. troops on every mission conducted outside American outposts.<sup>15</sup> Without Iraqi interpreters, U.S. troops would have been "essentially blind to what [was] happening around them."<sup>16</sup> Insurgents targeted interpreters, both men and women, because insurgents knew the American military would need Iraqi interpreters to build significant relationships among the populace if they wanted to win the hearts and minds of the Iraqi population.<sup>17</sup> Because the U.S. needed interpreters on "forward" missions,<sup>18</sup> they were exposed to more risk than many American servicemen and women who rarely left the comfort of American bases while serving in Iraq or Afghanistan.<sup>19</sup> Furthermore, while military units rotate home after a tour of duty,

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11. See *infra* pp. 9-21.

12. See 42 U.S.C. § 2000d-1 (2012); *infra* pp. 21-25.

13. King, *supra* note 5.

14. See T. Christian Miller, *U.S. Insurance Firm Neglects Survivors of Iraqi Translators, May Face Criminal Charges*, PROPUBLICA (May 23, 2011, 9:19 AM), <http://www.propublica.org/article/us-insurance-firm-neglects-survivors-of-iraqi-translators-may-face-criminal/single>.

15. Scott, *supra* note 2.

16. Thomas X. Hammes, *Lost in Translation*, N.Y. TIMES (Aug. 25, 2005), <http://query.nytimes.com/gst/fullpage.html?res=950DE4DB1E3EF936A1575BC0A9639C8B63&ref=interpreters#>.

17. Paul Thompson, *Current Development: Development in International Area: Iraqi Translators Face Difficulties Gaining Asylum in the United States*, 22 GEO. IMMIGR. L.J. 141, 142 (2007).

18. See John Koopman, *The Rough and the Smooth*, SFGATE (Mar. 20, 2006, 7:09 PM), <http://blog.sfgate.com/iraqjkcg/page/3/> (indicating that many troops serving in Iraq were removed from actual combat and were based in areas "with more security per square inch than the lobby of San Francisco's Hall of Justice."); Michael Doyle, *Courts Struggle to Decide Whether Civilians can be Court-martialed*, STARS AND STRIPES (Apr. 7, 2012), <http://www.stripes.com/news/us/courts-struggle-to-decide-whether-civilians-can-be-court-martialed-1.173815> (addressing the fact that interpreters work alongside troops located in areas where intense combat took place).

19. See John Koopman, *supra* note 18.

interpreters stay behind and provide assistance to the U.S. troops replacing the previous unit.<sup>20</sup> As a result, the interpreters' death toll was greater than any assisting country's military during the American-led coalition in Iraq.<sup>21</sup> The role of the interpreter was crucial to U.S. success because as Michael Breen, a former infantry Captain in the U.S. Army stated, "a trusted interpreter [could have been] the difference between a successful patrol and body bag."<sup>22</sup>

Though the U.S. considered interpreters to be contractors, they were under the supervision of military personnel while performing front-line military duties.<sup>23</sup> Furthermore, military commanders had final oversight over their actions just as military commanders have over American patrols on the ground in Iraq or Afghanistan.<sup>24</sup> The military even supplied interpreters with the necessary equipment and training to accompany soldiers on missions.<sup>25</sup> Thus, interpreters were essentially soldiers because they were subject to military regulations and endured the same risks as most service men and women.

#### A. The U.S. Response to Interpreter Benefits

After proposals by Massachusetts Senator Ted Kennedy and New York Congressman Steve Israel, Congress began to realize the importance of interpreters to U.S. troops overseas.<sup>26</sup> Senator Kennedy introduced the Refugee Crisis in Iraq Act in 2007, which President George W. Bush signed into law in 2008.<sup>27</sup> The Refugee Crisis in Iraq Act was included in the

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20. See Conrad Mulcahy, *Officers Battle Visa Hurdles for Iraq Aides*, N.Y. TIMES (May 14, 2008), [http://www.nytimes.com/2008/05/14/world/middleeast/14interpreters.html?\\_r=1&ref=interpreters](http://www.nytimes.com/2008/05/14/world/middleeast/14interpreters.html?_r=1&ref=interpreters) (last visited Apr. 4, 2012).

21. See Miller, *supra* note 14.

22. Michael Breen, *The Debt We Owe Iraqi Interpreters*, THE CHRISTIAN SCIENCE MONITOR (Dec. 9, 2008), <http://www.csmonitor.com/Commentary/Opinion/2008/1209/p09s02-coop.html> (last visited May 12, 2012).

23. See *Id.*; see also Scott, *supra* note 2.

24. Kristin L. Richer, Note, *The Functional Political Question Doctrine and the Justiciability of Employee Tort Suits Against Military Service Contractors*, 85 N.Y.U. L. REV. 1694, 1720 (2010) (citing U.S. DEP'T OF THE ARMY, CONTRACTING SUPPORT ON THE BATTLEFIELD 2-10 (1999)). "The Head of the Contracting Activity (HCA), generally the head of command in the particular theater of combat, has ultimate authority over all decisions made regarding the contracting firm." *Id.* at 1720 n.132. Furthermore, "the commander bears complete responsibility for all actions of contractors taken under his command." *Id.*

25. *Id.* at 1721 n. 135. "Contractors should be assured that the government will provide equipment and training . . ." *Id.* (quoting U.S. Dep't of the Army, Army Regulation 700-137, Logistics Civil Augmentation Program (1985)).

26. See Amos, *supra* note 4; INT'L RESCUE COMM., FIVE YEARS LATER, A HIDDEN CRISIS 10 (2008), available at [http://www.rescue.org/sites/default/files/migrated/resources/2008/iraq\\_report.pdf](http://www.rescue.org/sites/default/files/migrated/resources/2008/iraq_report.pdf).

27. Ruthie Epstein, *U.S. Withdraws Troops from Iraq, But Must Not Abandon Its Refugees*, Human Rights First (Dec. 9, 2011), <http://www.humanrightsfirst.org/>

National Defense Authorization Act for the 2008 fiscal year.<sup>28</sup> This act allowed up to 5,000 Iraqis, employed by the U.S. government in Iraq, to obtain SIVs annually for five years.<sup>29</sup> In 2007, Representative Israel introduced the Relocation Empowerment and Placement Assistance for Iraqi Refugees Act (REPAIR).<sup>30</sup> This would have required “instruction in English as a second language, vocational training, computer training, employment services, and certain counseling services” to improve job opportunities for former interpreters entering the U.S.<sup>31</sup>

Unfortunately for Senator Kennedy and Representative Israel, neither of these proposals came to fruition. The Refugee Crisis in Iraq Act has not lived up to expectations. The process required for interpreters to apply for SIVs, which the Refugee Crisis in Iraq Act acknowledged, was difficult, confusing, and lined in red tape.<sup>32</sup> Furthermore, former military officers have complained of roadblocks, such as requiring a General’s signature for the application to be complete.<sup>33</sup> This requirement is “like a junior associate at a Fortune 500 company asking the chief executive for a letter of recommendation.”<sup>34</sup> Due to these massive hurdles, only 3,415 former Iraqi interpreters received an SIV by the end of 2011.<sup>35</sup> This number is nearly 2,000 less than the amount authorized *per year* from 2008 to 2012, according to the Refugee Crisis in Iraq Act.<sup>36</sup>

Even with Representative Israel’s strong support for providing former interpreters with SIVs opportunities in the U.S., the REPAIR Act failed to pass in the House of Representatives.<sup>37</sup> Representative Israel has expressed his disappointment with Congress’ inaction and failure to support his proposal: “Now there’s no agency to help find a job or a place to live. Once Iraqi translators arrive in the U.S., they’re on their own.”<sup>38</sup> Those fortunate enough to make it to the U.S. live lives fit for paupers. Most struggle to make ends meet and must even consider returning to Iraq.<sup>39</sup> Back in Iraq,

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2011/12/09/u-s-withdraws-troops-from-iraq-but-must-not-abandon-its-refugees/; *see also* H.R. 1585, 110th Cong. §§ 1241- 49 (1st Sess. 2008).

28. H.R. 1585, 110th Cong. §§ 1241- 49 (1st Sess. 2008).

29. H.R. 1585, 110th Cong. § 1244(c)(2) (1st Sess. 2008).

30. Relocation Empowerment and Placement Assistance for Iraqi Refugees Act of 2007, H.R. 3824, 110th Cong. § 7 (2007).

31. *Id.*

32. Mulcahy, *supra* note 20.

33. *Id.*

34. *Id.*

35. Kevin Spak, *US Hangs Iraqi Translators Out to Dry*, NEWSER (Dec. 27, 2011 2:12 PM CST), <http://www.newser.com/story/136234/us-hangs-iraqi-translators-out-to-dry.html>.

36. H.R. 1585, 110th Cong. § 1244(c)(1) (1st Sess. 2008).

37. *Relocation Empowerment and Placement Assistance for Iraqi Refugees Act of 2007*, GOVTRACK.US, <http://www.govtrack.us/congress/bills/110/hr3824> (last visited May 13, 2012) (for an overview of House Bill 3824).

38. Amos, *supra* note 4.

39. *See King, supra* note 5; *see also* Mulcahy, *supra* note 20.

extremists will inevitably target interpreters and their families, now labeled as traitors, for their previous collaboration with the U.S.<sup>40</sup> Around the same time that Congress refused to provide assistance to these former interpreters living in the U.S., who were an integral part of the war effort, it enacted the VHHA, which ensures plentiful job opportunities for the 2.38 million Americans who served in Iraq and Afghanistan.<sup>41</sup> Both houses of Congress passed the VHHA last fall.<sup>42</sup>

## II. THE VOW TO HIRE HEROES ACT

The VHHA was designed to combat the unemployment problem among American veterans by providing job training assistance.<sup>43</sup> Several of the benefits provided to veterans in the VHHA are strikingly similar to some of the potential benefits that would have been provided to former interpreters in the REPAIR Act. The VHHA provides a retraining program for veterans that will offer civilian training for veterans in their military profession.<sup>44</sup> In addition, the VHHA provides incentives to non-profit organizations that provide training and mentoring for unemployed veterans and rehabilitation and vocational benefits to veterans with injuries or illnesses.<sup>45</sup> Similarly, the REPAIR Act also called for employment training and mentoring for former interpreters in their search for employment in the U.S.<sup>46</sup>

Representative Israel should be furious about the rejection of the REPAIR Act, considering the same benefits he wanted to extend to nearly 3,500 legal aliens in the U.S. were extended to over two million American citizens. Extending the same benefits to 3,500 former interpreters who risked just as much as the U.S. soldiers they worked alongside would only marginally diminish the entitlements to the 2.38 million veterans under the VHHA.

### A. Interpreters as veterans under the Vow to Hire Heroes Act

The U.S. has defined a veteran of the current conflicts in the Middle East as an individual who

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40. *Id.*

41. VOW to Hire Heroes Act of 2011, H.R. 674, 112th Cong. (1st Sess. 2011) (enacted); Associated Press, *Obama Salutes Iraq War Vets at White House Dinner*, LONGISLANDPRESS.COM (Feb. 29, 2012), <http://www.longislandpress.com/2012/02/29/obama-salutes-iraq-war-vets-at-white-house-dinner> [hereinafter LONGISLANDPRESS].

42. H.R. 674; LONGISLANDPRESS, *supra* note 41.

43. *See generally* H.R. 674, 112th Cong. (1st Sess. 2011); *see also* Murray, *supra* note 6.

44. H.R. 674, 112th Cong. § 211 (1st Sess. 2011).

45. H.R. 674, 112th Cong. §§ 225, 232, 234 (1st Sess. 2011).

46. Relocation Empowerment and Placement Assistance for Iraqi Refugees Act of 2007, H.R. 3824, 110th Cong. §§ 3, 7 (2007).

[s]erved on active duty at any time for a period of more than 180 consecutive days any part of which occurred during the period beginning on September 11, 2001, and ending on the date prescribed by Presidential proclamation or by law as the last date of Operation Iraqi Freedom. . . .<sup>47</sup>

Moreover, the individual must have been “discharged or released from active duty in the armed forces under honorable conditions.”<sup>48</sup>

The interpreters who enlisted their services to aid active duty service men and women in accomplishing military missions should fall within both of these definitions. First, interpreters fell under the command of military leaders.<sup>49</sup> Secondly the U.S. military provided them training and equipment to successfully assist the U.S. military in its operations in the Middle East.<sup>50</sup> The Refugee Crisis in Iraq Act required that interpreters work for the government for at least one year and receive a positive recommendation from a senior supervisor to obtain a SIV.<sup>51</sup> This is evident because a military General was required to sign off on a letter for the interpreters in order to move to the U.S.<sup>52</sup> The General’s signature was required to establish “faithful and valuable service to the U.S. government” just as an honorable discharge or release from the U.S. military is also intended to indicate faithful service to the government.<sup>53</sup>

Another reason why these interpreters should be considered veterans under the VHHA is their importance in the war effort. In *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979), the Supreme Court conceded that veterans benefits have been extended under broad statutory definitions and that they do not show preference for men over women.<sup>54</sup> The statute referenced in *Feeney* also allowed any person with specified campaign awards to be considered a veteran.<sup>55</sup>

For example, these interpreters’ presence in front line patrols in Iraq and Afghanistan were imperative to the success of American ground troop operations.<sup>56</sup> In some instances, their service was so exemplary that the military awarded them military honors.<sup>57</sup> When interpreters were killed in combat, many military units performed memorial ceremonies that replicated

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47. 5 U.S.C. § 2108(1)(D) (2012).

48. 5 U.S.C. § 2108(1)(d) (2012).

49. Richer, *supra* note 24, at 1720 n.132.

50. *Id.* at 1721 n.135.

51. National Defense Authorization Act of 2008, H.R. 1585, 110th Cong. § 1244 (1st Sess. 2008).

52. Mulcahy, *supra* note 20.

53. H.R. 1585, 110th Cong. § 1244 (1st Sess. 2008).

54. *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279-80 (1979).

55. *Id.* at 262 n.8.

56. *See* Breen, *supra* note 22.

57. Miller, *supra* note 14.

ceremonies for slain soldiers.<sup>58</sup> The Army has even tried interpreters in military court for violating the laws of the Uniform Code of Military Justice.<sup>59</sup> The justification is that interpreters, like soldiers, were “deeply embedded with the armed forces in an area of actual fighting” and “wore the same uniform, ate the same food, slept in the same tents, and faced the same constant dangers from the enemy.”<sup>60</sup> In sum, if the government treats interpreters like soldiers while at war, the government should treat interpreters as veterans once the conflict is over.

Veterans’ preference systems have traditionally been tailored “to reward veterans for the sacrifice of military service, to ease the transition from military to civilian life, [and] to encourage patriotic service.”<sup>61</sup> The general objective of most veterans’ preference statutes is to reward former service members for the risks they endured.<sup>62</sup> These preferences are problematic because they are offered at the expense of non-veterans.<sup>63</sup> However, excluding the former interpreters from the benefits of the VHHA is not simply an exclusion of non-veterans; it is an exclusion of individuals who fall within the definition of “veteran” according to Congress’ own definition.<sup>64</sup> Not only did the majority of these interpreters serve alongside U.S. forces for over 180 consecutive days following September 11, 2001—in accordance with the VHHA—they did so in the most hostile and dangerous zones of the conflicts in Iraq and Afghanistan.<sup>65</sup> Furthermore, providing similar benefits to interpreters and U.S. troops would send a message to future interpreters that their risks in assisting the American war effort will not go unrewarded.

Additionally, including interpreters in the veterans’ preference system would allow former interpreters to make a more seamless transition from the Middle East to the U.S, just as veterans’ preferences provide for a smooth transition from soldier to civilian life.<sup>66</sup> This is extremely significant considering that many former interpreters battle many of the same post-war effects as American soldiers. Some of these effects include physical injuries and psychological issues like post traumatic stress disorder.<sup>67</sup>

The U.S. should take this opportunity to allow former interpreters to stand side by side with veterans in order to send a message to the rest of the

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58. The Associated Press, *Translators Dying by the Dozens in Iraq*, USA TODAY (May 21, 2005, 3:58 PM), [http://www.usatoday.com/news/world/iraq/2005-05-21-translator-deaths\\_x.htm](http://www.usatoday.com/news/world/iraq/2005-05-21-translator-deaths_x.htm).

59. See Doyle, *supra* note 18.

60. *Id.*

61. *Feeney*, 442 U.S. at 265.

62. See Melissa E. Murray, *Whatever Happened to G.I. Jane?: Citizenship, Gender, and Social Policy in the Postwar Era*, 9 MICH. J. GENDER & L. 91, 93 (2002).

63. *Id.*

64. See 5 U.S.C. § 2108(1)(D) (2012).

65. Scott, *supra* note 2.

66. *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 265 (1979).

67. Miller, *supra* note 14.

world. Former interpreters are facing difficulties with employment opportunities in other well-developed nations. For example, former interpreters in the United Kingdom complain of being treated as illegal immigrants when it comes to finding work.<sup>68</sup> Furthermore, as of June 2011, only nine of 223 former Iraqi interpreters living in Australia were employed full time.<sup>69</sup> However, Denmark, a country that only committed 480 troops to the war in Iraq, granted asylum to 228 interpreters and their families in 2008, and even provided employment training and language schooling for up to three years.<sup>70</sup> Denmark's treatment of former interpreters is remarkable when considering it was the U.S. that spearheaded the attack in Iraq.<sup>71</sup> In light of Denmark's commitment to respecting the service of former interpreters, the U.S. should also honor their service by extending the VHHA benefits.

The reality is that the U.S. does not see these former interpreters as veterans under the VHHA, despite Congressional knowledge of their sacrifices with the failure of the REPAIR and Refugee Crisis in Iraq Acts. To overcome this Congressional neglect, former interpreters can take legal action to receive the government assistance they deserve. One legal remedy available against the U.S. government is to take legal action against the U.S. government. Of the legal remedies available, an Equal Protection claim would be the most plausible.

### III. EQUAL PROTECTION

#### A. The Principles of an Equal Protection Violation

The Equal Protection Clause of the Fourteenth Amendment prohibits states from denying persons the equal protection of laws.<sup>72</sup> "The Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the United States from discriminating against individuals or groups."<sup>73</sup> A claim under the equal protection component of the Fifth Amendment could be made on behalf of legal aliens (former interpreters of the U.S. military) because Congress was well aware of their

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68. Anushka Asthana, *Army's Iraqi interpreters face hardship after fleeing to UK*, THE GUARDIAN (Nov. 6, 2010), <http://www.guardian.co.uk/uk/2010/nov/07/iraqi-interpreter-refugees-jobless-britain>.

69. Ingrid Piller, *Patriots and traitors*, LANGUAGE ON THE MOVE (June 6, 2011), <http://www.languageonthemove.com/language-migration-social-justice/patriots-and-traitors>.

70. Walter Pincus, *Asylum Program Falls Short for Iraqis Aiding U.S. Forces*, WASH. POST (Jan. 22, 2008), <http://www.washingtonpost.com/wpdyn/content/article/2008/01/21/AR2008012102170.html>.

71. Ryan Chilcote, John King, & Barbara Starr, *U.S. Launches Cruise Missiles at Saddam*, CNN.COM (Mar. 20, 2003, 1:31 AM), <http://www.cnn.com/2003/WORLD/meast/03/19/sprj.iq.main>.

72. U.S. Const. amend. XIV § 1.

73. *Washington v. Davis*, 426 U.S. 229, 239 (1976) (citing *Bolling v. Sharpe*, 347 U.S. 497 (1954)).

hardships at the time the VHHA was passed and still disregarded former interpreters.

### 1. *Prima Facie Case*

Regardless of whether or not a challenged statute is facially neutral or facially discriminatory toward a suspect class, such as race, legal alienage, and national origin,<sup>74</sup> or a “quasi suspect class, such as women or illegitimate children,”<sup>75</sup> a plaintiff must make a prima facie case of discrimination.<sup>76</sup> The presumption of constitutional validity disappears if a statute is facially discriminatory towards a suspect class or a quasi suspect class.<sup>77</sup> Once a statute is deemed discriminatory on its face, it is then presumed that there is a prima facie case of discriminatory purpose behind the statute.<sup>78</sup>

### 2. *Discriminatory Impact*

In addition to a discriminatory purpose, the plaintiff must also prove the existence of a discriminatory impact.<sup>79</sup> If a plaintiff is able to successfully establish both a discriminatory purpose and a discriminatory impact, a prima facie case of discrimination against either the suspect class or the quasi suspect class has been made.<sup>80</sup> The burden of proof then shifts to the government to prove either there was no such discriminatory intent and impact,<sup>81</sup> or there was a compelling government interest behind the statute.<sup>82</sup> If the government fails to overcome this burden, a court will subject the statute to strict judicial scrutiny.<sup>83</sup> If the plaintiff fails to make a prima facie case of discrimination or the government rebuts a case of discrimination, the government simply has to show a rational relationship (rational basis test)

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74. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985); Nancy G. Maxwell, *Opening Civil Marriage to Same-Gender Couples: A Netherlands-United States Comparison*, 18 ARIZ. J. INT'L & COMP. LAW 141, 159 (2001).

75. *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 325 (1976); Jessica Knouse, *Civil Marriage: Threat to Democracy*, 18 MICH. J. GENDER & L. 361, 392 n.147 (2012).

76. *Davis*, 426 U.S. at 241.

77. *Harris v. McRae*, 448 U.S. 297, 322 (1980).

78. *Id.*

79. *Palmer v. Thompson*, 403 U.S. 217, 224-26 (1971).

80. *Davis*, 426 U.S. at 239.

81. *Id.* at 241.

82. *Graham v. Richardson*, 403 U.S. 365, 371, 376 (1971); Daniel Eduardo Guzman, Note, *There Be No Shelter Here: Anti-Immigrant Housing Ordinances and Comprehensive Reform*, 20 CORNELL J. L. & PUB. POL'Y 399, 426 (2010).

83. *Graham*, 403 U.S. at 376; For a more detailed analysis of the strict scrutiny test see infra pp. 20-21.



between the disparate treatment and legitimate government purpose behind the statute.<sup>84</sup>

Federal courts also consider a specific group's political powerlessness in the political process when determining how much protection a particular class will receive.<sup>85</sup> Courts may allow such groups to obtain special protection because they are being denied the use of the political arena to fight legislation that is adversely affecting them.<sup>86</sup> The Supreme Court has held that "[a] desire to harm a politically unpopular group cannot constitute a legitimate government interest."<sup>87</sup>

However, there are exceptions to alienage classifications. Strict scrutiny will not apply to classifications against lawful aliens where the restriction is to serve the process of self-government.<sup>88</sup> In *Cabell*, the Supreme Court held that restricting legal aliens from working as probation officers received the rational basis test because probation officers have the power to arrest and such coercive force should be limited to citizens.<sup>89</sup>

#### B. The Vow to Hire Heroes Act as a Facially Discriminatory Statute

The VHHA is a federal act passed by Congress.<sup>90</sup> Because potential plaintiffs would have to make a claim against the U.S. to fight the unconstitutionality of the VHHA, the equal protection component of the Fifth Amendment could be used to make the interpreters' claim.

A plaintiff could argue the VHHA is facially discriminatory because it continuously uses terms such as "veterans" and "members of the armed forces" to describe the beneficiaries of the statute.<sup>91</sup> A "veteran" of the recent "Operation Iraqi Freedom" is defined as any individual who served on active duty for 180 consecutive days after September 11, 2001 and was honorably released from active duty.<sup>92</sup> Most interpreters fought alongside of American armed forces for years in hostile zones, far exceeding the 180 day requirement.<sup>93</sup> Further, the military granted SIVs to interpreters who

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84. *Heller v. Doe*, 509 U.S. 312, 319 (1993); Kevin Lapp, *Pressing Public Necessity: The Unconstitutionality of the Absconder Apprehension Initiative*, 29 N.Y.U. REV. L. & SOC. CHANGE 573, 589 (2005).

85. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

86. Jennifer E. Watson, Note, *When No Place Is Home: Why the Homeless Deserve Suspect Classification*, 88 IOWA L. REV. 501, 509 (2003).

87. *Dept. of Agric. v. Moreno*, 413 U.S. 528, 534 (1973).

88. *Cabell v. Chavez-Salido*, 454 U.S. 432, 439 (1982).

89. *Id.* at 446, 457.

90. See VOW to Hire Heroes Act of 2011, H.R. 674, 112th Cong. (1st Sess. 2011) (enacted).

91. See generally H.R. 674, 112th Cong. (1st Sess. 2011).

92. 5 U.S.C. § 2108(1)(D) (2012).

93. Scott, *supra* note 2.

assisted the armed forces in their missions with distinction.<sup>94</sup> Thus, these interpreters have achieved “veteran” status.

Unfortunately, the federal government has refused to extend veteran benefits to interpreters. The government has come nowhere close to the 5,000 annual visa maximum for former interpreters as per the Refugee Crisis in Iraq Act.<sup>95</sup> Further, the Department of Labor has neglected to enforce the Defense Base Act.<sup>96</sup> This act required certain insurance companies to provide treatment payments to former interpreters battling physical or psychological injuries that resulted from fighting alongside American service men and women.<sup>97</sup> Although scarce data and recorded statements exist from lawmakers, indicating a refusal to consider former interpreters as veterans, the actions of the federal government show otherwise.

If this statute were found facially discriminatory against this class of legal aliens, then a prima facie case of discriminatory intent would be present.<sup>98</sup> A discriminatory impact could be proven with statistical analysis indicating the current economic suffering of former wartime interpreters. Even though such studies producing concrete numbers have not yet been conducted, unemployment statistics for current Iraqi refugees living in the U.S. reached 60 percent in 2009.<sup>99</sup> Moreover, many former interpreters are in such dire need of economic assistance that they are contemplating returning to their native countries where they face extreme danger.<sup>100</sup> A discriminatory purpose and impact would result in a court reviewing the VHHA with strict judicial scrutiny. Under a strict scrutiny review, the government would have to prove a compelling government interest existed

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94. Mulcahy, *supra* note 20.

95. See National Defense Authorization Act of 2008, H.R. 1585, 110th Cong. § 1244(c)(1) (1st Sess. 2008). The Iraqi Refugee Crisis Act allows for up to 5,000 interpreter visas a year from 2008-2012, but only 3,415 had been granted as of December 2011. *Id.*; see also Spak, *supra* note 35.

96. Miller, *supra* note 14.

97. 42 U.S.C. §§ 1651(a)(2)-(4), 1652(a)-(b); Miller, *supra* note 14.

98. *Harris v. McRae*, 448 U.S. 297, 322 (1980).

99. See *Migration Policy Institute Releases Refugee Report*, IRAQI REFUGEE ASSISTANCE PROJECT (June 9, 2011), <http://refugeerights.org/migration-policy-institute-releases-refugee-report> [hereinafter IRAQI REFUGEE ASSISTANCE PROJECT] (indicating that a recent Migration Policy Institute Report showed employment rates to be at 40% in 2009); Amanda Ruggeri, *For Iraqi Refugees in America, the Recession Makes It Even Harder to Find Jobs*, US NEWS (Dec. 22, 2008), <http://www.usnews.com/news/national/articles/2008/12/22/for-iraqi-refugees-in-america-the-recession-makes-it-even-harder-to-find-jobs> (quoting the vice president of the International Rescue Committee’s resettlement and migration policy as seeing a 50% drop in job placements from 2007 to 2008); *Refugee Crisis in America: Iraqis and Their Resettlement Experience*, GEO. U. L. CTR., HUM. RTS INST 20 (2009), available at [http://www.law.georgetown.edu/news/releases/documents/RefugeeCrisisinAmerica\\_000.pdf](http://www.law.georgetown.edu/news/releases/documents/RefugeeCrisisinAmerica_000.pdf) (explaining that the employment rate for Iraqi refugees in San Diego in 2008 was around 25%) [hereinafter GEO. U. L. CTR].

100. King, *supra* note 5.

when Congress decided to exclude this class of legal aliens from the VHHA.<sup>101</sup>

C. The Vow to Hire Heroes Act as a Facially Neutral Discriminatory Statute

Facially neutral classifications make an inferential discrimination against suspect classes.<sup>102</sup> Such legislation may not have had the direct intent to discriminate when they were passed.<sup>103</sup> By excluding former interpreters, the VHHA, at the very least, makes a facially neutral classification against legal aliens.<sup>104</sup> The interpreters fall within this suspect class because they are lawfully living in the U.S. on government issued SIVs.<sup>105</sup>

Furthermore, the VHHA is not narrowly tailored to achieve the government's interests. As previously established, the men and women who served as interpreters for the U.S. military in the Middle East shared many of the same hardships and benefits of American soldiers they worked alongside.<sup>106</sup> Therefore, if the VHHA does not include former interpreters, it is simply not a preference for veterans over nonveterans like the preference at issue in *Feeney*.<sup>107</sup> Instead, it is a preference for American citizens over legal aliens.

Additionally, the VHHA does not meet the exception to avoid strict scrutiny by meeting the exception set forth in *Feeney*. The VHHA does not mention providing benefits to veterans that would allow easier access to law enforcement positions or other occupations that would serve the process of self-government.<sup>108</sup> The VHHA simply calls for tax incentives to businesses that hire veterans, increased job training to veterans, and educational benefits to veterans.<sup>109</sup>

Further, the VHHA creates a discriminatory impact against former interpreters. Already faced with dismal job opportunities, the VHHA will ensure that former American soldiers will receive more opportunities than former interpreters. This diminishes the already low probability of former interpreters finding gainful employment in the U.S. The VHHA makes it far more difficult for former interpreters to receive aid from the government than the American citizens they served beside.

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101. *Graham v. Richardson*, 403 U.S. 365, 371 (1971); Guzman, *supra* note 82 at 426.

102. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256 (1979).

103. Sidney D. Watson, *Reinvigorating Title VI, Defending Health Care Discrimination—It Shouldn't Be So Easy*, 58 *FORDHAM L. REV.* 939, 942 (1990).

104. *Graham*, 403 U.S. at 372.

105. *Amos*, *supra* note 4.

106. *See infra* pp. 8-9.

107. *Feeney*, 442 U.S. at 280.

108. *See generally* H.R. 674, 112th Cong. (1st Sess. 2011).

109. *See* H.R. 674, 112th Cong. (1st Sess. 2011).

In addition to the legislation's discriminatory impact, interpreters would also be required to prove a discriminatory purpose.<sup>110</sup> The standard has proven difficult to meet and has, often times, resulted in an absolute bar to specific equal protection claims concerning race neutral statutes.<sup>111</sup>

#### D. Proving a Discriminatory Purpose

A plaintiff must show evidence of a discriminatory purpose independent of discriminatory impact to prove that a facially neutral law is in violation of the Equal Protection Clause.<sup>112</sup> However, a plaintiff can use other circumstantial evidence to show the totality of relevant facts, which produces an inference of a discriminatory purpose.<sup>113</sup> Patterns of discriminatory conduct will also give rise to an inference of discriminatory purpose.<sup>114</sup> In addition, courts can use statistics in certain cases to determine if they can infer a discriminatory purpose from the relevant facts.<sup>115</sup>

##### 1. *Circumstantial Evidence of Government Intent to Discriminate*

Even though the VHHA may not discriminate against legal aliens (former wartime interpreters for the U.S. military) on its face, other circumstantial evidence may suffice to convince a court that a discriminatory purpose could be inferred.<sup>116</sup> Other evidence of the government's intent to discriminate against this class of legal aliens has been evident in recent years. Studies have shown that Arabs have faced more discrimination in the U.S. than any class of individuals, other than homosexuals, since September 11, 2001.<sup>117</sup> The 2009 Fort Hood killings by Nidal Malik Hasan and the 2009 attempted suicide bombing by Umar

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110. *Palmer v. Thompson*, 403 U.S. 217, 224-26 (1971).

111. Chris Weaver & Will Purcell, *The Prison Industrial Complex: A Modern Justification for African Enslavement?*, 41 *How. L.J.* 349, 381 (1998).

112. *Washington v. Davis*, 426 U.S. 229, 241-42 (1976); Angela J. Davis, *Racial Fairness in the Criminal Justice System: The Role of the Prosecutor*, 39 *COLUM. HUM. RTS. L. REV.* 202, 210-11 (2007) [hereinafter "*Racial Fairness*"].

113. *Batson v. Kentucky*, 476 U.S. 79, 94 (1986); see Alice Kaswan, *Environmental Law: Grist for the Equal Protection Mill*, 70 *U. COLO. L. REV.* 387, 396 (1999).

114. See *Racial Fairness*, *supra* note 113, at 216.

115. See *Int'l Bhd. Of Teamsters v. United States*, 431 U.S. 324, 335, 337 (1977); Melissa Whitney, *The Statistical Evidence of Racial Profiling in Traffic Stops and Searches: Rethinking the Use of Statistics to Prove Discriminatory Intent*, 49 *B.C. L. REV.* 263, 287 (2008).

116. *Batson v. Kentucky*, 476 U.S. 79, 94 (1986).

117. Ming H. Chen, *Alienated: A Reworking of the Racialization Thesis After September 11*, 18 *AM. U. J. GEN. SOC. POL'Y & L.* 411, 412 (2010) (citing PEW FORUM ON RELIGION AND PUB. AFFAIRS, THE NEW RESEARCH CTR., VIEWS OF RELIGIOUS SIMILARITIES AND DIFFERENCES: MUSLIMS WIDELY SEEN AS FACING DISCRIMINATION 4 (2009), available at <http://pewforum.org/newassets/images/reports/summer09/survey0909.pdf>).

Farouk Abdulmutallab on a Northwest Airlines flight have further fueled this intolerance.<sup>118</sup> President Obama has even called for increased security measures, such as profiling individuals with “Muslim sounding names.”<sup>119</sup> Also, two Congressmen, P. David Gaubatz and Paul Sperry, expressed their desire for a “professional and legal backlash against Muslims” while promoting their book on alleged Islamic conspiracies in the U.S.<sup>120</sup>

An inference can also be made that Congress excluded former interpreters from the VHHA due to the actions of two Iraqi refugees last year. Federal officials arrested the refugees for attempting to provide weapons to al Qaeda from Kentucky.<sup>121</sup> Following this incident, the Department of Homeland Security acknowledged that flaws exist in the standards it uses to screen refugees before entering the country.<sup>122</sup> Though the two refugees were not former interpreters who risked their lives for an American cause, the government has slowly begun to lose interest in providing services to Iraqi refugees, regardless of whether they provided vital support to the military mission in the Middle East.<sup>123</sup>

For example, the Defense Base Act requires certain insurance companies to compensate contractors, such as interpreters of the U.S. military, for injuries sustained in combat.<sup>124</sup> However, a number of allegations surfaced last year that the Department of Labor “has seldom [taken] any action to enforce [this] law” when dealing with former interpreters now living in the U.S.<sup>125</sup> Therefore, numerous former interpreters endure physical and psychological injuries resulting from their work as wartime interpreters without the proper reparations from the U.S. government.<sup>126</sup>

Additionally, the National Defense Authorization Act of 2009 encouraged the Department of Defense and the Department of State to hire former interpreters as translators, interpreters, and cultural awareness instructors, even though many government agencies are restricted from

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118. *Id.*

119. *Id.* at 412 n.3.

120. *Id.* (addressing the two Congressman’s anti-Islamic views and book entitled MUSLIM MAFIA: INSIDE THE SECRET UNDERWORLD THAT’S CONSPIRING TO ISLAMIZE AMERICA.(2009).

121. Terry Frieden, *2 Iraqis arrested in Kentucky, charged with aiding al Qaeda in Iraq*, CNN JUSTICE (Mar. 31, 2011), [http://articles.cnn.com/2011-05-31/justice/kentucky.iraqis.arrested\\_1\\_qaeda-iraqi-authorities-weapons?\\_s=PM:CRIME](http://articles.cnn.com/2011-05-31/justice/kentucky.iraqis.arrested_1_qaeda-iraqi-authorities-weapons?_s=PM:CRIME).

122. Peter Smith & Andrew Wolfson, *Kentucky Terrorist Arrests Shouldn’t Jeopardize Refugee Program, Advocates Say*, COURIER-JOURNAL, Jun. 1, 2011, <http://www.courier-journal.com/article/20110601/NEWS01/306010147 /Kentucky-terrorist-arrests-shouldn-t-jeopardize-refugee-program-advocates-say>.

123. See Tim Arango, *Visa Delays Put Iraqis Who Aided U.S. in Fear*, N.Y. TIMES, July 12, 2011, [http://www.nytimes.com/2011/07/13/world/middleeast/13baghdad.html?\\_r=1&pagewanted=all](http://www.nytimes.com/2011/07/13/world/middleeast/13baghdad.html?_r=1&pagewanted=all).

124. See 42 U.S.C.A. §§ 1651(a)(2)-(4), 1652(a)-(b) (West 2012); see also Miller, *supra* note 14.

125. Miller, *supra* note 14.

126. *Id.*

hiring noncitizens.<sup>127</sup> This authorization was part of the Refugee Crisis in Iraq Act.<sup>128</sup> However, neither agency has used the National Defense Authorization Act to hire former interpreters.<sup>129</sup> A committee report from 2010 indicated that former interpreters' "fluency in Arabic and knowledge of Iraq could be useful to the U.S. government."<sup>130</sup> The report even indicated the risk and sacrifices made by interpreters while serving with American service members.<sup>131</sup> Even so, officials at the Departments of Defense and State have indicated they have no plan to establish such a program to employ former interpreters.<sup>132</sup>

By and large, the government has failed to provide benefits to former interpreters, despite acknowledging the sacrifices made to assist the military mission in the Middle East.<sup>133</sup> Such exclusions would create an inference to any reasonable trier of fact that the government also purposely neglected former interpreters when devising the VHHA.

## 2. Statistical Evidence

Plaintiffs cannot rely on statistics alone to prove intentional governmental discrimination under the Equal Protection Clause.<sup>134</sup> If a court accepts statistics, there must be a link between the statistics and the alleged discrimination.<sup>135</sup> There is no shortage of statistical facts to link the government to discrimination with regard to the VHHA.

When examining the history of these legal aliens from the start of the Iraq war until the present day, there is a strong pattern of statistical discrimination. In 2005, two years into the Iraq war, the U.S. government paid interpreters working with U.S. troops \$400 a month (\$4,800 per year).<sup>136</sup> The U.S. government paid oil and security contractors around \$80,000 to \$100,000 per year, without requiring them to accompany

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127. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-274, REPORT TO CONGRESSIONAL COMMITTEES: IRAQI REFUGEES AND SPECIAL IMMIGRANT VISA HOLDERS FACE CHALLENGES RESETTLING IN THE UNITED STATES AND OBTAINING U.S. GOVERNMENT EMPLOYMENT 18-19 (2010) [hereinafter REPORT TO CONGRESSIONAL COMMITTEES] (citing Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, S. 3001, 110th Cong. § 1235 (2008) enacted).

128. *Id.*

129. *Id.* at 19.

130. *Id.* at 19-20.

131. *Id.* at 20.

132. *See Id.*

133. *See* REPORT TO CONGRESSIONAL COMMITTEES, *supra* note 127, at 20; Miller, *supra* note 14.

134. *Int'l Bhd. Of Teamsters v. United States*, 431 U.S. 324, 339 (1977).

135. Michael R. Smith, *Depoliticizing Racial Profiling: Suggestions for the Limited Use and Management of Race in Police Decision-Making*, 15 GEO. MASON U. CIV. RTS. L.J. 219, 243 n.134 (2005).

136. Hammes, *supra* note 16.

frontline troops on combat patrols.<sup>137</sup> Such a variance in earnings between security contractors and interpreters provides strong enough statistical evidence to infer a discriminatory purpose. While interpreters' yearly wages were increased from \$4,800 to \$12,000 in 2009, a \$12,000 yearly salary would still put an interpreter in a desperate economic situation in the U.S.<sup>138</sup> In comparison, a brand new Army Private earns around \$18,000 a year.<sup>139</sup> This does not include extra pay, such as a basic housing allowance and hazardous duty pay if deployed overseas.<sup>140</sup> These numbers indicate that the U.S. saw interpreters merely as pieces of equipment soldiers were required to carry into combat.

Although no one has conducted an accurate study to determine the current employment rate of former interpreters, studies have been done to determine employment rates among Iraqi refugees. These studies have shown dangerously low numbers. For example, in 2008, the employment rate for Iraqi refugees in San Diego was around 25 percent.<sup>141</sup> In 2009, another report showed employment rates for Iraqi refugees throughout the U.S. to be around 40 percent.<sup>142</sup> Another telling figure is a United States Government Accountability Office Report where former interpreters were interviewed.<sup>143</sup> The interpreters disclosed they had interviewed for more than 30 low-skill cleaning jobs before finally receiving work from a former supervisor in Iraq.<sup>144</sup> These are just a few examples of the hardships facing former interpreters when it comes to finding gainful employment in the U.S.

Despite these alarming statistics, the federal government has failed to act. Congress has allowed the Departments of Defense and State to hire former interpreters to work as translators, interpreters, and instructors.<sup>145</sup> Although the federal government possesses knowledge of the current economic suffering of these legal aliens, its departments have failed to create programs that would allow former interpreters to take advantage of such jobs.<sup>146</sup>

Thus, the government has had ample opportunity to extend benefits and rewards to this class of legal aliens, but has continued to exclude them. The VHHA was another wasted opportunity for the government to include the former interpreters in the benefits being allocated to American veterans who risked their lives to take on the U.S. military's mission in the Middle East.

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137. *Fast Facts: Contractors in Iraq*, FOX NEWS.COM, July 6, 2005, <http://www.foxnews.com/story/0,2933,161208,00.html>; Hammes, *supra* note 16.

138. Miller, *supra* note 14.

139. *2012 Military Pay Scale Salary Chart*, MILITARY FACTORY, [http://www.militaryfactory.com/military\\_pay\\_scale.asp](http://www.militaryfactory.com/military_pay_scale.asp) (last visited May 14, 2012).

140. *Id.*

141. GEO. U. L. CNT., *supra* note 99, at 20-21.

142. IRAQI REFUGEE ASSISTANCE PROJECT, *supra* note 99.

143. REPORT TO CONGRESSIONAL COMMITTEES, *supra* note 127, at 12.

144. *Id.*

145. *Id.* at 19.

146. *Id.* at 11, 19.

### E. Strict Scrutiny

Whether the VHHA is seen as facially discriminatory or facially neutral, potential plaintiffs could find a discriminatory intent to exclude former military interpreters, legal aliens, who worked side by side with U.S. armed forces in Iraq and Afghanistan. Under the strict scrutiny standard, the burden will shift to the government to prove there was not a discriminatory purpose or impact.<sup>147</sup> Courts will not defer to a suspect classification in government legislation unless that classification is necessary to achieve a compelling government interest.<sup>148</sup> In addition, this legislation must be narrowly tailored to meet this compelling interest, which means the suspect groups that are excluded from the legislation must fit tightly with this interest.<sup>149</sup> To be narrowly tailored, the legislation must not be grossly underinclusive or overinclusive.<sup>150</sup> Underinclusive classifications fail to include all similarly situated people with regards to the legislation's purpose.<sup>151</sup> In other words, some similarly situated individuals are included, whereas others are not.<sup>152</sup> Overinclusiveness occurs when legislation extends beyond its purpose and affects people that lie outside of the statute's objective.<sup>153</sup>

The VHHA may serve a compelling government interest because the goal of most veterans' preference programs is to reward the risk of military service.<sup>154</sup> The President signed the VHHA into law with hope that the country would fulfill an obligation to servicemen and servicewomen.<sup>155</sup> Even if the VHHA is found to be a compelling government interest, it fails the narrowly tailored test. Congress and the President had other options to provide job benefits to those who served the military during the recent conflicts in the Middle East, without discriminating against the legal alien interpreters who served with American troops. Because the government's objective was to reward those who served the U.S. overseas, it would have

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147. *Washington v. Davis*, 426 U.S. 229, 241 (1976).

148. RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* 15 (2d ed. 1992).

149. Inimai M. Chettiar, Comment, *Contraceptive Coverage Laws: Eliminating Gender Discrimination or Infringing on Religious Liberties?*, 69 U. CHI. L. REV. 1867, 1892 (2002).

150. Eang L. Ngov, *When "The Evil Day" Comes, Will Title VII's Disparate Impact Provision be Narrowly Tailored to Survive an Equal Protection Clause Challenge?*, 60 AM. U. L. REV. 535, 564 (2011).

151. *Id.*

152. *Id.*

153. *Id.*

154. *Murray*, *supra* note 62, at 93; *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 265 (1979).

155. Matt Compton, *President Obama: "Hire a Veteran,"* THE WHITE HOUSE (Nov. 21, 2011, 5:51 PM EDT), <http://www.whitehouse.gov/blog/2011/11/21/president-obama-hire-veteran>.



made sense to reward the interpreters who accompanied frontline troops on every patrol and mission.<sup>156</sup>

As a result, the VHHA is underinclusive. The VHHA protects a group of individuals (U.S. citizen soldiers) who greatly assisted in the U.S. government's military mission in the Middle East, but not a separate group of individuals (legal alien interpreters) who assisted equally in support of that mission.<sup>157</sup> There is no explanation as to how the government can send interpreters on the same dangerous assignments,<sup>158</sup> provide them with the same equipment as service members,<sup>159</sup> award them with military honors for heroism,<sup>160</sup> and even punish them in the same manner as service members<sup>161</sup> without providing them the same benefits after their service.

In addition to being underinclusiveness, the VHHA possesses a desire to discriminate against a politically powerless group of legal aliens that has been consistently unpopular with the federal government. Therefore, the VHHA does not serve a compelling government interest.<sup>162</sup> The Department of Labor has refused to enforce the Defense Base Act which would require specified insurance companies to provide financing for injuries suffered while serving as interpreters in the Middle East.<sup>163</sup> The Departments of Defense and State have refused to open up jobs for former interpreters even though these departments have had the opportunity to do so.<sup>164</sup> The VHHA is another example of a government decision to neglect legal alien interpreters who put their lives at risk to support the U.S. government's military mission in the Middle East.

#### IV. CIVIL RIGHTS VIOLATION

If interpreters fail to achieve the strict burden of discriminatory purpose in an equal protection claim, a civil rights claim can also be made against the government under Title VI section 2000d of the Civil Rights Act of 1964. Title VI section 2000d states that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”<sup>165</sup>

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156. See generally Scott, *supra* note 2.

157. Doyle, *supra* note 18; Breen, *supra* note 22.

158. *Id.*

159. Richer, *supra* note 24, at 1720 n.132, 1721 n.135.

160. See generally Miller, *supra* note 14.

161. Doyle, *supra* note 18.

162. See U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973).

163. See Miller, *supra* note 14.

164. REPORT TO CONGRESSIONAL COMMITTEES, *supra* note 127, at 18-19.

165. 42 U.S.C. § 2000d (2012).

This prohibits the government from awarding federal funding to programs that discriminate.<sup>166</sup>

#### A. Requirements for a Claim Under Title VI

Title VI claims can be made for claims against racial classifications that would violate either the Equal Protection Clause or the Fifth Amendment.<sup>167</sup> A plaintiff does not have to prove a discriminatory intent to make a claim under Title VI of the Civil Rights Act of 1964.<sup>168</sup> In cases where injunctive relief is sought, a showing of unintentional discrimination or discriminatory impact will suffice for a valid Title VI claim.<sup>169</sup>

A plaintiff must prove by “a preponderance of the evidence that a facially neutral practice has a disproportionate adverse effect on a group protected by Title VI.”<sup>170</sup> Once this burden is met, a *prima facie* showing of discriminatory impact is established and the burden then shifts to the government to show that the impact does not exist.<sup>171</sup> The government can rebut this by proving that a “substantial legitimate justification” is present as a result of its practice.<sup>172</sup> However, a plaintiff will still prevail if he or she can reveal that “a comparably effective alternative practice which would result in less disproportionality” is present.<sup>173</sup>

To prove a discriminatory impact, a plaintiff must prove three elements: first, a facially neutral policy has an effect on a protected class of individuals; second, the effect must be adverse; and finally, the effect must be disproportionate.<sup>174</sup> Statistics can be used to establish this discriminatory impact.<sup>175</sup> Thus, the burden of proof under a Title VI claim is much lower than a claim under the Equal Protection Clause.

Federal courts have held that plaintiffs met the burden of proving a discriminatory impact in numerous circumstances. For example, in *Sandoval*, the Eleventh Circuit found Alabama’s policy of administering its driver’s license exam only in English was a facially neutral classification that resulted in an adverse discriminatory impact on applicants of foreign

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166. Jill E. Evans, *Challenging the Racism in Environmental Racism: Redefining the Concept of Intent*, 40 ARIZ. L. REV. 1219, 1271 n.266 (1998).

167. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 287 (1978).

168. *Guardians Ass’n. v. Civil Serv. Comm’n of New York*, 463 U.S. 582, 584, 593 (1983).

169. *Id.*

170. *Sandoval v. Hagan*, 197 F.3d 484, 507 (11th Cir. 1999), *rev’d sub nom. Alexander v. Sandoval*, 532 U.S. 275 (2001).

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.* at 508.

175. Justin Florence & Robert Friedman, *Profiles in Terror: A Legal Framework for the Behavioral Profiling Paradigm*, 17 GEO. MASON L. REV. 423, 446 (2010) (citing *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 324 (1977)).

descent.<sup>176</sup> In *Guardians Association*, applicants were appointed to entry-level positions with the New York City Police Department according to their score on several written police examinations.<sup>177</sup> As a result, African and Hispanic Americans were appointed after white applicants who had received higher test scores.<sup>178</sup> Also, African and Hispanic American officers were laid off before similarly-situated white employees because the Department had a “last-hired, first-fired” policy.<sup>179</sup> The Court held this examination procedure was not job related and resulted in a discriminatory impact.<sup>180</sup>

A potential remedy for the government’s failure to comply with section 2000d-1 of Title VI is the refusal to grant continued financial assistance to businesses that hire veterans under VHHA.<sup>181</sup> Unless there is clear congressional intent to discriminate against a class protected by Title VI, the relief in private actions is solely limited to declaratory or injunctive relief ordering subsequent compliance with the statutory obligations at issue.<sup>182</sup> Other forms of relief, such as compensatory or punitive damages will not be awarded in a case where only a discriminatory impact is present.<sup>183</sup> Intentional discrimination must be shown.<sup>184</sup>

#### B. Title VI Applied to the Vow to Hire Heroes Act

Former military interpreters working beside the U.S. military in the Middle East have a valid claim under Title VI under the Civil Rights Act of 1964. Former interpreters are being denied the benefits of the VHHA, which provides federal financial assistance to employers who hire American born veterans and job training to these veterans.<sup>185</sup> The former interpreters who are the collateral victims of the VHHA are part of a suspect classification (legal aliens) under the Equal Protection Clause and the Fifth Amendment.<sup>186</sup>

Additionally, interpreters can show they are suffering from a discriminatory impact resulting from the VHHA: the American service men and women they worked beside in the Middle East receive government benefits for contributing to the military mission while the interpreters do

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176. *Sandoval*, 197 F.3d at 511.

177. *Guardians Ass’n. v. Civil Serv. Comm’n of New York*, 463 U.S. 582, 585 (1983).

178. *Id.*

179. *Id.* at 582, 585.

180. *Id.* at 598.

181. 42 U.S.C.A § 2000d-2 (West 2012).

182. *Guardians Ass’n*, 463 U.S. at 598.

183. *Id.*

184. *Id.*

185. See H.R. 674, 112th Cong. (1st Sess. 2011).

186. *Graham v. Richardson*, 403 U.S. 365, 372 (1971).

not.<sup>187</sup> Although an accurate study has not been conducted on the current employment rates of these former interpreters, an adverse, disproportionate effect is inferred when looking at the current employment rates among Iraqi refugees currently living in the U.S. and the U.S. Government Accountability Office's finding that former interpreters currently struggle to find relevant work.<sup>188</sup> Even if the government can prove there is a reasonable justification for the VHHA, interpreters can simply demonstrate that opening the benefits of the VHHA to former interpreters would eliminate the disproportionality. Moreover, providing the same benefits to interpreters would have little to no impact on American veterans because there are only approximately 3,500 former interpreters currently living in the U.S., compared with the 2.38 million American veterans living in the U.S.<sup>189</sup>

Therefore, former interpreters would have a valid claim under Title VI of the Civil Rights Act of 1964. Although money damages could not be awarded unless plaintiffs can prove a discriminatory purpose, interpreters would be entitled to declaratory relief. As a result, the government would be forced to comply with Title VI, and Congress would have to extend the VHHA benefits to former interpreters. If Congress failed to do so, the VHHA would be stuck down as unconstitutional.

#### CONCLUSION

Congress has ignored the sacrifices made by interpreters overseas. This is evident when considering the government's reluctance to fully comply with the Refugee Crisis in Iraq Act of 2007 and its failure to pass the REPAIR Act, which would have provided the former interpreters similar benefits to the VHHA. Further, governmental branches, such as the departments of State and Defense failed to enact programs in accordance with the Defense Authorization Act of 2009. This act would have allowed the State and Defense departments to hire former interpreters to provide essential services.<sup>190</sup> As a result, former interpreters who share the same risks as American soldiers receive little in return for their service and sacrifice.

Based on Congress' decision to remain apathetic to the current suffering of the former interpreters in the U.S., intentional discrimination can be inferred from the VHHA, which fails to provide assistance to former interpreters. Therefore, a valid equal protection claim can be brought against the government for passing the VHHA. If a discriminatory purpose

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187. See generally VOW to Hire Heroes Act of 2011, H.R. 674, 112th Cong. (1st Sess. 2011) (enacted).

188. IRAQI REFUGEE ASSISTANCE PROJECT, *supra* note 99; Piller, *supra* note 69; REPORT TO CONGRESSIONAL COMMITTEES, *supra* note 127, at 11.

189. Spak, *supra* note 35; LONGISLANDPRESS, *supra* note 41.

190. REPORT TO CONGRESSIONAL COMMITTEES, *supra* note 127, at 18-19.

cannot be shown, a valid claim under Title VI of the Civil Rights Act of 1964 could provide the former interpreters with declaratory relief against the government.

The former military interpreters are poor, tired, and hungry from years of fighting for the success of the U.S. military operations in the Middle East. They arrive in the U.S. and find the employment prospects and government support more closely resemble hell than heaven. Inaction by U.S. lawmakers in not extending VHHA benefits to former interpreters has left them with a troublesome decision: either continue life as paupers in the U.S. or return home where murderous extremists anxiously await.





