

Denver Journal of International Law & Policy

Volume 40
Number 4 *Fall 2012*

Article 8

April 2020

Full Issue

Denver Journal International Law & Policy

Follow this and additional works at: <https://digitalcommons.du.edu/djilp>

Recommended Citation

International Law & Policy, Denver Journal (2020) "Full Issue," *Denver Journal of International Law & Policy*: Vol. 40 : No. 4 , Article 8.

Available at: <https://digitalcommons.du.edu/djilp/vol40/iss4/8>

This Full Issue is brought to you for free and open access by Digital Commons @ DU. It has been accepted for inclusion in Denver Journal of International Law & Policy by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu, dig-commons@du.edu.



Denver Journal

of International Law and Policy

VOLUME 40

NUMBER 4

FALL-2012

TABLE OF CONTENTS

CASE NOTE

- ABDULLAHI V. PFIZER*: SECOND CIRCUIT
FINDS A NONCONSENSUAL MEDICAL
EXPERIMENTATION CLAIM ACTIONABLE
UNDER ALIEN TORT STATUTE *Anna Alman* 533

ARTICLES

- TOWARDS A MORE REALISTIC VISION OF
CORPORATE SOCIAL RESPONSIBILITY
THROUGH THE LENS OF THE
LEX MERCATORIA..... *Jonathan Bellish* 548
- MICROFINANCE – IS THERE A SOLUTION?
A SURVEY ON THE USE OF MFIs TO
ALLEVIATE POVERTY IN INDIA *Jesse Fishman* 588
- SCIENCE FICTION NO MORE:
CYBER WARFARE AND THE
UNITED STATES *Cassandra M. Kirsch* 620
- A CONFLICT OF DIAMONDS:
THE KIMBERLEY
PROCESS AND ZIMBABWE’S
MARANGE DIAMOND FIELDS *Julie Elizabeth Nichols* 648
- THE TROUBLE WITH WESTPHALIA IN SPACE:
THE STATE-CENTRIC LIABILITY REGIME *Dan St. John* 686

CASE NOTE

ABDULLAHI V. PFIZER: SECOND CIRCUIT FINDS A NONCONSENSUAL MEDICAL EXPERIMENTATION CLAIM ACTIONABLE UNDER ALIEN TORT STATUTE

Anna Alman*

ABSTRACT

United States courts struggle to determine what international human rights violations and against what violators could be raised under the Alien Tort Statute by non-U.S. citizens. In 2009, the Second Circuit's majority in *Abdullahi v. Pfizer, Inc.* found that nonconsensual medical experimentation on humans violated a universally accepted norm of customary international law. The court found that the jurisdictional grounds under the Alien Tort Statute ("ATS") existed so that non-U.S. citizens could bring these claims to U.S. district courts. By integrating the principles outlined in *Sosa*, the court formulated clear criteria for determination of whether an alleged transgression of international law constitutes a norm of the law of nations and thus represents a triable issue under the ATS. The *Abdullahi* case also demonstrates a clear potential for international medical research to be exploitive in nature. If global medical research is to be safely accomplished, the international community will be forced to address the issue through application of international and comparative law. This case note provides in-depth analysis of the *Abdullahi* case and explores its implications on future ATS litigation.

INTRODUCTION

It is universally accepted that administering medical experiments on human subjects without their knowledge or consent is unethical and immoral. For most people, the subject of nonconsensual experimentation on humans brings up memory of the atrocious Nazi medical experiments conducted on concentration camp prisoners,¹ or of

* University of Denver, Sturm College of Law, J.D. '12. The author thanks Professor Brittany Glidden for her insightful comments, Julie Nichols for her editing suggestions, and my husband John Lear for his amazing support.

1. *United States v. Brandt*, 2 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, 181-82 (1949) [hereinafter *Brandt*].

the Tuskegee experiments on poor African-American men.² Despite agreement that such experimentation is unacceptable and is prohibited within the United States,³ the role of domestic courts in adjudicating these and other violations of international law remains uncertain and highly controversial.⁴ Specifically, United States courts have struggled to determine what international human rights violations could be raised by non-U.S. citizens or aliens and what violators could be sued under the Alien Tort Statute ("ATS").⁵

In January 2009, in *Abdullahi v. Pfizer, Inc.*, the Second Circuit's majority found that nonconsensual medical experimentation on humans violated a universally accepted norm of customary international law.⁶ The *Abdullahi* suit was brought by Nigerian children and their guardians alleging that Pfizer conducted medical experimentations of a new drug on the children without their informed consent during a bacterial meningitis outbreak in Nigeria in 1996.⁷ Plaintiffs asserted that, as a result of the new drug trials on two hundred children, eleven children died, and many others were left with permanent blindness, brain damage, loss of hearing, or paralysis.⁸ The Second Circuit found that jurisdiction existed under the ATS, allowing the foreign plaintiffs' claims of nonconsensual medical testing to proceed.⁹ Significantly, the *Abdullahi* court allowed private causes of action to be brought under the ATS as long as "the violations occurred as the result of concerted action" by the private individuals or organizations working together with the state government.¹⁰

This case comment provides in-depth analysis of the *Abdullahi* case and explores the implications of the *Abdullahi* decision for future cases brought to U.S. federal courts under the ATS. First, Part I surveys formation and significant developments of the ATS. Second, Part II provides the factual background and the procedural history of the case. Third, Part III examines the majority's holding and reasoning as well as discusses the dissenting opinion. Finally, Part IV addresses implications of the *Abdullahi* decision on the ATS jurisprudence and post-*Abdullahi* developments.

2. *U.S. Public Health Service Syphilis Study at Tuskegee*, CENTERS FOR DISEASE CONTROL AND PREVENTION, available at <http://www.cdc.gov/tuskegee/index.html>.

3. General Requirements for Informed Consent, 45 C.F.R. § 46.116 (2012); see also 21 C.F.R. § 50.20 (2012).

4. See Paul R. Dubinsky, *International Law in the Legal System of the United States*, 58 AM. J. COMP. L. 455, 472-73 (2010).

5. *Id.* at 473; Alien Tort Statute, 28 U.S.C. § 1350 (2006).

6. *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 187 (2d Cir. 2009) [hereinafter *Abdullahi*].

7. *Id.* at 169-70.

8. *Id.* at 169.

9. *Id.* at 187.

10. *Id.* at 188-89.

The Alien Tort Statute

The First Congress originally passed the ATS in 1789 allowing non-U.S. citizens to sue “for a tort only, committed in violation of the law of nations or treaty of the United States.”¹¹ The statute grants federal jurisdiction for suits alleging (1) torts committed anywhere in the world (2) against a non-U.S. citizen who brings the action (3) in violation of the law of nations.¹² Some courts and legal scholars consider the ATS as having a “strictly jurisdictional nature” in the sense that the statutory provision grants jurisdiction to federal courts without a substantive power to create new causes of action.¹³ At the time of enactment the ATS had a practical application for a limited set of actions that asserted violations of the law of nations.¹⁴ Specifically, the ATS has been traditionally limited to claims for crimes against ambassadors, violations of the right to safe passage, and crimes of piracy.¹⁵ Because of the scarce legislative history and conflicting historical interpretations of the ATS, non-American citizens randomly invoked the statute to seek redress for violations of international law in U.S. federal courts until 1980.¹⁶

While the ATS is a simple statute on its face, courts have struggled to identify the requirements that a non-U.S. citizen must satisfy in order to bring an ATS claim in a U.S. federal court.¹⁷ Starting in 1980 with *Filartiga v. Pena-Irala*, a number of cases attempted to clarify and expand its statutory application to allow for new causes of action.¹⁸ In *Filartiga*, after comprehensive examinations of numerous sources of customary international law condemning the acts of torture, the Second Circuit concluded that the right to be free from torture was proscribed by the law of nations.¹⁹ Because torture committed by state officials or under the color of official authority violated universally accepted norms of international law, the torture claim by non-U.S. citizens could be brought under the ATS.²⁰ Implicit in this finding is the notion that “a state’s treatment of its own citizens is a matter of international

11. 28 U.S.C. § 1350 (2006); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712-13 n.10 (2004) (explaining that the statute has been modified slightly since its initial enactment in 1789) [hereinafter *Sosa*].

12. *Kadic v. Karadzic*, 70 F.3d 232, 238 (2d Cir. 1995) [hereinafter *Kadic*].

13. *Sosa*, *supra* note 11, at 713.

14. *Id.* at 720.

15. *Abdullahi*, *supra* note 6, at 173.

16. *Sosa*, *supra* note 11, at 712-13; *see Filartiga v. Pena-Irala*, 630 F.2d 876, 887-88 (2d Cir. 1980) [hereinafter *Filartiga*].

17. *See Sosa*, *supra* note 11, at 720-21.

18. *Id.* at 724-25; *Kadic*, *supra* note 12, at 241-44; *see Filartiga*, *supra* note 16, at 880.

19. *Filartiga*, *supra* note 16, at 884-85. In *Filartiga*, the relatives of a victim brought the ATS action against a Paraguayan Police General who kidnapped and tortured to death the 17-year old victim in retaliation for the family’s political activities.

20. *Id.* at 880.

concern.”²¹ The *Filartiga* court found that there was an international consensus against the use of torture supported by numerous international treaties and accords.²² The issue of whether torture is a norm of customary international law actionable under the ATS was resolved. The ATS question after *Filartiga* became: What does it take for a well recognized norm of international law to qualify as the “law of nations” in order for a U.S. federal court to exercise federal jurisdiction?²³

Fifteen years after the *Filartiga* decision, the Second Circuit addressed another ATS issue of who could be held liable under the ATS.²⁴ The court in *Kadic v. Karadzic* held that “certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals.”²⁵ In *Kadic*, a group of victims of Bosnian war brought claims of crimes of genocide, war crimes, crimes against humanity, rape, forced prostitution, and forced pregnancy against the self proclaimed Bosnian-Serb leader.²⁶ The *Kadic* court emphasized that private persons might be found liable under the ATS for violations of international humanitarian law, genocide, and war crimes.²⁷ In addition, the court found the plaintiffs satisfied the state action requirement for other crimes by showing that the Bosnian-Serb leader acted under color of law because he acted in concert with the state officials of the former Yugoslavia.²⁸ Later, some courts also held that because the ATS contains no express exception for corporations, the statute grants jurisdiction over torture claims against corporate defendants.²⁹

Finally, in 2004, the U.S. Supreme Court weighed in on the scope of the ATS. In the seminal opinion, *Sosa v. Alvarez-Machain*, Justice Souter outlined the framework for determining whether a claim properly asserts a violation of a norm of customary international law,

21. *Id.* at 881.

22. *Id.* at 882-84.

23. *Id.* at 880-81; see also *In re Estate of Ferdinand Marcos*, 25 F.3d 1467, 1475 (9th Cir. 1994) (concluding that the ATS creates a cause of action for violations of specific, universal and obligatory international human rights standards).

24. *Kadic*, *supra* note 12, at 239.

25. *Id.*; see also *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1263 (11th Cir. 2009) (finding that private parties, both individuals and corporations, may be liable for a violation of the law of nations under the ATS).

26. *Kadic*, *supra* note 12, at 237.

27. *Id.* at 239-40.

28. *Id.* at 245.

29. The language of the statute limits *who* may sue and for *what* violations, but it does not limit *who* may be sued. See, e.g., *Romero v. Drummond Co., Inc.*, 552 F.3d 1303, 1315 (11th Cir. 2008); *Khulumani v. Barclay National Bank, Ltd.*, 504 F.3d 254, 260 (2d Cir. 2007) (*per curiam*).

thus supporting a cause of action under the ATS.³⁰ In order for a violation of the law of nations to be actionable under the ATS, the norm prohibiting such violation must be “defined with a specificity comparable to the features of the 18th-century paradigms” such as transgression of the rights of ambassadors, piracy crimes, and violations of safe conducts or passports.³¹ The Supreme Court explained that torts in violation of the customary international law could be defined by common law because nothing has precluded federal courts from “recognizing a claim under the law of nations as an element of common law.”³² Nevertheless, because the understanding of federal common law drastically changed in 1938 when the watershed opinion in *Erie R. Co. v. Tompkins* rejected the concept of federal “general” common law, the Supreme Court warned courts to exercise caution when finding actionable norms under the ATS.³³ Thus, the *Sosa* court called for judicial restraint in creating new private causes of actions under the ATS emphasizing potential encroachment on the decisionmaking region of Legislative and Executive branches.³⁴

In a nutshell, the federal courts can allow new private causes of actions for international law violations to be brought under the ATS but only when these norms have been accepted by civilized nations and are shown to be analogous to the historic crimes against ambassadors, piracy, and violation of safe conducts.³⁵ The Court explained that the ATS affords jurisdiction to a very limited set of actions asserting violations of international legal norms that are (1) specific, (2) universal, and (3) well-recognized by most civilized nations that consider these norms obligatory.³⁶ While the Supreme Court admitted that federal courts do have a capacity to adjudicate enforceable international legal norms, it also called for “great caution” in applying the law of nations and creating new private causes of actions under the ATS.³⁷

CASE SUMMARY

In 1996, Pfizer, Inc., one of the world's largest pharmaceutical companies, took advantage of a large outbreak of bacterial meningitis in Nigeria, using it as an opportunity to test an unapproved and

30. *Sosa*, *supra* note 11, at 720, 724-26.

31. *Id.* at 724-25.

32. *Id.*

33. *Id.* at 726; *see also* *Erie R. Co. v. Tompkins*, 304 U.S. 64, 68 (1938).

34. *See Sosa*, *supra* note 11, at 727.

35. *Id.* at 725.

36. *Id.* at 732.

37. *Id.* at 728-29.

potentially harmful medication.³⁸ In order to get the U.S. Food and Drug Administration's ("FDA") approval for the use of Trovafloxacin Mesylate ("Trovan") on children in the U.S., Pfizer conducted a medical research study for the new antibiotic on two hundred Nigerian children sick with meningitis.³⁹ Pfizer sent American doctors to conduct experiments together with Nigerian doctors at the Infectious Disease Hospital, a public hospital located in Kano, which is in the north of Nigeria.⁴⁰ The company's goal was to obtain the FDA's approval of Trovan through its comparison with another antibiotic Ceftriaxone.⁴¹ Financial analysts predicted at that time that Trovan would bring the company a billion U.S. dollars in revenue if approved by the FDA.⁴² While Ceftriaxone is a well-established and FDA-approved antibiotic for safe and effective treatment of bacterial meningitis in both adults and children, preliminary animal trials of Trovan revealed severe side effects, including degenerative joint disease, liver damage, and abnormal bone conditions.⁴³ Undeterred by these initial alarming findings, Pfizer proceeded with the experiments. The researchers divided the sick children in two groups: one group received the new drug Trovan, while the other group received Ceftriaxone.⁴⁴

This experiment was conducted without the patients' consent or knowledge that they were experiment subjects. Plaintiffs claimed that both American and Nigerian doctors working for Pfizer intentionally failed to inform the children and their parents that the medical experiments were being conducted. The doctors also failed to advise Plaintiffs about the serious health risks involved in the drug studies. Possibly the most appalling allegation of all was that the doctors failed to inform Plaintiffs that a safe and effective alternative treatment for meningitis was available at the same hospital through the non-governmental organization "Doctors Without Borders."⁴⁵ In their lawsuit, Plaintiffs also alleged that Pfizer deliberately administered lower doses of Ceftriaxone to the second group in order to boost the effectiveness of Trovan in comparison to Ceftriaxone.⁴⁶ Moreover, the Pfizer doctors neglected to provide any follow-up medical care to the

38. See Petition for Writ of Certiorari at 3, *Pfizer, Inc. v. Abdullahi*, 130 S. Ct. 3541 (2010) (No. 09-34).

39. *Id.*

40. *Abdullahi*, *supra* note 6, at 169.

41. *Id.*

42. Joe Stephens, *Where Profit and Lives Hang in Balance*, WASHINGTON POST (Dec. 17, 2000), available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/07/02/AR2007070201255.html>.

43. *Abdullahi*, *supra* note 6, at 169.

44. *Id.*

45. *Id.* at 170.

46. *Id.*

treated children after the conclusion of the medical experiments.⁴⁷ Plaintiffs alleged that, as a result of the Trovan medical trials, eleven children died and many others were left to suffer paralysis, brain damage, or permanent sight or hearing loss.⁴⁸ Following the medical experiments on the Nigerian children, the FDA never approved Trovan for use on children and eventually severely restricted use of Trovan even for adults.⁴⁹ Trovan was completely banned by the European Union in 1999.⁵⁰

Following these events, the injured children and their families sought legal relief. In 2001, the injured Nigerian children and their guardians brought a tort action against Pfizer under the ATS asserting violations of customary international law (the *Abdullahi* action).⁵¹ Meanwhile, another group of plaintiffs brought a suit against Pfizer in a federal court in Nigeria under the Nigerian law (the *Adamu* action).⁵² However, the Nigerian lawsuit was voluntarily dismissed by the plaintiffs due to alleged corruption in the Nigerian legal system and the plaintiffs' inability to obtain legal redress in Nigeria.⁵³ The *Adamu* plaintiffs then brought a lawsuit in the U.S, which was then consolidated with the *Abdullahi* action.⁵⁴ The district court granted Pfizer's motions to dismiss for failure to state a claim under the ATS. The district court dismissed the claim on the grounds of *forum non conveniens* on the condition that Pfizer agreed to litigate the lawsuit in Nigeria.⁵⁵ Plaintiffs appealed the dismissals to the Second Circuit, which reversed and remanded on appeal for the reasons explained below.⁵⁶

Majority's and Dissent's Opinions

In *Abdullahi*, the Second Circuit majority undertook a comprehensive analysis of subject matter jurisdiction under the ATS within the parameters outlined by the Supreme Court's opinion in *Sosa*. By integrating the principles identified by the Second Circuit in *Filartiga*, *Kadic*, and *Flores*⁵⁷ with those provided by *Sosa*, the court

47. *Id.* at 169-70.

48. *Id.* at 170.

49. *Company News; Suspension of Trovan Drug in Europe Is Urged*, N.Y. TIMES (June 12, 1999), available at <http://www.nytimes.com/1999/06/12/business/company-news-suspension-of-trovan-drug-in-europe-is-urged.html>.

50. *Abdullahi*, *supra* note 6, at 170.

51. *Id.*

52. *Id.* at 170-71.

53. *Id.*

54. *Id.* at 171.

55. *Id.*

56. *Id.* at 168-69.

57. *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 247-48 (2d Cir. 2003) [hereinafter *Flores*].

formulated clear criteria for determination of whether an alleged transgression of international law constitutes a norm of the law of nations and thus represents a triable issue under the ATS.

The Second Circuit clarified that a norm of international law actionable under the ATS must be a norm that is (1) universally adhered to by States out of sense of legal obligation, (2) specific and definable, and (3) of "mutual" concern to States as opposed to "several" concern to individual States.⁵⁸

Sources of International Law

The court started its analysis with the examination of various sources of international law.⁵⁹ In determining whether nonconsensual medical experimentation rises to the norm of international customary law, the Second Circuit referred to the four sources listed in Article 38 of the Statute of the International Court of Justice: (1) "international conventions" or treaties expressly accepted by States; (2) "international custom, as evidence of a general practice accepted as law"; (3) "the general principles of law recognized by civilized nations"; and (4) "judicial decisions and the teachings of the most highly qualified publicists of the various nations" as a secondary source of legal rules.⁶⁰ As evidence of customary international law prohibiting nonconsensual medical experimentations on human subjects, Plaintiffs cited the Nuremberg Code,⁶¹ the World Medical Association's Declaration of Helsinki,⁶² the Ethical Guidelines by the Council for International Organizations of Medical Services,⁶³ and article 7 of the International Covenant on Civil and Political Rights ("ICCPR").⁶⁴

The court admitted that none of the international legal authorities, except the ICCPR, had been ratified by the U.S., and thus these authorities, taken individually, would not have binding legal power in U.S. federal courts. Nevertheless, the court also said that these non-obligatory international legal norms "may, with time and in conjunction with state practice, provide evidence that a norm has developed the specificity, universality, and obligatory nature required for ATS

58. *Abdullahi*, *supra* note 6, at 174.

59. *Id.* at 174-75.

60. *Id.* at 175 (citing Statute of International Court of Justice art. 38(1), June 26, 1945, 59 Stat. 1055, 1 U.N.T.S. 993).

61. *Id.* (citing *Brandt*, *supra* note 1, at 181-82).

62. *Id.* (citing World Med. Ass'n, *Declaration of Helsinki: Ethical Principles for Medical Research Involving Human Subjects*, arts. 20, 22 (June 1964) (amended through October 2008), available at <http://www.wma.net/en/30publications/10policies/b3/17c.pdf>).

63. *Id.* (citing Council for Int'l Orgs. of Med. Serv., *International Ethical Guidelines for Biomedical Research Involving Human Subjects*, guideline 4 (3d ed. 2002), [hereinafter *Council for Int'l Orgs. of Med. Serv.*], available at http://www.cioms.ch/publications/guidelines/guidelines_nov_2002).

64. *Id.* (citing International Covenant on Civil and Political Rights art. 7, opened for signature Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]).

jurisdiction.”⁶⁵ The court further clarified that the scope of inquiry must be not whether *each* source of international legal authority is binding by itself but rather whether “a greater range of evidence” has been considered and whether the probative value of *all* the sources taken as a whole amounts to sufficient evidence of the current state of customary international law.⁶⁶ Thus, even international agreements that are not self-executing or that have not been ratified by the United States can constitute evidence of the norm of customary international law broadly accepted by the international community.⁶⁷

Principles of Universality

In order to properly bring a claim under the ATS, plaintiffs must assert a violation of a norm of customary international law that is universally accepted around the world as a binding legal obligation.⁶⁸ The court concluded that the prohibition of nonconsensual medical experimentations, originally identified at the Nuremberg war crimes trials, clearly represented such norm.⁶⁹ The court’s strongest reasoning for finding the international agreement to prohibit nonconsensual experimentation came from the fact that at least eighty-four countries now require the informed consent from participants for purposes of medical experimentations.⁷⁰ Through the advancements of international conventions as well as development of domestic regulations, the informed consent norm “has become firmly embedded and has secured universal acceptance in the community of nations.”⁷¹

Principles of Specificity

The court also stated that a norm of customary international law must be “sufficiently specific.” To be “sufficiently specific,” the norm must be analogous to the 18th-century paradigms of crimes against ambassadors, piracy, or infringement on the right of safe conduct.⁷² According to the victims’ allegations, Pfizer failed to inform any of the children or their guardians of the nature and risks of the medical experiments despite the fact that the company was well aware of the informed consent requirements. In other words, Pfizer doctors acted knowingly and purposefully when they nonetheless proceeded with

65. *Abdullahi*, *supra* note 6, 176 (citing *Filartiga*, *supra* note 16, at 883).

66. *Id.*

67. *Id.*

68. *Id.* at 177.

69. *Id.*; see also ICCPR, *supra* note 65, art. 7; *Brandt*, *supra* note 1, at 181-82; *Council for Int’l Orgs. of Med. Serv.*, *supra* note 64, at guideline 4.

70. *Abdullahi*, *supra* note 6, at 181.

71. *Id.* at 183-84.

72. *Id.* at 184.

medical research.⁷³ The court found that the Nigerian victims alleged ample facts that Pfizer knowingly and purposefully conducted the medical experiments in a harmful manner.⁷⁴ Thus, the allegations against the Pfizer doctors, if proven true, would preclude any assumptions of simple negligence in failure to inform the participants of the nature and risks of the medical experiments.⁷⁵ The court concluded that prohibition of nonconsensual medical testing is "sufficiently specific" the same way the customary international law prohibits piracy.⁷⁶

Principles of Mutual Concern

The court also required examination of a norm of customary international law from the perspective of the "mutual concern" to States. When nations act in concert with each other out of a sense of mutual concern, the nations make it their intention to prohibit certain conduct that they collectively find reprehensible. Unlike matters of "several concern" that involve issues in which individual States are only "separately and independently interested," matters of "mutual concern" encompass the objective of maintaining international peace and stability.⁷⁷ In other words, matters of "mutual concern" compel nations to cooperate with each other on eliminating mutually unwanted conduct through the means of international conventions and agreements in order to preserve international security and public health.⁷⁸

By conducting involuntary medical experimentations, the court found that Pfizer threatened international efforts to prevent the spread of contagious diseases across the international borders by fostering mistrust and opposition not only to future drug trials but also to vital public health programs organized by pharmaceutical companies.⁷⁹ For example, after the reports about the Trovan medical trials resulting in alleged deaths of the children came out in Nigeria, the local population boycotted polio vaccination efforts in 2004, in part because of the Trovan drug experiments.⁸⁰ The resistance to polio vaccinations in Nigeria resulted in the spread of the disease across Africa and the

73. *Id.*; but see *Viet. Ass'n for Victims of Agent Orange v. Dow Chem. Co.*, 517 F.3d 104, 121-23 (2d Cir. 2008) (finding that because the plaintiffs did not allege that the chemical was sprayed with the purpose to injure human population, "they fail[ed] to make out a cognizable basis for their ATS claim.").

74. *Abdullahi*, *supra* note 6, at 184-85.

75. *Id.*

76. *Id.* at 184.

77. *Id.* at 185 (quoting *Flores*, *supra* note 58, at 249).

78. *Id.*

79. *Id.* at 186.

80. See *Poliomyelitis in Nigeria and West/Central Africa*, WORLD HEALTH ORG. (June 18, 2008), available at http://www.who.int/csr/don/2008_06_18/en/index.html.

Middle East.⁸¹ In addition, the court found that nonconsensual medical trials conducted by American drug companies could contribute to growing anti-U.S. sentiments around the world, further threatening the already-volatile international security.⁸²

The State Action Requirement

The court looked to the “color of law” jurisprudence of 42 U.S.C. § 1983 to determine whether a state action requirement was satisfied.⁸³ When a private individual acts together with state officials or with substantial state aid, the individual acts under “color of law.”⁸⁴ The Second Circuit concluded that a private cause of action under the ATS could proceed as long as the private individual or organization “acted in concert with” the state actor under the color of law.⁸⁵ In *Abdullahi*, the court found sufficiently close relationship between Pfizer and the Nigerian governmental representatives who allegedly were involved in every stage of the drug trials.⁸⁶ Because the alleged illegal conduct took place with substantial help of Nigerian doctors in a public hospital provided to Pfizer by the local government specifically to conduct the medical trials, the court concluded that the illegal conduct was the “concerted action” between the American drug company and the Nigerian government.⁸⁷

The Dissenting Opinion

Although Judge Wesley agreed with the framework the majority used to analyze claims under the ATS, he rejected the notion of private cause of actions brought under the ATS.⁸⁸ Judge Wesley maintained that the correct application of *Sosa* framework to *Abdullahi* facts would not result in the jurisdictional grant for nonconsensual medical experimentations claims against private actors.⁸⁹ He insisted that nonconsensual medial experimentation “more closely resembles the acts for which only state actors may be held responsible.”⁹⁰ Judge Wesley reasoned that international law would only allow federal court jurisdiction over private actors under the ATS when the conduct in question is beyond the reach of any state, such as in crimes of piracy.

81. *Id.*

82. *Abdullahi*, *supra* note 6, at 187; see also Timothy S. Jost, *The Globalization of Health Law: The Case of Permissibility of Placebo-Based Research*, 26 AM. J.L. & MED. 175, 175 (2000).

83. *Abdullahi*, *supra* note 6, at 188.

84. *Kadic*, *supra* note 12, at 245.

85. *Id.*

86. *Abdullahi*, *supra* note 6, at 188.

87. *Id.* at 188-89.

88. *Id.* at 192-93 (Wesley, J., dissenting).

89. *Id.* at 209.

90. *Id.* at 206.

Because violations of medical experimentation fall under the jurisdiction of domestic courts, these crimes cannot be incorporated by analogy to crimes against ambassadors, piracy, and violation of safe conducts as to reach private, non-state actors under the ATS.⁹¹ With respect to the sources of customary international laws accepted as evidence by the majority, Judge Wesley concluded that the evidence presented by plaintiffs was merely aspirational and insufficient to uphold ATS jurisdiction for the private right of action.⁹²

Implications of *Abdullahi* Decision

It is undisputed that administering involuntarily medical experimentation on humans without their consent is unethical, morally reprehensible, and illegal. The controversy centers on whether such conduct is a recognized norm of international law actionable under the ATS. In reaching its conclusion that a nonconsensual medical experimentation constitutes a norm of customary international law actionable under the ATS, the *Abdullahi* majority carefully followed the *Sosa* framework to the extent *Sosa* provided guidance. The Supreme Court in *Sosa* affirmed that the ATS is purely jurisdictional. At the same time, it did not preclude federal courts from recognizing new norms of international law, even absent express statutory authority. Moreover, although the Supreme Court in *Sosa* provided some guideposts for determination of customary international law norms, the Court evaded laying out a clear and functional framework clarifying what causes of actions could be actionable under the ATS. The matter is further complicated by the fact that Congress has not clarified the scope and implications of the ATS.⁹³

Although the *Abdullahi* opinion has been broadly criticized,⁹⁴ there are two reasons to believe that the Second Circuit decided the case in accordance with the framework outlined in *Sosa*. First, the Supreme Court has denied the Pfizer's petition for a writ of certiorari, thus rejecting an opportunity to overrule or correct the ATS framework set forth by the Second Circuit in *Abdullahi*.⁹⁵ The Supreme Court's denial could also mean that either the factual basis of the case was not adequate to warrant the Court's review of the ATS or that the issue was not sufficiently important to the Court. In any case, the denial of the

91. *Id.*

92. *Id.* at 194-95, 198.

93. *Flores*, *supra* note 58, at 246.

94. *In re S. African Apartheid Litig.*, 633 F. Supp. 2d 117, 123 (S.D.N.Y. 2009); Dennis M. Coyne, *International Pharmaceutical Mistrials: Existing Law for the Protection of Foreign Human Subjects and Proposal for Reform*, 29 B.U. INT'L L.J. 427, 428 (2011).

95. Warren Richey, *Supreme Court Allows Drug Test Case Against Pfizer to Proceed*, CHRISTIAN SCIENCE MONITOR (June 29, 2010), <http://www.csmonitor.com/USA/Justice/2010/0629/Supreme-Court-allows-drug-test-case-against-Pfizer-to-proceed>.

writ of certiorari means that the *Abdullahi* decision stays as the mandatory authority for the ATS claims within the Second Circuit's jurisdiction.

Second, the fact that Congress has not acted in response to the *Abdullahi* decision by expressly prohibiting suits by victims of nonconsensual medical experimentations under the ATS might be a good sign. Following the court's decision in *Filartiga*, Congress passed the Torture Victim Protection Act in 1991 ("TVPA"), which specifically allowed individuals to bring civil actions suits against "any individual who, under actual or apparent authority, or color of law, of any foreign nation . . . subjects an individual to torture."⁹⁶ Moreover, the House Report on the TVPA expressly referred to the *Filartiga* case with a comment approving the *Filartiga* court's reasoning.⁹⁷ In other words, by passing the TVPA, Congress authorized the cause of action for torture that has been recognized in *Filartiga* under the ATS.⁹⁸ It is reasonable to draw parallels with the *Filartiga* case and anticipate that Congress would be influenced by the *Abdullahi* decision holding that the involuntarily medical experimentation contravenes the universally accepted norms of customary international law.

It is important to note what issues the *Abdullahi* decision did not address. While the Second Circuit in *Abdullahi* focused on whether nonconsensual medical experimentation constituted a norm of customary international law, the court did not address another important matter: who could be sued as a violator under the ATS. Most recently, the U.S. Supreme Court granted the petition for certiorari in another Second Circuit's ATS case also brought by Nigerians. In *Kiobel v. Royal Dutch Petroleum Co.*, Nigerian plaintiffs brought claims against the multinational oil company alleging extrajudicial killing, torture, and crimes against humanity.⁹⁹ The plaintiffs claimed that the company collaborated with the Nigerian government to commit these violations of customary international law in response to the plaintiffs' legitimate protests against oil exploration and production destroying the local environment. The Second Circuit majority held that corporations, unlike States and individuals, could not be held liable for human rights violations. The court explained that although corporations are considered "persons" under U.S. domestic law, such liability under domestic law does not create a norm of customary international law actionable against corporations under the ATS. Faced with a high probability that the Supreme Court would affirm the

96. *Flores*, *supra* note 58, at 246-47 & n.21.

97. H.R. REP. NO. 102-367(I), at 3 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 85.

98. *Kadic*, *supra* note 12, at 241.

99. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 123 (2d Cir. 2010), *cert. granted*, 132 S. Ct. 472 (Oct 17, 2011) (No. 10-1491).

Second Circuit's decision in favor of the corporate defendants resulting in future inability of non-U.S. citizen victims to bring ATS claims against corporations, the *Abdullahi* plaintiffs agreed to settle with Pfizer.¹⁰⁰

CONCLUSION

The rapid globalization of medical research of new drugs and heated debates around ethics of international medical research have exposed the vulnerability of human research subjects in developing countries suffering from widespread poverty, lack of education, and corrupt authorities. The *Abdullahi* case demonstrates a clear potential for international medical research to be exploitive in nature. If global medical research is to be safely and ethically accomplished, the international community will be forced to address the issue through application of international and comparative law.¹⁰¹ The *Abdullahi* decision sends a plain message of intolerance of nonconsensual medical testing to not only large multinational pharmaceutical companies but also the international community at large. While Congress has yet to pass any legislation codifying the *Abdullahi* approach and creating a statutory cause of action for nonconsensual medical testing under the ATS, the *Abdullahi* opinion could serve as a catalyst for congressional action. The growing ATS litigation will help further assimilation of international human rights law into the U.S. legal system and will likely lead to further developments of new norms of customary international law actionable under the ATS.

It is important to remember that the ATS is not just a monetary redress, but also an avenue to tell the story of injustice for victims and publicly name the perpetrators of abuse. Even though the ATS is a civil statute, its goal is nevertheless to bring those guilty for serious human right violations to answer for their actions. The ATS litigation also facilitates better understanding of the role of international legal norms within the U.S. legal system. The cases brought under the ATS also help create a record of human rights violations precipitating changes in the countries where violations took place. Most importantly, ATS litigation helps bring worldwide awareness to human rights causes or create political pressure necessary for changes to prevent future abuses.

100. See Sue Reisinger, *Pfizer Settles Lawsuits Over Drug Trials on Children in Nigeria*, CORPORATE COUNSEL (Feb. 23, 2011), <http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202482854504> (discussing that while the settlement is confidential, Pfizer established the trust fund that would pay a maximum of \$175,000 per child to those able to prove death or permanent disability due to the Trovan drug trial).

101. See Jost, *supra* note 83, at 175-76; James V. Lavery, *Putting International Research Ethics Guidelines to Work for the Benefit of Developing Countries*, 4 YALE J. HEALTH POL'Y L. & ETHICS 319, 320-22 (2004).

The *Filartiga* court emphasized that “for purposes of civil liability, the torturer has become like the pirate and slave trader before him *hostis humani generis*, an enemy of all mankind.”¹⁰² Whether through the *Abdullahi* court’s application of the ATS, a Supreme Court’s opinion, or a Congressional act, the American society has the responsibility to ensure that the medical researchers, both individuals and corporations, conducting nonconsensual harmful medical experiments on human beings abroad become the “enemies of all mankind.”

102. *Filartiga*, *supra* note 16, at 890.

TOWARDS A MORE REALISTIC VISION OF CORPORATE SOCIAL
RESPONSIBILITY THROUGH THE LENS OF THE *LEX MERCATORIA*

*Jonathan Bellish**

*Globalization has led to a shift in power away from states and towards the private sector, which has resulted in multinational corporations taking a place among the most powerful international actors. This phenomenon has had many positive consequences, but it has also resulted in human rights, labor, and environmental abuses in developing nations. Such abuses are inconsistent with the way these multinationals behave at home and have led to a subsequent call for increased corporate social responsibility ("CSR") through enforceable norms. Though there is substantial agreement as to the contents of CSR norms, there is little such accord where enforcement is concerned. Some have suggested that binding CSR norms will ultimately emerge from multinational corporations themselves along the lines of the *lex mercatoria*. This article seeks to counter that argument by suggesting that, even if the traditional narrative of the *lex mercatoria* is true—an assertion upon which considerable doubt has been cast—modern multinational corporations are not likely to take the lead in developing and enforcing such norms. This is because, while *lex mercatoria* norms tend to increase profits and reduce liability, CSR norms tend to shrink margins and expose corporations to an additional form of liability. From this assertion, the article concludes that political and macroeconomic developments are likely to overtake legal and normative developments, particularly those emanating from the corporate suite, in leading to corporate responsiveness to a broader community of stakeholders.*

I. INTRODUCTION

When an American court hears a medical malpractice tort claim, it applies the professional standard of care to the doctor's actions to

* Jonathan Bellish, 2012 J.D. graduate of the University of Denver, Sturm College of Law, with certificates in public and private international law from The Hague Academy of International Law. I would like to thank my family and friends for their support, with a special thanks to Kathryn for her tireless help and thoughtful suggestions throughout the drafting process. Finally, I would be remiss to forget Professor Ved Nanda who continues to be an invaluable mentor.

determine liability.¹ This standard requires the court to look into the prevailing practice of doctors who are similarly situated to the defendant to determine whether or not the doctor-defendant was negligent in a particular case. Centuries from now, when legal historians look back at the widespread application of the professional standard of care as applied to doctors in the United States of America, they are unlikely to conclude a multi-state, American *lex doctoria* created independently binding legal norms governing a doctors' treatment of patients, despite the prevalence of different state courts using the doctor's custom to determine legal liability. Rather, these historians will conclude that twenty-first century courts applied the legal standard of reasonableness, looking into the custom of doctors as factual matter to support their legal argument, as was indeed the case.

Yet the existence of mercantile custom and the explicit insertion of that custom into medieval mercantile disputes have led to the conclusion that there was an international *lex mercatoria* that created independently binding legal obligations. Some scholars have even gone so far as to use the concept of the *lex mercatoria* to characterize norms of corporate social responsibility ("CSR"). This paper argues that, even if the prevailing characterization of the *lex mercatoria* is historically accurate, an extension of this characterization to norms of corporate social responsibility is unfounded. To characterize corporate social responsibility norms as a new *lex mercatoria* is to ignore the stubbornness of the shareholder primacy model of the corporation as well as the practical effects of CSR norms on a given corporation.

Where actual implementation is concerned, market-driven CSR norms have been the most successful in shaping corporate behavior. This is mainly because multinational corporations find themselves outside the reach of home country laws,² host country laws,³ and international law. These corporate actors generally adhere to the

1. See, e.g., FLA. STAT. § 766.102(1) (2012) (defining the professional standard of care as: "The prevailing professional standard of care for a given health care provider shall be that level of care, skill, and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar health care providers."); *Bearce v. Bowers*, 587 S.W.2d 217, 218 (Tex. App. 1979), (citing *Bowles v. Bourdon*, 219 S.W.2d 779, 785 (Tex. 1949)) ("In order for this [medical malpractice] suit to have reached the jury, *Bearce* was required to present competent evidence by a doctor of the same school of practice as Dr. Bowers that the treatment complained of was negligence Therefore it was necessary for *Bearce* to establish through a medical expert a professional standard of care so the jury could determine whether Dr. Bowers' treatment deviated from that standard so as to constitute negligence or malpractice.").

2. "Home country" refers to the country where the multinational corporation is incorporated.

3. "Host country" refers to the country in which the multinational corporation operates.

shareholder primacy model of the corporation in which managers' only goal is to maximize shareholder returns. Some scholars view the success of market-driven CSR norms to suggest that the larger world of corporate social responsibility is properly seen as a new *lex mercatoria*.⁴ Under this characterization, CSR norms will become so widespread that they crystallize into independently binding legal norms later applied by government-sanctioned courts.⁵ The application of modern market-driven CSR norms, as well as the respective natures of *lex mercatoria* and CSR norms more broadly, makes it unlikely that this optimistic phenomenon will materialize.

Because ancient *lex mercatoria* norms fall directly in line with a corporation's desire to maximize profits and minimize liability and CSR norms tend to cut into profits and expose the corporation to new forms of liability, the marketplace embraced the former but will reject the latter to the extent that it impedes shareholder value. Nonetheless, exploring the contrast between the *lex mercatoria* and corporate social responsibility remains a useful exercise. Such exploration helps to illuminate both the need for binding CSR norms and the fact that such norms are more likely to come from the broader international community than from within the executive suite.

Part II describes the varying interpretations of the *lex mercatoria* and ultimately characterizes it as a blank canvas upon which scholars and commentators may paint their own desires for the concept. Part III describes the history, evolution, and enforcement mechanisms for establishing corporate social responsibility norms, as well as their respective merits and shortcomings. Part IV looks at the application of market-driven CSR norms and concludes that, though they have been the most successful in coercively binding corporations to norms of corporate social responsibility on a large scale, such market-driven CSR norms are better explained by the shareholder primacy model of the corporation than a deviation from that model in favor of social responsibility. Market-driven CSR norms tend to emerge in the presence of a consumer base that explicitly values corporate social responsibility over low price, in the wake of an egregious and widely publicized CSR atrocity, or both, and as such are likely to be adopted by

4. See Reza Banakar, *Reflexive Legitimacy in International Arbitration*, in EMERGING LEGAL CERTAINTY: EMPIRICAL STUDIES ON THE GLOBALIZATION OF LAW 347, 374-79 (Volkmar Gessner & Ali Cem Budak eds., 1998); Joe W. Pitts III, *Corporate Social Responsibility: Current Status and Future Evolution*, 6 RUTGERS J.L. & PUB. POL'Y 334, 357 (2009); Ralph G. Steinhardt, *Soft Law, Hard Markets: Competitive Self-Interest and the Emergence of Human Rights Responsibilities for Multinational Corporations*, 33 BROOK. J. INT'L L. 933, 951 (2008). But see Eric Engle, *Corporate Social Responsibility (CSR): Market-Based Remedies for International Human Rights Violations*, 40 WILLAMETTE L. REV. 103, 118-20 (2004).

5. See sources cited *supra* note 4.

a small minority of corporate actors. Part V argues that, because of a dubious historical foundation and opposite financial and economic consequences, CSR norms are not likely to develop along the supposed lines of the *lex mercatoria*. Instead, Part VI asserts a continued need for the international community to develop coercive, binding CSR norms to deal with the worst abusers and suggests that macroeconomic and political developments are likely to overtake legal developments and in the creation of binding CSR norms. Part VII concludes.

II. THE BLANK CANVAS THAT IS THE *LEX MERCATORIA*

Lex mercatoria, or “the law merchant,” refers to a set of mercantile customs that began voluntarily within the merchant community but eventually crystallized into binding norms.⁶ The concept of the *lex mercatoria* is one of the most obscure concepts in international law. In fact, only two certainties surrounding the *lex mercatoria* and its history truly exist. The first certainty is that “[i]nternational trade is in some measure a constant thing.”⁷ The story of the *lex mercatoria* has its roots in medieval Europe, but it is a matter of historical fact that the Europeans traded with the Arabs during the Crusades and “before the Arabs came the Romans, and before the Romans the Greeks, and before the Greeks the Phoenicians.”⁸ As long as human beings have been able to travel across borders they have engaged in international commerce.

The second certainty is that cross-border merchants had a set of customs through which they dealt with one another, and this set of customs became known as the *lex mercatoria*. Indeed, the concept of *lex mercatoria* is recognized in The Hague and Vienna Conventions on the International Sale of Goods⁹ and is explicitly incorporated into the United States’ Uniform Commercial Code.¹⁰ More recently, the concept of *lex mercatoria* has played a central gap-filling role in international arbitration.¹¹ The application of *lex mercatoria* is seen as preferable to national law because of the uncertainty and one-sidedness inherent in

6. Christine Stammel, *Back to the Courtroom? Developments in the London Reinsurance Market*, in EMERGING LEGAL CERTAINTY, *supra* note 4, at 84-85.

7. WYNDAM ANSTIS BEWES, *THE ROMANCE OF THE LAW MERCHANT: BEING AN INTRODUCTION TO THE STUDY OF INTERNATIONAL AND COMMERCIAL LAW WITH SOME ACCOUNT OF THE COMMERCE AND FAIRS OF THE MIDDLE AGES 1-2* (Fred B. Rothman & Co. 1986).

8. *Id.* at 2.

9. Berthold Goldman, *The Applicable Law: General Principles of Law – the Lex Mercatoria*, in CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION 113, 113 (Julian D.M. Lew ed., 1987); Karyn S. Weinberg, *Equity in International Arbitration: How Fair is “Fair”? A Study of Lex Mercatoria and Amiable Composition*, 12 B.U. INT’L L.J. 227, 229 (1994).

10. U.C.C. § 1-103(b) (2011) (“Unless displaced by the particular provisions of this chapter, the principles of law and equity, including the law merchant . . .”).

11. Weinberg, *supra* note 9, at 252.

the latter.¹² These two certainties, the existence of ancient international trade and the fact that a body of law came to govern that trade, are clear, but drawing a logical connection between these certainties and characterizing that connection has proven to be highly problematic. Attempts over many centuries to characterize the *lex mercatoria* have been so disparate that the concept has essentially become a blank slate upon which scholars and practitioners project their beliefs about the nature of international trade and the regulation of such trade.

A. The Character of *Lex Mercatoria*

The centuries-old debate surrounding the *lex mercatoria* has been riddled with ambiguities regarding the definition, importance, contents, and current state of the concept.

1. Definitional Ambiguity

An American court has defined the concept not as a set of laws, but rather principles and custom that result from "general convenience" and "a common sense of justice."¹³ One scholar defined *lex mercatoria* as the sum total of customary international law, interstate, and state law relating to international trade.¹⁴ Still another views it as a set of general principles of commercial law, which operates in a similar fashion as "general principles of law recognized by civilized nations" as described in Article 38(1) of the Statute of the International Court of Justice.¹⁵

2. Ambiguity in Attributed Importance

With such definitional ambiguity, it should come as no surprise that there is disagreement regarding the importance of the *lex mercatoria*. On one end of the spectrum lies the notion that *lex mercatoria* is an inexorable part of transnational commercial law because domestic laws were not written with international trade in mind and are too deeply intertwined with a national culture, history, and values system to serve as the governing principles for international relationships.¹⁶ On the other end of the spectrum lies the belief that *lex mercatoria* simply does not exist as a historical matter.¹⁷

12. *Id.*

13. *Bank of Conway v. Stary*, 200 N.W. 505, 508-09 (N.D. 1924).

14. Goldman, *supra* note 9, at 113.

15. Ole Lando, *The Lex Mercatoria in International Commercial Arbitration*, 34 INT'L & COMP. L.Q. 747, 749-50 (1985).

16. Tom Carbonneau, *The Remaking of Arbitration: Design and Destiny*, in LEX MERCATORIA AND ARBITRATION: A DISCUSSION OF THE NEW LAW MERCHANT 36 (Thomas E. Carbonneau ed., rev. ed. 1998).

17. Georges R. Delaume, *The Myth of the Lex Mercatoria and State Contracts*, in LEX MERCATORIA AND ARBITRATION, *supra* note 16, at 130-31.

3. Diverging Lists of the *Lex Mercatoria's* Elements

The prevailing wisdom among scholars is that it is impossible to produce an exhaustive list of the elements making up the *lex mercatoria*.¹⁸ However, this has not stopped such scholars from attempting to do so. Some lists are relatively short,¹⁹ and some are quite long,²⁰ but, in the end, any purportedly complete, substantive list

18. *E.g.*, Lando, *supra* note 15, at 749.

19. Note, *General Principles of Law in International Commercial Arbitration*, 101 HARV. L. REV. 1816, 1826-33 (1988) (listing elements of *lex mercatoria* as: 1. A sovereign government may make and be bound by contractual agreements with foreign private parties; 2. The corporate veil may be pierced to prevent a beneficial owner from escaping contractual liability; 3. Force majeure justifies non-performance of a contract such that the loss is borne fairly by the parties; 4. Contracts that seriously violate bonos mores or international public policy are invalid; 5. Equitable compensation constitutes the primary remedy for damages; 6. The right of property and of acquired vested rights is generally inviolable—a State may not effect a taking without equitable compensation; 7. A party may not receive unjust enrichment).

20. The Rt. Hon. Lord Justice Michael Mustill, *The New Lex Mercatoria: The First Twenty-five Years*, in LIBER AMICORUM FOR THE RT. HON. LORD WILBERFORCE 174-77 (Maarten Bos & Ian Brownlie eds., 1987) (listing the elements of *lex mercatoria* as: “1. A general principle that contracts should prima facie be enforced according to their terms: pacta sunt servanda. The emphasis given to this maxim in the literature suggests that it is regarded, not so much as one of the rules of the *lex mercatoria*, but as the fundamental principle of the entire system; 2. The first general principle is qualified at least in respect of certain long-term contracts, by an exception akin to ‘rebus sic stantibus.’ The interaction of the principle and the exception has yet to be fully worked out; 3. The first general principle may also be subject to the concept of abus de droit, and to a rule that unfair and unconscionable contracts and clauses should not be enforced; 4. There may be a doctrine of culpa in contrahendo; 5. A contract should be performed in good faith; 6. A contract obtained by bribes or other dishonest means is void, or at least unenforceable. So too if the contract creates a fictitious transactions designed to achieve an illegal object; 7. A State entity cannot be permitted to evade the enforcement of its obligations by denying its own capacity to make a binding agreement to arbitrate, or by asserting that the agreement is unenforceable for want of procedural formalities to which the entity is subject; 8. The controlling interest of a group of companies is regarded as contracting on behalf of all members of the group, at least so far as concerns an agreement to arbitrate; 9. If unforeseen difficulties intervene in the performance of a contract, the parties should negotiate in good faith to overcome them, even if the contract contains no revision clause; 10. ‘Gold clause’ agreements are valid and enforceable. Perhaps in some cases either as gold clause or a ‘hardship’ revision clause may be implied; 11. One party is entitled to treat itself as discharged from its obligations if the other has committed a breach, but only if the breach is substantial; 12. No party can be allowed by its own act to bring about a non-performance of a condition precedent to its own obligation; 13. A tribunal is not bound by the characterization of the contract ascribed to it by the parties; 14. Damages for breach of contract are limited to the foreseeable consequences of the breach; 15. A party which has suffered a breach of contract must take reasonable steps to mitigate its loss; 16. Damages for non-delivery are calculated by reference to the market price of the goods and the price at which the buyer has purchased equivalent goods in replacement; 17. A party must act promptly to enforce its rights, on pain of losing them by waiver. This may be an instance of a more general rule, that each party must act in a diligent and practical manner to safeguard its own interests; 18. A debtor may in certain

of the contents of *lex mercatoria* is likely to be more reflective of the list creator's perspective than the *lex mercatoria* itself.

4. Differing Conceptions of the *Lex Mercatoria's* Current State

The uncertainty that shrouds *lex mercatoria* also extends to the current state of the concept as well. One scholar sees the *lex mercatoria* primarily as an historical concept now controlled by positive law and accordingly "well settled."²¹ Others see it as an ever-present, ever-evolving concept.²² And still another views it as a complete illusion.²³ In sum, there is virtually no agreement surrounding the *lex mercatoria*, as reflected in the concept's definition, importance, substantive contents, and current state. There is similar discord surrounding the *lex mercatoria's* history.

B. The History of *Lex Mercatoria*

To the extent that there is any common wisdom surrounding the history of *lex mercatoria*, that wisdom says that it came about in Italy in the central part of the Middle Ages and was founded on Roman and canon law.²⁴ Then, around the turn of the seventeenth century, European courts began to recognize a "novel principle"; mercantile custom could actually create an independent, binding legal obligation irrespective of relevant positive law.²⁵ Thus, what once was voluntary custom became binding law in and of itself. There are, however, credible and widely read historical accounts that both extend and limit this prevailing historical narrative.

1. Extending the Traditional Narrative

One historical characterization extends the traditional narrative around the *lex mercatoria* by asserting that it pre-existed the middle ages and began at least as early as the writing of the Hebrew Bible. Bewes's *The Romance of the Law Merchant* first advanced this view.²⁶ Bewes believed that by the time medieval Europeans began to incorporate the *lex mercatoria* into their own customs, that body of mercantile custom was already "centuries standing" in the Arab

circumstances set off his own cross-claims to extinguish or diminish his liability to the creditor; 19. Contracts should be construed according to the principle *ut res magis valeat quam pereat*; 20. Failure by one party to respond to a letter written to it by the other is regarded as evidence of assent to its terms").

21. See FILIP DE LY, *INTERNATIONAL BUSINESS LAW AND LEX MERCATORIA* 208 (1992).

22. *Id.*, at 213 (describing the work of Berthold Goldman).

23. Keith Highet, *The Enigma of the Lex Mercatoria*, 63 TUL. L. REV. 613, 623 (1989).

24. BEWES, *supra* note 7, at 1.

25. J. H. Baker, *The Law Merchant and the Common Law Before 1700*, 38 CAMBRIDGE L.J. 295, 295-98 (1979).

26. BEWES, *supra* note 7, at 2.

world.²⁷ Bewes uses both historical accounts and the prevalence of Arabic in the English language of commerce as evidence of medieval European trade with the East,²⁸ and he uses the first certainty surrounding the *lex mercatoria* – that “[i]nternational trade is in some measure a constant thing” – as evidence that mercantile customs long pre-existed such trade.²⁹ Bewes goes so far as to ask whether it was not possible that “the practice of insurance existed [in ancient times] but left little trace,”³⁰ but ultimately resigns himself to the notion that, while the West is indebted to the East for some of its mercantile law, “how much [it] shall perhaps never know.”³¹

2. Questioning the Extent of the Traditional Narrative

Another, more tempered, conception of the *lex mercatoria* questions the traditional narrative by suggesting that different cultures recognized the concept at different times. According to this version of the *lex mercatoria*, Medieval Northern Europeans were familiar with the term, but sixteenth century Italian Merchants were not.³² While the proponent of this argument cited many Northern European references to *lex mercatoria* as such, he was unable to find a single reference to *lex mercatoria* in Benvenuto Stracca’s *De mercatura*, which is as surprising as it is revealing.³³ Written in 1553, *De mercatura* is thought to be the first comprehensive treaty on commercial law.³⁴ If the *lex mercatoria* was as important and omnipresent as the prevailing narrative suggests, it almost certainly would have been mentioned in the seminal sixteenth century European treatise on commercial law. This is especially true when one considers that an Italian wrote this treatise, whose countrymen supposedly played a crucial role in the *lex mercatoria*’s dissemination throughout Europe.³⁵ More basically, cross-border universality is an integral characteristic of the *lex mercatoria*. Thus its notable absence in *De mercatura* calls into question *lex mercatoria*’s existence more generally.

3. Denying the Traditional Narrative

The final historical characterization of the *lex mercatoria* takes the opposite position of Bewes’s and argues that the *lex mercatoria* is

27. *Id.* at 8.

28. *Id.* at 10.

29. *Id.* at 1-2.

30. *Id.* at 63.

31. *Id.* at vi.

32. Charles Donahue, Jr., *Medieval and Early Modern Lex Mercatoria: An Attempt at the Probatio Diabolica*, 5 CHI. J. INT’L L. 21, 27 (2004).

33. *Id.*

34. *Id.*

35. *Id.* at 27-28.

essentially an historical fiction propagated by those seeking to romanticize the merchant class. One scholar notes that "[m]uch early writing on the [*lex mercatoria*] was characterized by an ideological, almost mystical zeal. It was advocacy rather than descriptive or analytical."³⁶ In fact, the Right Honourable Sir Richard Atkin, in his Forward to Bewes' *Romance of the Law Merchant* lamented that merchants were not associated with notions of romance and celebrated Bewes's book's potential to "not only create an interest in the past, but give a vision of the romance that attends the commerce of the present."³⁷

One scholar took a purely historical approach to the issue and came to the conclusion that the *lex mercatoria*, as understood today, is mostly the product of legend.³⁸ According to this author, the *lex mercatoria* was not a body of mercantile laws but rather an expedited process utilized by men who understood the inefficiencies of traditional courts and mutually agreed to avoid those inefficiencies.³⁹ He bases this argument on, *inter alia*, an examination of the oldest English treatise on *lex mercatoria*, published in the late thirteenth century, which states that the only difference between *lex mercatoria* and the common law are the speed of the process, the liability of pledges to answer, and the denial of wager of law as a means of establishing a negative.⁴⁰ According to this scholar, the *lex mercatoria* did not create any new obligations, but was merely a convenient way to discharge pre-existing obligations.⁴¹ Contrary to the popular narrative, "[m]ercantile customs were either local facts [to be proved as such] or they were the common law of England," and the speedy procedural aspects of the *lex mercatoria* were never adopted by English courts.⁴²

Upon an examination of the debate surrounding the nature and history of the *lex mercatoria*, the concept seems more like a Rorschach test where scholars and practitioners project their own views of international commercial law than a concrete historical and sociological phenomenon from which similarly concrete lessons may be drawn. The *lex mercatoria* can be a millennia old mercantile tradition still operating as the central animating force of international commercial law today, an historical relic of mercantile convenience with no contemporary relevance, or anything in between. Depending upon what one wishes to

36. Celia Wasserstein Fassberg, *Lex Mercatoria—Hoist with its Own Petard?*, 5 CHI. J. INT'L L. 67, 68 (2004).

37. The Right Honourable Sir Richard Atkin, *Forward* to BEWES, *supra* note 7, at iv.

38. See Baker, *supra* note 25, at 320-22.

39. *Id.* at 300, 303.

40. *Id.* at 300 (discussing LEX MERCATORIA as printed in THE LITTLE RED BOOK OF FORTAL 57-58 (F. B. Bickley ed., Bristol 1900, vol. I)).

41. *Id.* at 303.

42. *Id.* at 321.

assert about the *lex mercatoria*, he or she can find a plethora of scholarly and legal writing to support that preferred position.

III. AN OVERVIEW OF CORPORATE SOCIAL RESPONSIBILITY

Unlike the *lex mercatoria*, the principle of corporate social responsibility (“CSR”) has both a clear history and relatively straightforward contents. The debate surrounding CSR instead lies in how the international community can ensure that corporations live up to the widely agreed upon principles of corporate social responsibility. More than any single incident of corporate misbehavior, macroeconomic forces accompanying globalization led to the widespread acceptance of the need for workable CSR norms. Between 1990 and 1997, the amount of capital spent abroad increased by over five hundred percent.⁴³ This increase came largely as a result of the proliferation of information technology and its ability to allow corporations to benefit from global supply chains like never before.⁴⁴

While this phenomenon has led to benefits for the developing world in terms of a closing knowledge and resource gap,⁴⁵ it has also given multinational corporations unprecedented power relative to the countries in which they operate. Because MNCs’ resources tend to dwarf those of their host countries,⁴⁶ they tend to behave in ways that fall below standards of their domestic counterparts in dealing with the communities where they do business.⁴⁷ This seemingly perpetual asymmetry between multinational corporations and developing countries has led to an increased risk of corporate abuses abroad. As a result, the international community has worked hard to define the contents of corporate social responsibility and compel corporate and sovereign stakeholders to accept those contents both nominally and in practice.

A. History of Corporate Social Responsibility

The notion that corporate action could be considered an international criminal offense originated after the end of World War

43. See Joseph Stiglitz, *Regulating Multinational Corporations: Towards Principles of Cross-Border Legal Frameworks in a Globalized World Balancing Rights with Responsibilities*, 23 AM. U. INT’L L. REV. 451, 474 (2007).

44. See, e.g., *Data, Data Everywhere*, THE ECONOMIST, Feb. 25, 2010, <http://www.economist.com/node/15557443>.

45. STIGLITZ, *supra* note 43, at 453.

46. See *id.* at 476 (noting that “[t]he annual revenues of General Motors are greater than the GDP of more than 148 countries; while Wal-Mart’s revenues exceed the combined GDP of sub-Saharan Africa, excluding South Africa and Nigeria”).

47. See *id.* at 476-79.

II.⁴⁸ At the Subsequent Nuremburg Trials held in 1945 and 1946 and conducted by a United States military commission, corporate officers of the I.G. Farbin trust, the Flick trust, and the Krupp firm were indicted for crimes against humanity, war crimes, complicity in the crime of mass murder, and aiding and abetting the inhumane acts performed by the S.S.⁴⁹ In the United Kingdom in 1946, a British Military Tribunal convicted businessmen Karl Weinbacher and Bruno Tesch for aiding and abetting murder for their manufacture of gas used in Nazi concentration camps.⁵⁰ There, what was once thought a politically and legally neutral act, namely the manufacture and sale of a commodity, became an act through which indirect criminal liability could run.⁵¹ Though the Nuremburg Trials were an important first step towards internationally recognized and enforced rules on corporate social responsibility, corporate actors continued to act with relative impunity for the next half-century.⁵²

Unlike international human rights more generally, new legal norms dealing with corporations did not immediately begin to emerge following the Nuremburg Trials. Nonetheless, the idea that corporations should consider stakeholders other than its shareholders soon took hold. Less than a decade after the Nuremburg Trials, economist Howard Bowen coined the term "corporate social responsibility."⁵³ According to Bowen, the notion of corporate social responsibility was not antithetical to the shareholder primacy model because he was convinced that economic benefits would flow from a corporation's introduction of broader societal goals into its decision making process.⁵⁴

Bowen's work, combined with a marked increase in international trade, ultimately led to early efforts at corporate social responsibility in the form international treaties and domestic legislation. These early efforts were the result of developing countries' worries that their national control would be diluted by the introduction of foreign direct

48. See Wolfgang Kaleck & Miriam Saage-Maa, *Corporate Accountability for Human Rights Violations Amounting to International Crimes: The Status Quo and Its Challenges*, 8 J. INT'L CRIM. JUST. 699, 701 (2010).

49. See TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, vols. 6 (Flick), 7-8 (I.G. Farben), 9 (Krupp). Nuremberg (1951), available at http://www.loc.gov/rr/frd/Military_Law/NTs_war-criminals.html.

50. United Nations War Crimes Comm'n, *The Zyklon B Case: Trial of Bruno Tesch and Two Others*, 1 L. REP. OF TRIALS OF WAR CRIMINALS 93, 93-102 (1947), available at http://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-1.pdf.

51. *Id.* at 102.

52. See Kaleck & Saage-Maa, *supra* note 48, at 702.

53. Kevin T. Jackson, *Global Corporate Governance: Soft Law and Reputational Accountability*, 35 BROOK. J. INT'L L. 41, 48-49 (2010).

54. *Id.*

investment but still saw such investment as the only means towards economic progress.⁵⁵ This early period is exemplified by the United Nations Conference on Trade and Development's (UNCTAD's) Voluntary Code of Conduct for Transnational Corporations, the first of many voluntary codes of conduct, created in the early 1970's.⁵⁶

Because these early efforts at CSR were not particularly effective in shaping corporate behavior, the 1980's and 1990's were characterized by "a self-regulating, profit-maximizing, shareholder-focused brand of corporate governance."⁵⁷ This period was fraught with ecological and social calamities that eventually led to increased pressure for a more binding brand of corporate social responsibility. Some well-known examples of corporate malfeasance that took place during this period include Unocal's criminal behavior in Myanmar, the Bhopal disaster in India, the Exxon Valdez oil spill, and Nike's widespread use of "sweatshops" in Asia.⁵⁸ These atrocities were handled in an ad hoc fashion, with tactics ranging from public pressure in the case of Nike,⁵⁹ to federal liability in the Ninth Circuit in the case of Unocal.⁶⁰ While the debate as to precisely how to create and enforce CSR norms that meaningfully affect corporate behavior continues, the need for such norms was painfully clear by the turn of the twenty-first century.

B. Character of Corporate Social Responsibility

1. *Defining Corporate Social Responsibility*

Strictly speaking, no legally authoritative definition of corporate social responsibility exists.⁶¹ However, a survey of several definitions demonstrates a common understanding as to the general nature of the concept. The United Nations Industrial Development Organization defines CSR as "the way a company achieves balance or integration of economic, environmental and social imperatives while at the same time addressing shareholder expectations."⁶² The Canadian government notes that CSR applies to firms operating at home and abroad, and that a key feature of CSR lies in the way a corporation engages with its shareholders, employees, customers, suppliers, governments, NGOs and

55. *Id.* at 49.

56. *Id.*

57. *Id.* at 50.

58. *Id.* at 51; Kaleck & Saage-Maa, *supra* note 48, at 702.

59. See *Nike FAQs*, GLOBAL EXCHANGE, <http://www.globalexchange.org/sweatfree/nike/faq> (last visited Oct. 5, 2011).

60. *Doe I v. Unocal Corp.*, 395 F.3d 932, 945 (9th Cir. 2002).

61. MICHAEL KERR, RICHARD JANDA, & CHIP PITTS, *CORPORATE SOCIAL RESPONSIBILITY: A LEGAL ANALYSIS* 5 (Chip Pitts ed. 2009).

62. *What is CSR?: Defining the Concept*, UNITED NATIONS INDUSTRIAL DEVELOPMENT ORGANIZATION, <http://www.unido.org/index.php?id=o72054> (last visited Apr. 15, 2012).

IGOs.⁶³ The European Commission largely echoes the United Nation's definition in its focus on social and environmental concerns but explicitly describes CSR as a voluntary concept.⁶⁴ The Department of Business, Innovation, and Skills of Great Britain adds a cost-benefit analysis to the European Commission's definition when it describes CSR as "voluntary actions that business can take, over and above compliance with minimum legal requirements" with the aim of "maximising [economic, social, and environmental] benefits and minimizing the downsides."⁶⁵ Broadly speaking, corporate social responsibility encompasses what John Elkington referred to as "the triple bottom line" of "people, planet, and profit."⁶⁶ In pursuing corporate social responsibility, corporations should consider the social and ecological impact of their business practices without ceasing to be a profit-generating entity.

2. *The UN's Ten Principles of CSR*

The most comprehensive and legally significant instrument detailing the contents of CSR is the United Nations Global Compact's Ten Principles of Corporate Social Responsibility.⁶⁷ The Ten Principles were officially launched on July 26, 2000 and have been endorsed by over 8,000 entities, including 135 countries,⁶⁸ making the Ten Principles the most widely acceded to voluntary CSR initiative in the world.⁶⁹ The Ten Principles are drawn from several multilateral treaties including the Universal Declaration of Human Rights, the International Labor Organization's Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development, and the United Nations Convention Against Corruption.⁷⁰ Reference to these treaties not only bolsters the legal

63. *Corporate Social Responsibility*, INDUSTRY CANADA, <http://www.ic.gc.ca/eic/site/csr-rse.nsf/eng/home> (last visited Oct. 7, 2011).

64. Commission of the European Communities, *Green Paper: Promoting a European Framework for Corporate Social Responsibility*, ¶ 1, COM (2001) 366 final (July 18, 2001), available at http://eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001_0366en01.pdf.

65. DEP'T FOR BUS. INNOVATION & SKILLS, CORPORATE RESPONSIBILITY REPORT 5 (2009), available at <http://www.bis.gov.uk/files/file50312.pdf>.

66. JOHN ELKINGTON, CANNIBALS WITH FORKS: THE TRIPLE BOTTOM LINE OF 21ST CENTURY BUSINESS, at iv (1998).

67. *The Ten Principles*, UNITED NATIONS GLOBAL COMPACT, <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html> (last visited, Oct. 7, 2011) (hereinafter *Ten Principles*).

68. *UN Global Compact Participants*, UNITED NATIONS GLOBAL COMPACT, <http://www.unglobalcompact.org/ParticipantsAndStakeholders/index.html> (last visited, Oct. 7, 2011).

69. *Overview of the UN Global Compact*, UNITED NATIONS GLOBAL COMPACT, <http://www.unglobalcompact.org/AboutTheGC/index.html> (last visited, Oct. 7, 2011).

70. *Ten Principles*, *supra* note 67; see also Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948); ILO Declaration on

significance of the Ten Principles but also reminds states of their already existing obligations to human rights, labor rights, the environment, and non-corrupt business practices.

Where human rights are concerned, the United Nations Ten Principles of Corporate Social Responsibility states that corporations should support the protection of internationally recognized human rights and ensure that they are not complicit in the violation of such rights.⁷¹ Regarding labor rights, the Ten Principles calls for business to uphold the freedom of association and the right to collective bargaining, eliminate all forms of compulsory, forced, and child labor, and eliminate all forms of discrimination in employment.⁷² With respect to the environment, the Ten Principles state that businesses should take a precautionary approach to the environment that seeks to promote greater environmental responsibility and diffuse environmentally friendly technologies.⁷³ Finally, the Ten Principles clearly states that corporations “should work against corruption in all its forms, including extortion and bribery.”⁷⁴

In sum, while the Ten Principles are nominally agreed upon, the breadth of agreement may result from the fact that they are voluntary and bind neither nation states nor corporations. In addition, the widespread agreement fails to even address the question of how these principles should be implemented. Indeed, where enforcement is concerned, the debate surrounding CSR begins to appear similar to that surrounding the *lex mercatoria*. There is such a wide spectrum of views on the enforcement of CSR norms – ranging from a purely voluntary approach to CSR to the establishment of corporate criminal liability in the International Criminal Court – that a proponent of any position can find ample support for that position in academic literature.⁷⁵

Fundamental Principles and Rights at Work and Annex, June 18, 1998, 37 I.L.M. 1233; United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26 (Vol. I), Annex I (June 14, 1992); United Nations Convention Against Corruption, G.A. Res. 58/4; U.N. Doc. A/RES/58/4, (Oct. 31, 2003).

71. *Ten Principles*, *supra* note 67.

72. *Id.*

73. *Id.*

74. *Id.*

75. See, e.g., Eric Engle, *Corporate Social Responsibility (CSR): Market-Based Remedies for International Human Rights Violations?*, 40 WILLAMETTE L. REV. 103, 106 (2004) (exploring “(1) marketplace activism (influence over or via capital structure and sales of the corporation), (2) internal self-regulation (codes of conduct), and (3) shareholder activism”); Mordechai Kremnitzer, *A Possible Case for Imposing Criminal Liability on Corporations in International Criminal Law*, 8 J. INT’L CRIM. JUST. 909, 910 (2010) (claiming “full justification to impose on corporations the rules of international law applicable to natural persons, especially the most basic ones concerning genocide, crimes against humanity and war crimes, and to regard them as accountable for respecting these rules”).

The key distinction between the disagreement surrounding corporate social responsibility and that surrounding the *lex mercatoria* is that the former consists of complementary options while the latter consists of mutually exclusive versions of the same story. The existence of voluntary CSR norms does not impede other efforts to shape corporate behavior, such as economic sanctions or civil liability. Each method of ensuring corporate compliance with internationally recognized social norms supplements the others. Conversely, the *lex mercatoria* is either an historical phenomenon in which voluntary norms were codified into binding law or is not. It is either in a state of flux or is totally settled. Thus, when considering the debate around methods for implementing CSR norms, one should view the debate as a menu of options and not a choice between competing views on the same subject.

C. Implementation of Corporate Social Responsibility Norms

Each option advanced as a means toward implementing corporate social responsibility norms seeks to balance practical efficacy with political feasibility, and each approach inevitably favors one over the other. The range of policy options can be divided into four categories: international regulation, domestic regulation, civil liability, and market-driven self-regulation.⁷⁶ A brief description of each category is warranted to provide the context in which market-driven norms of corporate social responsibility exist and to illustrate the practical difficulty in imposing binding norms of corporate social responsibility upon corporations.

1. International Regulation

As a means for creating binding CSR norms, international regulation is the most ambitious and legally challenging option. Proponents have therefore been unsuccessful in creating binding norms. The most ambitious of all international corporate regulations is international corporate criminal liability.⁷⁷ To establish such liability, Article 5 of the Rome Statute would have to be amended to expand ICC

76. See generally Ralph G. Steinhardt, *Corporate Responsibility and the International Law of Human Rights: The New Lex Mercatoria*, in NON-STATE ACTORS AND HUMAN RIGHTS 177 (Philip Alston ed., 2005).

77. See, e.g., Kremnitzer, *supra* note 75, at 910; Joanna Kyriakakis, *Corporations and the International Criminal Court: The Complementarity Objection Stripped Bare*, 19 CRIM. L.F., 115, 150 (2008) ("Arguments in favour of the better regulation of multinational corporations in their global activities, such as those outlined above, might support a reform of the ICC to include corporations in its jurisdiction in furtherance of the stated objectives of the Court, and so it is with such questions that the future reformers of the ICC Statute should be concerned.").

jurisdiction to include legal, as well as natural persons.⁷⁸ This approach has not been successful, not only because of a lack of political will in developed countries to expose their corporations to such liability,⁷⁹ but also because international human rights law has developed according to the notion of state primacy in which states bear primary responsibility for the protection of the human rights of their citizens.⁸⁰ Furthermore, this approach is antithetical to the shareholder primacy model of the corporation, which states that a corporation's duty is to maximize shareholder profit.⁸¹ Shareholder primacy is more than a dominant theoretical model for the corporation; it is seen by some as legal requirement for boards of directors in the United States of America.⁸²

As a result of these doctrinal challenges, most of the international efforts consist of voluntary norms for corporations and multilateral agreements directed at states, exemplified by the UN's Global Compact discussed above.⁸³ While internationally developed sets of CSR norms represent an important part of the discussion, as they are indeed one option, in practice they create little opportunity for binding norms.

A third approach to international regulation of multinational corporations comes in the form of multilateral treaties, which avoid the complication of state primacy plaguing voluntary codes of corporate conduct, as they are aimed directly at states. The four most prescient treaties to CSR are those explicitly referenced by the Ten Principles: the Universal Declaration of Human Rights, the International Labor Organization's Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development, and the United Nations Convention Against Corruption.⁸⁴ These treaties fail to result in binding norms emanating from the host state for precisely the same reason that corporate social responsibility is a problem in the first place – namely that host governments lack the capacity to protect their

78. See Rome Statute of the International Criminal Court art. 5(1), July 17, 1998, 2187 U.N.T.S. 90, available at <http://untreaty.un.org/cod/icc/statute/rome.htm>.

79. See Jordan Sundell, Note, *Ill-Gotten Gains: The Case for International Corporate Criminal Liability*, 20 MINN. J. INT'L L. 648, 676 (2011) (describing significant political challenges).

80. Steinhardt, *supra* note 4, at 933.

81. *Id.*

82. See *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919) ("A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits, or to the nondistribution of profits among stockholders in order to devote them to other purposes.").

83. *Ten Principles*, *supra* note 67.

84. See *id.*

citizens from corporate abuses. Thus, where these multilateral treaties are needed most, the relevant state parties do not enforce them.

2. Domestic Criminal Regulation

In addition to calls for international regulation of MNCs, developed nations have used domestic mechanisms, including judicial action and legislation, to affect the actions of corporations doing business abroad. For example, a Dutch criminal court convicted businessman Frans van Anraat of aiding and abetting war crimes for supplying the Iraqi government with chemicals needed to manufacture mustard gas used against the Kurdish population.⁸⁵ More recently, the Hamburg Consumer Protection Agency filed charges of unfair competition in Heilbronn district court claiming that German discount retailer Lidl falsely advertised its products by claiming that it provided fair labor conditions to its workers in Bangladesh when an investigation uncovered that the claim was far from true.⁸⁶

Domestic regulation of multinational corporations has also taken the form of legislation and executive orders, and some go so far as to call for developed countries to apply its corporate laws to the local parent companies of corporations operating overseas.⁸⁷ While this approach has not gained political traction, domestic legislation has been successful to a certain degree in regulating the actions of multinational corporations. The most important and successful example of such legislation is the United States' Foreign Corrupt Practices Act, which makes it illegal for any corporation that is publicly traded in the United States to bribe a foreign official.⁸⁸ This effort, initially seen as a hindrance to American multinationals, has become a model global standard.⁸⁹

85. *Public Prosecutor v. Van Anraat*, LJN AU8685, The Hague District Court, 23 Dec. 2005 at 13; BA6734, Gerechtshof's-Gravenhage, 2200050906-2, judgment of 5 Sept. 2007.

86. *Consumer complaint demands fair working conditions*, EUROPEAN CENTER FOR CONSTITUTIONAL AND HUMAN RIGHTS, <http://www.ecchr.de/index.php/lidl-case/articles/consumer-complaint-demands-fair-working-conditions.html> (last visited Oct. 12, 2011).

87. See, e.g., Jonathan Clough, *Punishing the Parent: Corporate Criminal Complicity in Human Rights Abuses*, 33 BROOK. J. INT'L L. 899, 903 (2008).

88. *Foreign Corrupt Practices Act* of 1977, 15 U.S.C. §§ 78dd-1 et seq (1998).

89. Angel Gurria, OECD Sec'y Gen., *Towards Coherence in International Economic Law: Perspectives at the 50th Anniversary of the OECD* (Mar. 23, 2011), available at http://www.oecd.org/document/44/0,3746,en_21571361_44315115_47472044_1_1_1_1,00.html ("The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which is based on the U.S. Foreign Corrupt Practices Act, has outlawed foreign bribery in 38 countries. OECD's recognized 'gold standard' and strict monitoring mechanism puts key competitors closer in line with best practices."); Letter from Citizens for Responsibility and Ethics in Washington to the U.S. House of Representatives (Jan. 12, 2012), available at <http://www.scribd.com/doc/78161873/CREW-Foreign-Corrupt-Practices-Act-FCPA-Letter-to-Congress-01-12-12>

The executive branch also has a role to play in ensuring compliance with human rights norms abroad. This role takes the form of trade sanctions, the most coercive method of ensuring compliance.⁹⁰ These trade sanctions commonly occur when a developed country, regional organization, or inter-governmental organization learns of widespread human rights violations occurring in a country and impose trade sanctions upon that entire nation.⁹¹ These sanctions can be implemented quickly and at little or no cost,⁹² but they have also been criticized for stifling a state's ability to pursue other human rights objectives.⁹³ In short, domestic regulation of multinational corporations are highly effective where they have been forcefully implemented, but such regulation is sparse and ad-hoc in nature, making them unacceptable for proponents of universally binding norms.

3. Domestic Civil Regulation

The third category of enforcement mechanisms for corporate social responsibility norms is a regime of civil liability. The Alien Tort Claims Act ("ATCA") in the United States exemplifies this regime.⁹⁴ The ACTA was enacted as part of the Judiciary Act of 1789 and vests original jurisdiction in United States District Court allowing an alien to bring a claim for the violation of the law of nations or a United States treaty.⁹⁵ In 1980, the United States Court of Appeals for the Second Circuit held that the ATCA could be invoked for human rights violations in *Filartiga v. Peña-Irala*.⁹⁶ There, the court held that a Paraguayan government official violated the Act when he tortured a citizen of Paraguay.⁹⁷ Then, in 1997, the Northern District of California held that a corporation could be brought to court under the ATCA when it found that Unocal was complicit in human rights abuses perpetrated by Myanmar's

(describing the FCPA as having led to a "leadership role in curbing corruption both at home and abroad").

90. See Olufemi Amao, *Trade Sanctions, Human Rights and Multinational Corporations: The EU-ACP Context*, 32 HASTINGS INT'L & COMP. L. REV. 379, 382 (2009).

91. See, e.g., Exec. Order No. 12532, 50 Fed. Reg. 36,861 (Sept. 9, 1985) (imposing trade sanctions on South Africa in response to apartheid); Sudan Peace Act of 2002, Pub. L. No. 107-245, 116 Stat. 1504 (2002) (imposing trade sanctions in Sudan in response to violence perpetrated by the government).

92. Amao, *supra* note 90, at 394.

93. *Id.* at 386.

94. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73 (codified as amended at 28 U.S.C. § 1350).

95. *Id.*

96. *Filartiga v. Peña-Irala*, 630 F.2d 876, 878 (2d Cir. 1980).

97. *Id.*

military on its behalf.⁹⁸ The Ninth Circuit later affirmed the case, opening the statute for use to enforce corporate social responsibility.⁹⁹

However, in the 2004 landmark case of *Sosa v. Alvarez-Machain*, the United States Supreme Court defined the jurisdiction of the ATCA quite narrowly.¹⁰⁰ There, the Court held that the ATCA was jurisdictional in nature but was meant to be immediately operable upon passage.¹⁰¹ Looking to the legislative history of the statute, the court found that it was meant to create a common law cause of action for piracy, violation of safe conducts, and infringement on the rights of ambassadors.¹⁰² It held that new causes of action could arise under the common law if the norm that was allegedly violated was of sufficient universality and specificity such that it mirrored the three eighteenth century norms contemplated by Congress.¹⁰³

Though a United States Circuit court has held that the ATCA can apply to corporations in the post-*Sosa* era,¹⁰⁴ the final disposition is pending before the Supreme Court. Moreover, even if successful on the merits, its reach appears to be limited to violations of international law norms approaching, if not reaching, the status of *jus cogens*. Moreover, even if the plaintiff is able to establish a violation of sufficient gravity to be covered by the ATCA, he or she must properly serve the defendant with process in the United States and overcome an almost certain *forum non-conveniens* challenge – both significant obstacles in themselves.¹⁰⁵ While there are alternatives to the ATCA, they all pose significantly greater jurisdictional challenges than the American statute, making the ATCA the strongest option for challenging corporate human rights violations in civil court.¹⁰⁶ Because the civil realm is limited only to the gravest violations of human rights and is subject to significant jurisdictional challenges, it is not a practicable option for enforcing corporate social responsibility on a global level.

4. Market-Based Regulation

The final class of CSR enforcement mechanisms comes from the marketplace itself and is the direct focus of this paper. Examples of a

98. *Doe I v. Unocal Corp.*, 963 F. Supp. 880, 884 (C.D. Cal. 1997).

99. *Doe I v. Unocal Corp.*, 395 F.3d 932, 947 (9th Cir. 2002).

100. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 710 (2004).

101. *Id.* at 710, 725.

102. *Id.* at 724.

103. *Id.* at 725.

104. *See Sarei v. Rio Tinto, PLC*, 456 F.3d 1069, 1074 (9th Cir. 2006).

105. Bahareh Mostajeleian, Note, *Foreign Alternatives to the Alien Tort Claims Act: The Success (or Is It Failure?) of Bringing Civil Suits Against Multinational Corporations That Commit Human Rights Violations*, 40 GEO. WASH. INT'L L. REV. 497, 502-03 (2008).

106. *See id.* at 505-14 (including the Brussels Convention, the United Kingdom's common law judicial system, and France's Civil Code as potential legal sources that could be used to bring a MNC to court for violations of human rights).

market-driven approach to corporate social responsibility include rights-sensitive branding, unilateral codes of conduct, voluntary submission to auditing, and shareholder pressure.¹⁰⁷ Although this category of norms has the strongest practical foundation, the reach of these efforts is fairly narrow and actual compliance with the underlying norms is mixed, even when the efforts are successfully implemented.

The basis of the advocacy for a market-based regime of CSR norms is an apparent absence of alternatives that do not offend international human rights law, corporate law, or both.¹⁰⁸ Externally imposed CSR norms offend the traditional notion of shareholder primacy “by requiring management to develop an expertise in human rights law and exercise *de facto* control over abuses generally committed by governments, raising costs without raising revenues.”¹⁰⁹ These top-down norms similarly offend the notion of state primacy in human rights law, the idea that states have the primary responsibility to protect human rights, absent extraordinary circumstances defined by national agreement.¹¹⁰ These points are relatively straightforward but nonetheless bear repeating. The fundamental nature of shareholder primacy and state primacy in corporate and international human rights law, respectively, cannot be overstated. A market-driven approach accordingly seeks to avoid the problem arising from shareholder primacy altogether and make the state primacy model largely irrelevant. At present, it is the most practical and realistic of all approaches.

4a. Rights-Sensitive Branding

The first subset of market-driven CSR norms is rights-sensitive branding, which seeks to attract “a profitable contingent of consumers [who are willing to] pay a premium for some assurance that the goods they purchase are not produced or marketed in violation of the rights of workers and communities.”¹¹¹ Some prominent examples of rights-sensitive branding include Starbucks’ “fair trade” coffee, Chiquita’s “ethical banana” (marketed in Europe), and the well known “Kimberly Process” aimed at reducing the prevalence of conflict diamonds on the world market.¹¹² While these efforts prove that some consumers are willing to pay higher retail prices for goods they believe to be manufactured and marketed in a way that is consistent with these

107. Steinhardt, *supra* note 76, at 180-85.

108. See Steinhardt, *supra* note 4, at 933-34.

109. *Id.* at 933.

110. *Id.* at 933-34.

111. Steinhardt, *supra* note 76, at 181.

112. *Id.* at 181-82.

consumers' ideals, "translation into corporate practice [has been] episodic at best."¹¹³

4b. Unilateral Codes of Conduct

In a similar vein, corporations seeking to show their customers that they hold themselves to high standards when it comes to human rights, labor rights, and environmental protection may adopt unilateral codes of conduct. Firms as diverse as Royal Dutch Shell, Nike, and Liz Claiborne have adopted these unilateral codes of conduct.¹¹⁴ Critics of these codes argue that they are little more than public relations strategies or attempts to preempt host countries from issuing tougher regulation.¹¹⁵ However, empirical studies show these unilateral codes have led to real change, especially when coupled with external monitoring mechanisms.¹¹⁶ Unilateral codes of conduct are especially effective when they are implemented by a company high on the supply chain that extends the code to suppliers as a condition of doing business.¹¹⁷ However, there is no way to enforce these codes of conduct, and frequently, it is impossible to know if the corporations advancing these codes are even attempting to comply with them.

4c. Social Accountability Auditing & Certification

The third subcategory of market-driven CSR norms is social accountability auditing and certification, which occurs when a corporation partners with an NGO to develop verifiable standards in the workplace and submits itself to periodic auditing to ensure that the corporation in fact meets those standards.¹¹⁸ This approach seeks to remedy some of the deficiencies in ensuring compliance associated with declaratory unilateral codes of conduct. The SA 8000, developed by Social Accountability International and seeking compliance with standards in child labor, forced labor, health and safety, freedom of association, freedom from discrimination, disciplinary practices, work hours, compensation, and management systems, serves as a prime

113. *Id.* at 182.

114. *Id.* at 183.

115. Gunther Teubner, *Self-Constitutionalizing TNCs? On the Linkage of "Private" and "Public" Corporate Codes of Conduct*, 18 IND. J. GLOBAL LEGAL STUD. 617, 619 (2011).

116. See, e.g., Richard Locke et al., *Does Monitoring Improve Labor Standards? Lessons from Nike* 19, 37-38 (Corporate Soc. Responsibility Initiative, John F. Kennedy Sch. of Gov't, Harvard Univ., Working Paper No. 24, 2006); Anne Landman, *Absolving Your Sins and CYA: Corporations Embrace Voluntary Codes of Conduct*, PR WATCH (Sept. 4, 2001), <http://www.prwatch.org/node/7724>.

117. See Larry Cata Backer, *Multinational Corporations as Objects and Sources of Transnational Regulation*, 14 ILSA J. INT'L & COMP. L. 499, 509-10 (2008) (using Gap, Inc. as an example).

118. Steinhardt, *supra* note 76, at 184.

example.¹¹⁹ Participants in this system voluntarily submit to announced and unannounced surveillance audits to ensure compliance.¹²⁰ Other examples include the ISO 14001 and the ISO 9000, which seek compliance with environmental standards and quality control norms, respectively.¹²¹ However, these accountability audits are only as good as the auditors themselves. The Enron debacle, in which Arthur Andersen, Enron's accountant, actively worked to conceal fraud and destroy evidence, is a striking example of the limitations on relying upon accounting measures to ensure compliance.¹²² The Arthur Andersen scandal shows the degree to which corporations can manipulate their records to dictate the outcome of an audit.

4d. Ethical Investment by Shareholders

The final category of market-based mechanisms to promote compliance with corporate social responsibility norms is ethical investment organizations through which interested shareholders and institutional investors apply shareholder pressure to coerce corporations into heeding social norms.¹²³ This form of market-based pressure is the purest of all four, as it falls directly in line with the shareholder primacy model of the corporation. In this instance, corporations pursue CSR norms not because they feel a duty to third party stakeholders, but because their own shareholders have demanded it. The most famous example of such shareholder pressure is the Norwegian Government Pension Fund.¹²⁴ The second largest pension fund with assets in excess of \$300 billion,¹²⁵ the Norwegian Fund has used its formidable economic sway to disinvest from Singapore Technologies because of the "large degree of probability" that it was producing anti-personnel mines through a subsidiary,¹²⁶ and to exclude Kerr-McGee from its portfolio for actions taken off the coast of the non-self-governing territory of Western Sahara.¹²⁷ Similarly, certain investment vehicles like the FTSE4GOOD Index series have been created to measure the performance of companies that meet globally recognized CSR norms so that "consultants, asset owners, fund

119. See SOC. ACCOUNTABILITY INT'L, SOCIAL ACCOUNTABILITY 8000, at 5-8 (2008), available at http://www.sa-intl.org/_data/n_0001/resources/live/2008StdEnglishFinal.pdf.

120. *Id.* at 10.

121. Steinhardt, *supra* note 76, at 184.

122. See Gary J. Aguirre, *The Enron Decision: Closing the Fraud-Free Zone on Errant Gatekeepers?*, 28 DEL. J. CORP. L. 447, 447 (2003).

123. Steinhardt, *supra* note 76, at 184-85.

124. See Simon Chesterman, *The Turn to Ethics: Disinvestment from Multinational Corporations for Human Rights Violations—The Case of Norway's Sovereign Wealth Fund*, 23 AM. U. INT'L L. REV. 577, 582 (2008).

125. *Id.*

126. *Id.* at 584.

127. *Id.* at 591.

managers, investment banks, stock exchanges and brokers [can assess] or creat[e] responsible investment products.”¹²⁸ In the end, however, “[t]hese indices are necessarily partial, because they include only ‘high impact’ and only particular areas of corporate responsibility, some of which have little to do with human rights.”¹²⁹

Because these market-driven approaches to binding corporate social responsibility norms are enforced by the marketplace and not by governments, they have been met with considerably more practical success than their more coercive counterparts. This has led some to argue that the best hope for binding CSR norms comes not from governments but from corporations themselves.

5. *The Argument That Market-Driven Norms Are a New Lex Mercatoria*

The strongest proponents of a market-driven approach to corporate social responsibility argue that CSR can and should be seen as a new *lex mercatoria*.¹³⁰ The argument, advanced most notably by Professor Ralph G. Steinhardt, is that the true character of the *lex mercatoria* is highly representative of the aspirations that proponents of enforceable corporate social responsibility norms have for the future of the concept.¹³¹ According to Professor Steinhardt, the *lex mercatoria* “blurred the distinction between self-interest and altruism,” was transnational in scope, grounded in good faith, reflective of market practices, and ultimately codified into binding legal norms.¹³² Steinhardt argues that corporate social responsibility and the *lex mercatoria* share the same “genetic marker” implying that corporate social responsibility will evolve in much the same way as the *lex mercatoria*.¹³³ Thus, Steinhardt predicts that the seemingly soft notions of corporate social responsibility will evolve into hard legal norms because a merchant’s self-interest will depend on his respect for the interests of others. Thus, at the core of this private law ultimately rests public values.¹³⁴

Professor Steinhardt is right in arguing that corporations have in fact submitted voluntarily to CSR norms without the help of governments and that “the justifications for this ‘human rights

128. *FTSE4GOOD Index Series*, FTSE: THE INDEX COMPANY, http://www.ftse.com/Indices/FTSE4Good_Index_Series/index.jsp (last visited, Oct. 17, 2011).

129. Steinhardt, *supra* note 76, at 185 n.14.

130. *See, e.g.*, Steinhardt, *supra* note 4, at 947-48; Pitts, *supra* note 4, at 357; Engle, *supra* note 4, at 118.

131. *See* Steinhardt, *supra* note 76, at 223; Steinhardt, *supra* note 4, at 950.

132. Steinhardt, *supra* note 76, at 223-24.

133. *Id.* at 225.

134. *Id.*

entrepreneurialism' are multiple and mutually reinforcing."¹³⁵ However, this author argues that rather than developing as a result of an emerging understanding among merchants that respect for CSR norms is essential to collective mercantile success, binding norms of corporate social responsibility will result from pressures entirely outside the corporate suite and will ultimately come in the form of clauses in bilateral investment treaties. A close examination of existing CSR norms shows that rather than blurring self-interest and altruism in a way that derogates from the shareholder primacy model, every current example of market-driven CSR can be easily explained by simple self-interest on the part of the corporation.

IV. MARKET-DRIVEN CSR: SELF INTEREST IS A PRECONDITION FOR ALTRUISM

Proponents of corporate social responsibility as a new *lex mercatoria* offer the notion that the *lex mercatoria* "effectively blurred the distinction between self-interest and altruism" in support of their position.¹³⁶ The idea behind this argument is that merchants have historically been willing to bind themselves to *lex mercatoria* norms that favored the general interest, and they can accordingly be expected to bind themselves in a similar fashion to corporate social responsibility norms in the future.

Professor Steinhardt himself admits that, while the benefits of *lex mercatoria* norms flowed primarily to the mercantile community itself, the benefits of corporate social responsibility norms flow to a "labour force or a society or even an idea."¹³⁷ Yet Professor Steinhardt and other proponents maintain that *lex mercatoria* and CSR norms are sufficiently similar such that CSR norms will develop into a new *lex mercatoria*. A closer look into the types of corporations and situations that have given rise to voluntary CSR norms suggests that the shareholder primacy model is alive and well and that short-term corporate self-interest is the most natural explanation for the development of market-driven CSR norms.

Current examples of market-driven CSR further suggest that such norms are not likely to develop outside of three specific, and relatively rare, scenarios. These scenarios include servicing the "right" customer base, atoning for a prior CSR atrocity, or servicing the "right" customer base after a CSR atrocity.

135. Steinhardt, *supra* note 4, at 937.

136. Steinhardt, *supra* note 76, at 223.

137. *Id.* at 225.

A. Servicing the "Right" Customer Base

The first scenario involves corporations that are dealing in branded goods and servicing a customer base that is not price sensitive and highly values-sensitive. The second scenario consists of companies dealing in low-cost goods or commodities that are atoning for an egregious and widely publicized CSR-related disaster within the industry. The third scenario is actually a combination of the first two and occurs when a significant and widely publicized CSR disaster occurs in an industry that services non-price sensitive, highly values-sensitive customers. Though this third class is quite small, it is there where the most meaningful CSR norms have developed. Because these three scenarios are more easily explained by the shareholder primacy model than by a sudden shift towards altruism, the empirical claim that MNC's have in fact increased compliance with CSR norms does little in the way of advancing the notion that CSR norms are capable of fully developing into binding law, from the bottom up, along the supposed line of the *lex mercatoria*.

The first scenario results in voluntary codes of conduct and rights sensitive branding lines coming from companies like Starbucks,¹³⁸ Jonathan's Organics,¹³⁹ Avon Cosmetics,¹⁴⁰ Ben & Jerry's,¹⁴¹ and Whole Foods Market.¹⁴² The first thing to note about these examples is that they are all premium brands. If one were to line up all of a grocery store's coffee, produce, and ice cream by price per ounce, Starbucks, Jonathan's Organics, and Ben & Jerry's products would all be at or near the expensive end of the line. Customers buying high-end goods such as these are willing to pay a premium for their product. Thus, the economic effects of adhering to CSR norms are passed from the firm to the consumer where they are happily accepted. Moreover, these high-end goods providers are competing with other high-end goods providers. Ben & Jerry's competes with Häagen-Dazs; Starbucks competes with Seattle's Best. Because a significant segment of the affluent consumer group values social responsibility above price,¹⁴³ companies selling high-end, branded goods are able to gain market share through their adoption and promotion of their adoption of CSR codes.

138. See *Products: Coffee*, FAIR TRADE USA, <http://fairtradeusa.org/products-partners/coffee> (last visited Oct. 26, 2011).

139. See *Products: Fruits & Vegetables*, FAIR TRADE USA, <http://fairtradeusa.org/products-partners/fruits-vegetables> (last visited Oct. 26, 2011).

140. See *Products: Body Care*, FAIR TRADE USA, <http://fairtradeusa.org/products-partners/body-care> (last visited Oct. 26, 2011).

141. See *Products: Cocoa*, FAIR TRADE USA, <http://fairtradeusa.org/products-partners/cocoa> (last visited Oct. 26, 2011).

142. See *Products: Wine*, FAIR TRADE USA, <http://fairtradeusa.org/products-partners/wine> (last visited Oct. 26, 2011).

143. See Steinhardt, *supra* note 76, at 181.

The implementation of market-based CSR norms under this first scenario does indeed have positive consequences for those outside of the firm, but to call the adoption of these norms “altruistic” goes too far. A company develops a rights-sensitive branding line for a high-end product in order to gain share of a market whose consumers are already willing to accept a higher price; it is a wholly self-interested decision.

B. Atoning For a Prior Atrocity

The second scenario under which corporations aggressively adopt CSR norms, namely corporations in an industry marred by egregious and well-publicized human rights or environmental disasters, is equally self-interested. The most significant examples of this phenomenon can be seen in Shell Nigeria,¹⁴⁴ Exxon Mobil,¹⁴⁵ and Union Carbide, who were responsible for the atrocities committed against the Ogoni people, the Exxon-Valdez oil spill, and the Bhopal disaster, respectively.

Whereas the first class of corporate actors undertake CSR initiatives to attract new customers by going above and beyond the industry standard when it comes to corporate social responsibility, this second class seeks to retain existing customers by proving that the current industry standard is acceptable to the broader public when it comes to CSR. The firms in this second class are primarily seeking to restore their reputational accountability so that they can continue to be competitive.¹⁴⁶ The measures taken under the second scenario are even less altruistic than those taken under the first, as the corporation sees them as being necessary for survival rather than a marketing strategy designed to gain market share. Moreover, the actions taken by this class more commonly take the form of charity and community support, rather than norms designed to regulate business practices.¹⁴⁷

C. Atoning For a Prior Atrocity in the Minds of the “Right” Consumer

Finally, there are certain scenarios where human rights atrocities surface in an industry supplying goods to affluent consumers who are more concerned with the assurance that their values are reflected in the products they consume than about the price they must pay for the goods themselves. The two key examples of this third scenario involve the

144. See *Environment and Society*, SHELL NIGERIA, http://www.shell.com.ng/home/content/nga/environment_society/ (last visited Oct. 26, 2011).

145. See *Safety & Environment*, EXXON MOBIL, <http://www.exxonmobil.com/Corporate/safety.aspx> (last visited Oct. 26, 2011).

146. Jackson, *supra* note 53, at 91 (noting that this system of reputational accountability is only effective when coupled with a system of civil liability).

147. See, e.g., SHELL NIGERIA, *supra* note 144 (focusing on education and healthcare in the region).

diamond industry and the textiles industry and have resulted in some of the most robust examples of enforceable CSR norms to date.

The Kimberly Process was created in response to news in the 1990's that a large number of diamonds bought in the developing world were being used to fund conflicts in African nations such as Sierra Leone, Liberia, and Angola.¹⁴⁸ The egregious nature of the African conflicts led the United Nations to announce the launch of the Kimberly Process in 2002.¹⁴⁹ The Kimberly Process, which went into effect on January 1, 2003, requires that each participating country track each exported diamond back to the mine from which it came or to the source of import by implementing national laws that ensure compliance, designate import and export authorities, establish control systems, provide certificates for each diamond, ensure that diamonds are shipped in tamper-resistant containers, and collect relevant data on their activities.¹⁵⁰ The Process has been highly successful in reducing the prevalence of conflict diamonds to less than 1 percent of the global market.¹⁵¹ Similarly, the apparel industry has responded to harsh criticism regarding labor conditions at suppliers' factories by developing robust CSR schemes. For example, Nike employs a team of around 100 inspectors who grade suppliers on labor standards and work with managers to address issues as they arise.¹⁵² Similar programs have been implemented by Gap, Inc.¹⁵³ (the parent company of Gap, Old Navy, and Banana Republic Clothing lines), as well as Levi Strauss, Co.¹⁵⁴ Like the Kimberly Process, these initiatives have been quite successful in shaping corporate behavior.

A proponent of CSR as a new *lex mercatoria* might argue that the Kimberly Process and the changes in the garment manufacturing industry are particularly salient examples of corporate altruism. In actuality these examples merely point out that the two already-mentioned forces of CSR – a non-price sensitive, highly values-sensitive consumer base and the presence of a well-publicized CSR atrocity – are more potent together than they are alone. Purchasers of diamonds and branded clothing generally have a high level of disposable income and

148. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-978, CONFLICT DIAMONDS: AGENCY ACTIONS NEEDED TO ENHANCE IMPLEMENTATION OF THE CLEAN DIAMOND TRADE ACT 1-2 (2006) [hereinafter GAO Report].

149. Tina Muscarella Gooch, *Conflict Diamonds or Illicit Diamonds: Should the Difference Matter to the Kimberley Process Certification Scheme?*, 48 NAT. RESOURCES J. 189, 193 (2008).

150. GAO Report, *supra* note 148, at 9.

151. Vivienne Walt, *Diamonds Aren't Forever*, FORTUNE, Dec. 7, 2006, http://money.cnn.com/magazines/fortune/fortune_archive/2006/12/11/8395442/index.htm.

152. *Nike's New Game Plan for Sweatshops*, BLOOMBERG BUSINESSWEEK (Sept. 20, 2004), http://www.businessweek.com/magazine/content/04_38/b3900011_mz001.htm.

153. Backer, *supra* note 117, at 511.

154. Steinhardt, *supra* note 76, at 183.

are likely to be aware of, and bothered by, the idea that their purchases are fueling bloody African conflicts or unconscionable labor conditions. Diamond and branded textile producers are under constant pressure outside the corporate suite to improve their practices as a result of reports of conflict diamonds and sweatshops. The directors and managers inside the corporation know that their consumers are more likely to walk away from their product as a result of these corporate abuses than for having to pay a marginal premium to ensure that such abuses do not occur.

None of this is to say that the above-mentioned efforts are negative, or even unimpressive. Much of the beauty of the free market capitalist system can be found in these “win-win” situations, and such scenarios should be sought after and implemented at every turn. But altruism is defined as the “disinterested and selfless concern for the well-being of others,”¹⁵⁵ and accordingly, current examples of market-driven corporate social responsibility fail to fit the definition. They are all driven primarily by corporate self-interest and can be explained using the shareholder primacy model of the corporation.

One cannot look at an action from the outside and decide if it is self-interested or altruistic. Not all actions with a positive social effect are altruistic, just as not all actions with a negative social impact are in the corporation’s self-interest. To decide whether a corporation’s decision is altruistic or self-interested, one must look into the circumstances surrounding the decision and characterize the decision with reference to those circumstances. Here, the requisite circumstances appear to be a corporation looking to gain market share in a segment actively seeking CSR, the presence of a widely reported disaster within a given industry, or both. As such, self-interest appears to be a precondition for altruism in the corporate context. These three scenarios will never make up more than a small corner of all global business, ensuring that adherence to CSR norms such that those norms are effectively binding will remain primarily the responsibility of those outside the corporation.

V. CORPORATE SOCIAL RESPONSIBILITY IS NOT A NEW *LEX MERCATORIA*

Even apart from the fact that all current examples of market-driven CSR are more easily explained through the shareholder primacy model of the corporation than by a novel introduction of altruism into that model, there are two important conceptual flaws to the argument that corporate social responsibility shares a common fate with the *lex mercatoria*. The first is that the entire argument rests upon a premise that is far from certain – namely that *lex mercatoria* norms developed

155. *Definition of Altruism*, in OXFORD ENGLISH DICTIONARY, available at <http://oxforddictionaries.com/definition/altruism>.

exactly in the way that the traditional narrative suggests – an assertion upon which considerable doubt has been cast. Also, *lex mercatoria* and corporate social responsibility norms have the opposite practical effect on firms with respect to effect on the price of goods sold, ease of business administration, and changes in exposure to liability. These flaws suggest that what Professor Steinhardt referred to as a shared genetic marker is much more superficial, and that corporate social responsibility norms are not likely to develop in the same fashion as the supposedly ancient and independently-binding norms of the *lex mercatoria*.

A. A Narrow View of History

Upon surveying the historical landscape of the *lex mercatoria*,¹⁵⁶ two basic historical characterizations emerge. The first is that the *lex mercatoria* began as a set of medieval mercantile customs, but at a certain point in the sixteenth century, courts began to recognize these customs as binding – even if applying the common law directly would lead a different result.¹⁵⁷ The second is that what is called the *lex mercatoria* actually refers to an extrajudicial practice through which educated men, each of whom saw the other as a relative equal, settled disputes. Mercantile customs were local facts to be proved as such,¹⁵⁸ and when the law, as applied to the particular facts of a case, led to a particular result, governmentally sanctioned courts reached that result.

The difference between these two arguments is one of causation. Under the first argument – the traditional view of the *lex mercatoria* – the existence of reliable, equitable, and workable mercantile custom actually caused that custom to be codified into law. Judges actively and explicitly incorporated mercantile custom into the common law and applied it as such to the parties before it. Under the second, alternative view of the *lex mercatoria*, this causal relationship does not exist. The *lex mercatoria* is more properly considered an alternative dispute resolution mechanism, or even a means of extrajudicial settlement, than an independent body of law. If the so-called *lex mercatoria* is merely an example of an extrajudicial settlement mechanism or a court applying facts to law, it is wholly irrelevant to the modern issue of corporate social responsibility.¹⁵⁹ The argument that CSR should be

156. See *supra* Part II.B.

157. Baker, *supra* note 25, at 297.

158. *Id.* at 321.

159. This article is not about which historical characterization is correct; the argument that CSR norms should be seen as a new *lex mercatoria* fails on independent economic and financial grounds. It is worth noting, however, that the alternative history of the *lex mercatoria* is on stronger logical footing than the traditional view. The strongest argument in favor of the traditional view appears to be that mercantile laws were found to be so similar in so many jurisdictions for such a long time. This is indeed a remarkable

seen as a new *lex mercatoria* only makes sense if the traditional historical view of the *lex mercatoria* is ontologically accurate.

Thus, the argument that corporate social responsibility is properly viewed as a new *lex mercatoria* is built upon an unsound foundation. But even if one is willing to concede the historical portion, the overall argument still crumbles. The desired norms of corporate social responsibility and the identified norms of the *lex mercatoria* are foundationally different, such that while the latter were economically destined not only to emerge, but to bind the stakeholders, the former will almost certainly require substantial outside pressure before they become binding.

B. Polar Opposite Business Effects

Lex mercatoria norms benefitted merchants by reducing liability and lowering overhead costs, which in turn allowed them to lower prices and satisfy consumers. On the other hand, CSR norms expose corporations to a new form of liability and raise overhead costs, which lead to an increase in aggregate prices, making all but the most well-off and socially conscious consumers unhappy. If one accepts that corporations are primarily profit-maximizing, liability-minimizing entities (which, as Section IV, *infra* suggests, is the case), it is easy to see how *lex mercatoria* norms developed without any governmental pressure. It is also easy to see why CSR norms are not likely to develop in the same way.

1. *Lex Mercatoria* Norms Reduce Liability

The two primary characteristics of *lex mercatoria* norms are “good faith and dispatch.”¹⁶⁰ This focus on equity and expeditiousness served in no small part to make the merchant’s business easier to run from a purely practical standpoint, which ultimately reduced the cost of goods sold. Several examples of identified *lex mercatoria* norms prove this point.

One such example is the *lex mercatoria* norm that stated that each partner in a partnership was an agent for the partnership and could thus bind the partnership even when acting alone.¹⁶¹ This allowed each partner to conduct business on behalf of the partnership without the other’s presence. Partners could cover twice the area in the same

fact, but this author believes that such universality is most simply explained not by courts adopting custom as independently-binding law for the first and only time, but by: 1) Medieval merchants of different nations met with each other at trade fairs as a matter of historical fact; and 2) economic efficiency is equally apparent to educated people of reason, regardless of nationality, and the merchant was among the most well off class of medieval and ancient society.

160. BEWES, *supra* note 7, at 19.

161. *Id.* at 20.

amount of time rather than duplicating all of their efforts due to a legal requirement that both partners accede to every transaction undertaken by the partnership.

Similarly, the *lex mercatoria* said that an employee of the merchant was but a "piece of machinery causing legal relations between his principle and the third person," having "no independent rights or liabilities of his own."¹⁶² This *lex mercatoria* norm performed a similar function to the preceding norm, except that it allowed for an employee to do business on behalf of the merchant rather than allowing a single partner to do business on behalf of the entire partnership. Thus, where the Roman law imposed an economically inefficient burden on merchants, *lex mercatoria* norms were created and mutually agreed upon in order to bypass that legal burden, lower overhead costs, lower the cost of goods sold, and increase profits.

2. CSR Norms Increase Liability

Conversely, violations of corporate social responsibility norms almost always arise out of perceived impediments to easy business administration. Sadly, these impediments underlie every instance of egregious CSR abuses. Royal Dutch Shell's actions in Nigeria illustrate the problem, though unfortunately there is no shortage of historical examples.

Wiwa v. Royal Dutch Petroleum, *Wiwa v. Anderson*, and *Wiwa v. Shell Petroleum Development Company* are three lawsuits brought against the Dutch oil company for complicity in the summary execution, crimes against humanity, torture, inhumane treatment, arbitrary arrest, wrongful death, assault and battery, and infliction of emotional distress performed by the Nigerian government against the Ogoni people.¹⁶³ Royal Dutch Shell began drilling for oil in the Ogoni area of Nigeria in 1958.¹⁶⁴ This drilling led to the severe contamination of the water and agricultural land relied upon by the region for survival.¹⁶⁵ For many years, the Ogoni people staged protests against Shell's activities in the region, which the Nigerian government repeatedly quashed through violent means.¹⁶⁶ The violence perpetrated by the Nigerian government for Royal Dutch Shell's benefit culminated in 1995 when "the company and its subsidiary colluded with the Nigerian government to bring about the arrest and execution of the Ogoni 9," who were hanged after a military trial premised upon obviously

162. *Id.* at 21.

163. *Wiwa et al. v. Royal Dutch Petroleum et al.*, CENTER FOR CONSTITUTIONAL RIGHTS, <http://ccrjustice.org/ourcases/current-cases/wiwa-v.-royal-dutch-petroleum> (last visited Oct. 20, 2011).

164. *Id.*

165. *Id.*

166. *Id.*

trumped up charges.¹⁶⁷ Royal Dutch Shell was brought before a United States District Court for violations of the ATCA and settled their case for \$15.5 million.¹⁶⁸

It is difficult to argue that Royal Dutch Shell would have saved money had they acceded to the demands of the Ogoni people. For some perspective, in 1997, Royal Dutch Shell was exporting 899,000 barrels of oil per day out of Nigeria.¹⁶⁹ Using 1997's average oil price of \$18.97 per barrel,¹⁷⁰ Royal Dutch Shell exported \$6,224,720,950 worth of oil from Nigeria in 1997, or \$17,054,030 per day. Thus, the \$15,500,000 settlement paid to the Ogoni, when converted into 1997 dollars,¹⁷¹ amounts to 68 percent of one day's worth of Nigerian oil production. To satisfy the concerns of the Ogoni people in Nigeria, Royal Dutch Shell would have had to either reduce the pace of extraction such that environmental degradation was eliminated, or, if that was not feasible, stop production altogether. Either way, meeting CSR standards in this particular case would have entailed an increase in overhead cost coupled with a decrease in volume, thereby narrowing profit margins by much more than the ultimate cost of settlement.

3. Following *Lex Mercatoria* Norms Leads to Lower Prices

Inexorably connected to *lex mercatoria*'s and CSR's effect on cost of goods sold is their effect of the ultimate price of goods sold. Specific *lex mercatoria* norms, such as those allowing a single partner to bind the partnership and an employee to act solely as an agent of the merchant, not only reduce overhead cost but also allowed efficiencies to be passed on to customers in the form of lower prices in order to increase market share. Similarly, the expedited process favored by the *lex mercatoria*, used in medieval commercial courts, and, according to the traditional narrative, adopted by traditional courts, served to minimize the costs of disputes. To be clear; merchants could choose to utilize these savings to pad their profits rather than lower their prices, but the aggregate effect of competition suggests that, when all firms in an industry are able to enjoy the same set of savings, they will compete with each other on price over the long term.

4. Following CSR Norms Leads to Higher Prices

Contrast the economic results of adherence to *lex mercatoria* norms with that of modern adhering to modern CSR norms, which is

167. *Id.*

168. *Id.*

169. INT'L BUS. PUBL'NS, USA, DOING BUSINESS AND INVESTING IN NIGERIA GUIDE: VOLUME 1 STRATEGIC AND PRACTICAL INFORMATION 113 (2011).

170. *History of Illinois Basin Posted Crude Oil Prices*, IOGA.COM, http://www.ioga.com/Special/crudeoil_Hist.htm (last visited, Oct. 20, 2011).

171. \$11,693,494.68, using 2.38% inflation.

ultimately to raise prices. When a company changes its business practices to respect more fully the human rights of the population, the labor rights of workers, and the environment, it must inevitably spend money to make these changes. Corporations can either take these additional costs out of their profits or they can pass them onto consumers. Absent market pressure to take the former course, corporations, as profit-maximizing entities, are likely to do the latter. Some have argued that respecting labor rights will ultimately result in increased productivity and that respecting human rights and the environment will lead to a stable market.¹⁷² While true, these savings can only begin to be realized after the corporate culture has changed and employees and the host country's society at large respond to that change. Most companies take a shorter view and see CSR norms as drivers of increased costs.

5. *Lex Mercatoria Norms Limit Potential Liability*

The final foundational difference between *lex mercatoria* norms and CSR norms is that the former reduces liability while the latter increases liability. The limited partnership is supposedly a creation of the *lex mercatoria* and illustrates this difference. The limited partnership, in which a general partner is fully exposed to personal liability while the limited partner is exposed to liability only up to his investment, was created to avoid the prohibition on usury while simultaneously allowing the limited partner to control, and thereby reduce, his exposure to liability.¹⁷³ Similarly, the *lex mercatoria* norm allowing for interest to be charged under the head of damages on an unpaid account,¹⁷⁴ as well as the norm stating that an unpaid vendor has a lien on the goods sold against the original buyer, even if that good has been passed to a subpurchaser,¹⁷⁵ serve primarily to ensure that liability for the good sold remained with the purchaser and not the seller. Together, they represent a reduction in liability from the perspective of the merchant.

6. *CSR Norms Expose Corporations to New Forms of Liability*

CSR norms lead to the opposite result of increased liability because ascension to CSR norms represents a corporation's de facto acceptance of new forms of liability. Where before corporations were able to act with impunity when taking environmental and humanitarian shortcuts,

172. See, e.g., Denis G. Arnold & Laura P. Hartman, *Beyond Sweatshops: Positive Deviancy and Global Labor Practices*, 14 BUS. ETHICS 206, 222 (2005); ASIAN DEV BANK, CORE LABOR STANDARDS 11 (2006), available at <http://ap-irnet.ilobkk.or.th/resources/core-labor-standards-handbook-1/>.

173. BEWES, *supra* note 7, at 77.

174. *Id.* at 23.

175. *Id.* at 20.

acceptance of binding CSR norms constitutes acceptance on the part of the corporation that of a requirement to take on liability for a class of wrongs that were not previously likely to result in such liability. Given that the primary function of a corporation is to shield the individuals running the corporation from liability, it comes as no surprise that corporations were quick to adopt liability-minimizing *lex mercatoria* norms and have resisted the imposition of liability-increasing CSR norms.

Simply put, corporations are creatures seeking to minimize liability and maximize profitability. Even outside the question of whether efforts to minimize liability and maximize profit are the *only* efforts that a corporation should seek to undertake, it is undeniable that maximizing profits and minimizing liabilities is the corporation's natural predisposition. These fundamental differences explain why *lex mercatoria* norms developed from within the mercantile community and why binding CSR norms will only come as the result of outside pressure. Because of these foundational differences with respect to cost of goods sold, price, and exposure to liability universally binding CSR norms will only result from outside pressure, making them nothing like the *lex mercatoria*.

VI. LESSONS TO DRAW FROM THE CONTRAST BETWEEN CSR AND THE *LEX MERCATORIA*

The argument advanced above is not necessarily a defeatist one, and resigning oneself to the position that corporations are profit-maximizing entities does not automatically suggest that they are incapable of benefitting non-shareholders. Quite to the contrary, the vast majority of the daily actions of world's corporations do not even touch on issues of corporate social responsibility, and every example of enforced adherence to voluntary CSR norms shows that companies are more than willing to behave responsibly when they see such behavior as being in their self-interest.

Nonetheless, because multinational corporations operating in developing countries, especially those providing discount goods and serving commodity markets, are prone to corporate abuses, the need remains for binding CSR norms. Ongoing efforts, both public and private, have certainly shrunk the universe of corporate abusers, but they have not eliminated it altogether. While Professor Steinhardt is entirely correct in noting that the source of binding CSR norms does not lie in international human rights law or corporate law, he is wrong to argue that it lies in the corporations themselves. Instead, binding CSR norms are most likely to take the form of clauses in bilateral investment treaties (BITs) or in the practice of law enforcement and regulatory bodies in host countries. These changes will likely result from macroeconomic and political developments giving host countries increased bargaining power relative to multinational corporations.

They will not emerge out of new customary legal norms emanating from multinational corporations.

Currently, bilateral investment treaties are drafted in favor of developed countries.¹⁷⁶ This is because developing nations see themselves in competition with each other to attract foreign investment. As a result, developing nations tend to sacrifice their own interests in improved labor standards or environmental quality in the hopes that they will attract enough additional investment to make up for those sacrifices.¹⁷⁷ This has led to a race to the bottom, leaving all developing countries worse off and creating the assumption that host governments are not likely to play a positive role in the realm of corporate social responsibility.¹⁷⁸ However, there is evidence to suggest that, at least over the medium or long term, several factors will combine to improve the relative bargaining power of host countries to a point where they will insert CSR provisions into bilateral investment treaties thereby creating CSR norms that are both binding and enforceable. Additionally, the local laws of host countries will be enforced in a way that holds corporations accountable for their labor and environmental practices. Both of these phenomena would essentially be the result of increased host country bargaining power. The major factors potentially leading to this potential increase are summarized below.

A. Increasing Demand for Commodities

The first factor leading to increased host country bargaining power is the rapidly increasing demand for commodities. As evidence of this demand increase, in 2010, cotton prices rose 92 percent,¹⁷⁹ coffee prices rose 65 percent,¹⁸⁰ and copper prices rose 30 percent.¹⁸¹ This increasing demand comes in part from futures trading and global drought and

176. See Stiglitz, *supra* note 43, at 490; Susan D. Franck, *Development and Outcomes of Investment Treaty Arbitration*, 50 HARVARD INT'L L. J. 435, 437 (2009) ("These concerns about the integrity of investment treaty arbitration are worthy of consideration. Unfair treatment of respondent states on the basis of whether they are part of the developed or developing world raises tangible issues about the legitimacy and long-term viability of arbitration. Similarly, if participants believe that a dispute's outcome depends in some part upon whether an arbitrator comes from the developing or developed world, they may question the procedural integrity of arbitration.").

177. Stiglitz, *supra* note 43, at 490.

178. Darren M. Springer, *Reimagining the WTO: Application of the New Deal as Means of Remediating Emerging Global Issues*, 29 VT. L. REV. 1067, 1083 (2005).

179. Liam Plevin & Matt Wirz, *Companies Stock Up as Commodity Prices Rise*, WALL ST. J., Feb. 3, 2011, <http://online.wsj.com/article/SB10001424052748704775604576120533736097682.html>.

180. *Why Are Commodity Prices Rising? Let Me Count the Ways*, SEEKING ALPHA (Jan. 17, 2011), <http://seekingalpha.com/article/246895-why-are-commodity-prices-rising-let-me-count-the-ways>.

181. *Id.*

flooding,¹⁸² but the primary driver of this global phenomenon comes from a growing middle class in developing countries such as Brazil, India, and China.¹⁸³ This trend is only accelerating. According to numbers compiled by the United Nations and Goldman Sachs, by 2030 China will have 1.4 billion middle class consumers and India will have 1.07 billion.¹⁸⁴ During the same time period, the middle classes of the United States and Western Europe will be 365 million and 414 million, respectively.¹⁸⁵

This demographic and macroeconomic shift benefits developing countries because “[h]igher commodity prices act like a consumption tax, transferring income from households and companies which use the resources to companies and countries that produce them.”¹⁸⁶ The majority of commodities are produced in developing countries. For example, 58.5 percent of the world’s refined copper, 51.2 percent of the world’s aluminum, and 58.4 percent of the world’s grains are produced in the developing world.¹⁸⁷

Thus, both the fact of rising commodity prices and its cause – a growing middle class in developing countries – suggest that developing nations will have increased bargaining power at the negotiating table. The argument that a multinational corporation who does not feel that it is getting favorable enough terms can simply move to another developing country and secure these terms is becoming a much less tenable one. Over time, developing countries will come to appreciate

182. *Id.*

183. See Nick Trevethan, *Analysis: World Commodity Prices Poised to Gain on Rising Yuan*, REUTERS, Jan. 12, 2011, <http://www.reuters.com/article/2011/01/13/us-china-commodities-yuan-idUSTRE70C0U220110113> (noting that “[t]he volume of unwrought copper was about the same in the two years, but the value of those imports rose 44 percent in 2010,” and that “China consumed over 7.5 million tonnes of copper in 2010, according to Reuters calculations, almost 40 percent of the world’s refined output”); Paul Krugman, *Commodities: This Time is Different*, N.Y. TIMES (Jan. 29, 2011), <http://krugman.blogs.nytimes.com/2011/01/29/commodities-this-time-is-different/> (“[I]t’s clear from news coverage that Chinese demand is driving the markets. As I and others have been pointing out, we’ve got a bifurcated world right now, with advanced economies still depressed but emerging economies in an inflationary boom; commodity prices are reflecting the boom part of the picture.”).

184. Kenneth Rapoza, *Within A Generation, China Middle Class Four Times Larger Than America’s*, FORBES (Sept. 5, 2011), <http://www.forbes.com/sites/kenrapoza/2011/09/05/within-a-generation-china-middle-class-four-times-larger-than-americas/>.

185. *Id.*

186. *Back With a Vengeance: Rising Commodity Prices Both Reflect and Threaten the World’s Economic Recovery*, THE ECONOMIST, Jan. 20, 2011, <http://www.economist.com/node/17969925>.

187. UNITED NATIONS CONFERENCE ON TRADE AND DEV., PRODUCTION AND INTERNATIONAL TRADE OF COMMODITIES 75 (2004), available at www.unctad.org/en/docs/gdscsir20041c5_en.pdf.

this trend and use it as a bargaining chip in negotiations with home countries and MNCs themselves.

B. The Persistence of the "Obsolescing Bargain"

The second factor leading host countries to a greater voice in CSR compliance applies equally to the resource extraction and manufacturing context and can be found in "the obsolescing bargain," an idea developed by Raymond Vernon in the early 1970's.¹⁸⁸ The obsolescing bargain says that, although MNCs have an initial bargaining advantage over their host country, over time, the former's bargaining power weakens vis-à-vis the latter.¹⁸⁹ This change in relative bargaining power is the result of several shifts that take place as a MNC's foreign direct investment matures.

Initially, a high level of uncertainty characterizes an MNC's relationship with a host country. Then, as the MNC begins to enjoy success in the newly exploited market, the perception that the MNC's high returns are justified by the risk weakens substantially, and the host country will be less willing to offer the MNC such favorable terms as the relationship progresses.¹⁹⁰ As the MNC constructs immovable assets in the host country, the MNC's ability to cease operations there diminishes significantly due to the "sunk costs" represented by plants, offices, and the development of human capital.¹⁹¹ Over time, changes within the host country itself lead to a shift in the relative bargaining positions of the MNC and the host government. Essentially, the economic development that results from foreign direct investment leads to increasing demands for social services.¹⁹² Under the initial contract between the MNC and the host government, the corporation is able to keep the bulk of its profits, leading to rapidly expanding corporate coffers coupled with only a modest increase in government revenue.¹⁹³ This situation leads to dramatically increased pressure on the host government to secure more favorable terms vis-à-vis the MNC in the future.

To support this theory, an empirical, longitudinal study found that the MNC's proportion of foreign ownership fell over time, regardless of the existence of a colonial relationship between the host and home

188. See generally RAYMOND VERNON, *SOVEREIGNTY AT BAY: THE MULTINATIONAL SPREAD OF U.S. ENTERPRISES* (1971).

189. Robin F. Hansen, *Multinational Enterprise Pursuit of Minimized Liability: Law, International Business Theory and the Prestige Oil Spill*, 26 BERKELEY J. INT'L L. 410, 447 (2008).

190. Barbara Jenkins, *Reexamining the "Obsolescing Bargain": A Study of Canada's National Energy Program*, 40 INT'L ORG. 139, 141 (1986).

191. See Hansen, *supra* note 189, at 447.

192. Jenkins, *supra* note 190, at 141.

193. See *id.*

countries or the identity of the home country.¹⁹⁴ However, this study found that the size of the firm was negatively correlated with foreign ownership – the larger the firm, the more control the home country retained over the venture.¹⁹⁵ This suggests that a larger size results in an increase in leverage over the host government that outweighs the pressures of sunk costs upon the MNC. On balance though, time is evidently on the side of the host country when it comes to relative bargaining power.

C. Self-Determination in the Developing World

Lastly, the Arab Spring has the potential to lead to the establishment of governments in the developing world that are less willing to acquiesce to the demands of developed nations and more responsive to the people. This final factor is more aspirational and less economically inevitable than the first two but nonetheless has the potential to play a major role in the proliferation of effectively binding CSR norms. At their fullest potential, the democratic uprisings in the Middle East and North Africa represent a new era in the developing world – one in which the popular will of the people overcomes the self-interested decisions of despots like Hosni Mubarak and Muammar Ghaddafi.¹⁹⁶ When dealing with governments who respond to the needs of its citizens, MNCs likely will be forced to account for the host country conditions that norms of corporate social responsibility are meant to address. In countries where these uprisings lead to stable institutions, the Arab Spring may successfully pressure host governments to secure more favorable terms for their citizens and pass and enforce laws and regulations passed domestically.

Increased demand for commodities (including labor), the steady long term effect of the obsolescing bargain, and the new emergence of popular governance in the developing world will all lead to greater bargaining power on the part of host government vis-à-vis MNCs and their home governments. Taken together these three factors may lead to an insistence on the part of host governments that their citizens are protected to a degree never before seen. These phenomena would allow for the regulation of multinational corporations without a need to derogate from the state primacy model of international human rights law or the shareholder primacy model of corporate law.

194. Sushil Vachani, *Enhancing the Obsolescing Bargain Theory: A Longitudinal Study of Foreign Ownership of U.S. and European Multinationals*, 26 J. INT'L BUS. STUD. 159, 174 (1995).

195. *Id.* at 175.

196. See generally Lisa Anderson, *Demystifying the Arab Spring: Parsing the Differences Between Tunisia, Egypt, and Libya*, 90 FOREIGN AFF., no. 3, May-June 2011, at 2, 2-6.

This development, if it is to occur at all, is likely to be a gradual one. Renegotiation of bilateral investment treaties is not an every day occurrence, and the transformation of a society towards democratic governance is even rarer. Such a tectonic shift will undoubtedly take time. When one considers the severe doctrinal barriers to creating non-contractual binding legal norms, however, the relative efficacy and efficiency of the introduction of contractually based or domestically enforced norms begin to seem both more appealing and more realistic.

While the already-tried mechanisms for ensuring corporate compliance with widely-accepted CSR norms have done an outstanding job shaping corporate behavior around the edges, the most serious violators will almost certainly respond only to coercive, binding, and enforceable measures. Over the medium and long term, these coercive measures are much more likely to come in the form of BIT clauses or domestic regulation driven by macroeconomic and political factors than through the emergence of new, independently binding legal norms, especially those devised and implemented by MNCs themselves and then adopted by governmentally-sanctioned courts.

VII. CONCLUDING REMARKS

The principle of equity lies at the heart of the *lex mercatoria* norms. Even if *lex mercatoria* norms did not create independently binding legal norms in a traditional court, the principles emerged organically as a direct result of the fact that the mercantile community saw each other as equals and treated each other accordingly. They saw equity as a goal to be sought in and of itself throughout the mercantile community. Today, a different economic paradigm prevails in which parties seek only achieve the best result possible for themselves. That result is deemed equitable, regardless of the actual contents or broader consequences of the agreement, because it was created as the result of a bargain in the free market, which is viewed as a sort of natural state. This creates a community that looks nothing like the mercantile community in which *lex mercatoria* norms developed; if medieval merchants dealt with one another then the way that many multinational corporations deal with developing nations today, *lex mercatoria* norms may not have developed at all.

In the end, medieval merchants developed *lex mercatoria* norms because it helped their bottom line and minimized potential liability. They allowed themselves to be bound by the norms because they saw each other as relative equals. Because neither of these conditions exist with regards to developing nations and the worst corporate abusers, enforceable norms of corporate social responsibility will ultimately develop outside of the corporate suite and be implemented independently of the corporation itself. To argue otherwise is to romanticize the corporation and to ignore the need for outside pressure

in order for meaningful norms to develop. A more realistic approach must prevail.

MICROFINANCE – IS THERE A SOLUTION?
A SURVEY ON THE USE OF MFIS TO ALLEVIATE POVERTY IN INDIA

*Jesse Fishman**

ABSTRACT

Microfinance has a long history of success in providing financial access to the world's poor through small loans. It has been lauded as aiding the Millennium Development Goals, reducing poverty, empowering women, and supporting numerous other social benefits. Recently, however, public figures have questioned microfinance. One politician went so far as to say that microfinance is “sucking blood from the poor.” However, recent setbacks in microfinance do not indicate that microfinance as an institution is extinct. Despite the recent problems, microfinance still serves a crucial role in international development. This paper explores some of the reasons that microfinance is currently struggling and provides potential suggestions for addressing them.

I. INTRODUCTION

A. Summary of Paper

Microfinance has a long history of providing financial access to the world's poor through small loans. It has shown numerous successes throughout history, most famously through the Grameen Bank. It has been lauded as aiding the Millennium Development Goals, reducing poverty, empowering women, and supporting numerous other social benefits. Recently, however, public figures have begun to question microfinance. In fact, Bangladesh's Prime Minister went so far as to say that microfinance is “sucking blood from the poor.”¹ A string of suicides in Andhra Pradesh (AP) was linked to the pressures of repaying microloans, further muddying microfinance's reputation. Microfinance, as it stands, is simply not working.

* 2012 Graduate, Sturm College of Law at the University of Denver. I would like to thank Jason Lantagne, Malliga Och, and John Crone for their invaluable contributions throughout the editing process. In addition, many thanks to Stu and Sue Fishman for their insight on India, and to Y.S. Lee for his pioneering work on microtrade.

1. *Indian Microlenders Facing Crisis, Warns Industry*, FINANCIAL EXPRESS (Dec. 12, 2010) [hereinafter *Indian Microlenders Facing Crisis*], http://www.thefinancialexpress-bd.com/more.php?news_id=119980.

Despite microfinance's recent problems, it serves a crucial role in international development, in providing financial access to the poor, and in alleviating poverty. This paper explores some of the reasons that microfinance is currently struggling, and provides potential suggestions for addressing them. Section I explores the foundations of microfinance, explains why microfinance matters, and addresses programs Grameen Bank utilized to aid development. Section II addresses how microfinance affects international human rights, including many of the concepts scholars deem as successful, in part, due to microfinance. Section III analyzes the current state of microfinance institutions, explaining their prevalence and the recent suicides in AP. Section IV explores some of the difficulties microfinance institutions have had in alleviating poverty and the reasons that scholars say microfinance is floundering. Section V provides recommendations for improving microfinance and how to effectively use it to alleviate poverty and spur development. Finally, Section VI concludes that, though flawed, microfinance can still be effectively used to help reduce poverty and stimulate development.

B. Why Microfinance Matters

Exchanging hair for capital is not a novel concept;² however, the rural women building these businesses add a new face to the old idea. Sivamma, a 35-year-old woman from AP, took out her first \$45 loan to build a business based on human hair.³ She hired 250 women to collect human hair from villagers in exchange for items such as toys.⁴ Then, "[t]he hair is collected and sold to a leading Indian hair exporter in Madras, from where it eventually finds its way to the United States and other Western countries to be used for wigs and hairpieces."⁵ Now, Sivamma enjoys her earnings. She is proud of "the \$3,000 home she built from the profits, the \$700 motorbike she bought for her husband and her \$1,000 savings."⁶

Jane found similar success in microfinance. Jane grew up in a Kenyan slum, dropped out of school after eighth grade, and became a 38-year-old single mother.⁷ When her husband took a second wife, Jane was pushed out of the house. She was alone, homeless, broke, and

2. Saritha Rai, *Tiny Loans Have Big Impact on Poor*, N. Y. TIMES (Apr. 12, 2004), <http://www.nytimes.com/2004/04/12/business/tiny-loans-have-big-impact-on-poor.html>.

3. *Id.*

4. *Id.* ("When the women travel to the nearby villages with the small toys that she buys for them, small children greet them and exchange handfuls of hair for the toys.").

5. *Id.*

6. *Id.*

7. Nicholas D. Kristof, *Sewing Her Way Out of Poverty*, N.Y. TIMES (Sept. 14, 2011), <http://www.nytimes.com/2011/09/15/opinion/kristof-sewing-her-way-out-of-poverty.html>.

trying to support her small children.⁸ In order to survive, Jane sold all that she had left – her body.⁹ After five years of prostitution, Jane joined an antipoverty organization utilizing microfinance and microsavings.¹⁰ She left prostitution, learned to sew, and used what she saved plus a small loan to buy a sewing machine. When her sewing business flourished, Jane bought a “small home in a safe suburb” and focused on keeping her children in school.¹¹ Jane’s children are equally a success story: her daughter was the first child in Jane’s family to graduate from high school, and her son ranked first in his class.¹² When the New York Times author spoke to Jane’s son, he said “that when he gets his first paycheck, he’s going to buy something beautiful for his mom – and his eyes glistened as he spoke.”¹³ Jane literally sewed her way out of poverty. Because of the opportunities provided by microfinance, the image of a woman in an impoverished village having financial access and the opportunity to create a successful business is now commonplace.

C. Definitions

“Microcredit is the extension of small loans and other financial services . . . to the . . . poor.”¹⁴ The term is used nearly interchangeably with “microfinance.”¹⁵ Microcredit allows the very poor to become entrepreneurs and generate income, thus providing an ongoing source of income for borrowers and their families.¹⁶ The microloans go to those who traditionally could not have access to normal banking because they lack collateral, steady employment, and a credit history.¹⁷ Historically, the rural poor only had access to capital through usurious

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* (noting that Jane’s son is also “a star soccer player even though he has no soccer shoes.”).

13. *Id.*

14. *What is Microcredit*, THE MICROCREDIT SUMMIT CAMPAIGN, http://www.microcreditsummit.org/about/what_is_microcredit/ (last visited Apr. 9, 2012) [hereinafter MICROCREDIT SUMMIT].

15. The Microfinance Alliance defines “microfinance” as “financial services targeting and catering to clients who are excluded from the traditional financial system on account of their lower economic status.” B. Seth McNew, *Regulation and Supervision of Microfinance Institutions: A Proposal for a Balanced Approach*, 15 L. & BUS. REV. AMS. 287, 290 (2009) (internal quotation marks omitted).

16. MICROCREDIT SUMMIT, *supra* note 14.

17. *Micro Credit Law & Legal Definition*, USLEGAL, INC., <http://definitions.uslegal.com/m/micro-credit/> (last visited Apr. 11, 2012).

moneylenders, the equivalent of modern day loan sharks.¹⁸ Microloans were initially meant to “provide a kinder, cheaper alternative.”¹⁹ Modern microfinance institutions (MFIs) do not have a uniform makeup – they can be nonprofit organizations, “credit unions, cooperatives, private commercial banks, and even non-bank financial institutions.”²⁰ Since “microcredit” institutions have grown to include numerous types of financial access,²¹ this paper will primarily use the term “MFI” to refer to microfinance and microcredit programs.

As microfinance borrowers are typically impoverished, they cannot offer banking institutions typical types of collateral.²² Therefore, many MFIs loan money to groups of people in a community, so that borrowers “are jointly responsible if anyone defaults on a loan.”²³ This “social collateral” among borrowers pressures them not to default, and has proved to be successful in urging repayment.²⁴ As the World Bank explained regarding a microfinance project in AP: “[k]ey to the management of risk for banks was the social collateral provided by poor women in self-help groups who guarantee each other’s loans.”²⁵ The situations where the social collateral method is used are often called “self-help groups.”²⁶ Unfortunately, while the “social collateral” approach is successful in aiding loan repayment, the shame it causes borrowers is often difficult for them to deal with.²⁷ “Both proponents and critics acknowledge that the peer-pressure exerted by the group on the borrowers is often shame-based. The combined pressure from peers and loan officers can be intense, and studies have documented some early tragedies, including one woman who killed herself as a result of

18. See Eric Bellman & Arlene Chang, *India’s Major Crisis in Microlending*, WALL ST. J. (Oct. 28, 2010), <http://online.wsj.com/article/SB10001424052702304316404575580663294846100.html>.

19. *Id.*

20. McNew, *supra* note 15, at 290-91.

21. Rebecca Farrer, *Exploring the Human Rights Implications of Microfinance Initiatives*, 36 INT’L J. LEGAL INFO. 447, 448 n.1 (2008).

22. See *id.* at 453.

23. *Id.* at 455; see also Jameel Jaffer, *Microfinance and the Mechanics of Solidarity Lending: Improving Access to Credit Through Innovations in Contract Structure*, 9 J. TRANSNAT’L L. & POL’Y 183, 198; Yoko Miyashita, *Lessons from Indonesia’s Village Banking System*, 10 PAC. RIM. L. & POL’Y 147, 198 (Dec. 2000).

24. See Farrer, *supra* note 21, at 455-56.

25. *Widespread Community Impact in Andhra Pradesh*, THE WORLD BANK, <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/IDA/0,,contentMDK:22331408-menuPK:3266877~pagePK:51236175~piPK:437394~theSitePK:73154,00.html> (last updated Sept. 2009).

26. See *id.*

27. See Farrer, *supra* note 21, at 456; Rashmi Dyal-Chand, *Reflection in a Distant Mirror: Why the West Has Misperceived the Grameen Bank’s Vision of Microcredit*, 41 STAN. J. INT’L L. 217, 263 (2005).

this pressure.”²⁸ In the past few years, suicides attributed to the pressure of repaying microloans have increased.²⁹ The difficulties with this shame-based social collateral system are further addressed in the section on AP.

D. History of Microfinance

The idea of microcredit has a long and tumultuous history. Informal banking institutions have existed for centuries, including such industries as “susus” of Ghana, ‘chit funds’ in India, [and] ‘tandas’ in Mexico.”³⁰ As early as the 18th century, in Europe, charities and credit cooperatives have been extending small loans to budding entrepreneurs.³¹ For example, 18th century author Jonathan Swift donated part of his wealth to be lent to poor tradesmen, in small sums, to be repaid weekly and without interest.³² Similarly, the Irish Reproductive Loan Fund Institution was founded post-famine in 1822 to give loans under ten pounds to people in rural areas for the “relief of the distressed Irish.”³³ Group microlending was documented as early as the nineteenth century in Germany.³⁴ Like the programs that Yunus’ infamous Grameen Bank³⁵ would utilize in the future, the early cooperatives relied upon close groups of people that knew one another well, in communities where individuals were willing to be held liable for the debts of other borrowers in their groups.³⁶ Starting in the 1970s with the popularization of Grameen Bank, microcredit became an important tool in advancing development.

28. Farrer, *supra* note 21, at 456; *see also* Dyal-Chand, *supra* note 27, at 263 (describing “a defaulting female borrower who was locked by bank workers inside a bank building as punishment . . . because the woman faced shame, social ostracism, and violence, she hanged herself inside the bank building.”).

29. *See* Soutik Biswas, *India's Micro-finance Suicide Epidemic*, BBC NEWS (Dec. 16, 2010), <http://www.bbc.co.uk/news/world-south-asia-11997571>.

30. *The History of Microfinance*, GLOBALENVISION.ORG (Apr. 14, 2006), <http://www.globalenvision.org/library/4/1051/>.

31. Laura Brandt et al., *Lending Methodology Module*, 53 THE RUSSIA MICROFINANCE PROJECT 1, 1, 4 (utilizing their module, invented from structure and content borrowed from chapter 6 of C. WATERFIELD & A. DUVAL, CARE SAVINGS AND CREDIT SOURCEBOOK (1996)).

32. THOMAS SHERIDAN, *THE LIFE OF THE REV. DR. JONATHAN SWIFT* 234 (2d ed. 1787).

33. Aidan Hollis & Arthur Sweetman, *The Life-cycle of a Microfinance Institution: The Irish Loan Funds*, 46 J. ECON. BEHAV. & ORG. 291, 296 (2001) (internal quotation marks omitted).

34. Edward S. Prescott, *Group Lending and Financial Intermediation: An Example*, 83 ECON. Q. 23, 29 (1997).

35. *See infra* pp. 594-96 and note 37.

36. Prescott, *supra* note 34, at 23.

E. The Evolution of Grameen Bank

In 1974, Muhammad Yunus was a Professor and Head of the Rural Economics Program at the University of Chittagong.³⁷ He traveled through many rural areas of Bangladesh and was appalled by the poverty that villagers were suffering.³⁸ As he explains it:

The starving people did not chant any slogans. They did not demand anything from us well-fed city folk. They simply lay down very quietly on our doorsteps and waited to die. There are many ways for people to die, but somehow dying of starvation is the most unacceptable of all. It happens in slow motion. Second by second, the distance between life and death becomes smaller and smaller, until the two are in such close proximity that one can hardly tell the difference. Like sleep, death by starvation happens so quietly, so inexorably, one does not even sense it happening. And all for lack of a handful of rice at each meal.³⁹

Shocked at the poverty and looking for a way to help the starving villagers, Yunus used his background in economics to pioneer modern day microfinance. In 1983, Yunus established Grameen Bank to provide small loans to people for starting or growing their businesses.⁴⁰ Grameen began as an organization “with the belief that credit should be accepted as a human right,” where a person “who does not possess anything gets the highest priority in getting a loan.”⁴¹ With this ideal in mind, the bank had modest beginnings – its first loan was for only twenty-seven dollars to aid forty-two stool makers.⁴²

Grameen Bank grew quickly, and Yunus soon realized that he needed to implement programs to aid with “income shocks,” specifically, to compensate borrowers for natural disasters.⁴³ Initially, if a borrower’s entire business was ruined from a hurricane or other natural disaster, Grameen had no system to help the borrower rebuild. To resolve this, Yunus started programs where group borrowers gave a set amount of money per month to the group’s emergency fund, which could

37. *A Short History of Grameen Bank*, GRAMEEN BANK: BANK FOR THE POOR, http://www.grameeninfo.org/index.php?option=com_content&task=view&id=19&Itemid=1 14 (last visited Apr. 4, 2012).

38. MUHAMMAD YUNUS, *BANKER TO THE POOR: MICRO-LENDING AND THE BATTLE AGAINST WORLD POVERTY* vii (PublicAffairs 2007) (1997).

39. *Id.* at vii-viii.

40. *A Short History of Grameen Bank*, *supra* note 37.

41. *Is Grameen Bank Different from Conventional Banks?*, GRAMEEN BANK: BANK FOR THE POOR (Oct., 2011), http://www.grameen-info.org/index.php?option=com_content&task=view&id=27&Itemid=176.

42. McNew, *supra* note 15, at 293.

43. For example, “[i]n 1987, devastating floods hit Bangladesh and caused” them “serious losses.” YUNUS, *supra* note 38, at 218.

be emptied by any group member if a similar "income shock" occurred.⁴⁴ After success in battling "income shocks," Yunus began implementing social programs and trainings to help borrowers become more successful.⁴⁵ For example, Yunus noticed that villagers had poor health care, so he started a health insurance program.⁴⁶ Grameen's programs changed to address the needs of borrowers.

Grameen has shown incredible growth since it was founded. When Grameen started in 1983, it cumulatively loaned \$194.95 (in million USD), and by 2009, that number grew to \$8741.86 (also in million USD).⁴⁷ The number of groups taking out loans in 1983 was 11,667, and by 2009, the groups grew to 1,253,160.⁴⁸ The number of villages covered by Grameen grew from 1,249 in 1983 to 83,458 in 2009.⁴⁹ Grameen includes more than 5.5 million members, and has distributed more than \$5.2 billion in loans.⁵⁰ Most shockingly, the profit/loss amount per year went from -0.0059 in 1983 to 5.38 in 2009 (both in million USD).⁵¹ Grameen went from an organization aiding the poor to a company making \$5.38 million a year.⁵² The Bank reported a 98 percent repayment rate on its loans,⁵³ attributing and majority of its success to the "group lending" concept it popularized.⁵⁴ Yunus and Grameen Bank won the Nobel Peace Prize in 2006 for "pioneering the system."⁵⁵

44. This protection against income shocks would have been useful in the recent ruined crop in Bangladesh – "after the total destruction of their crops," villagers are unable to repay their loans, "[y]et the microfinance organizations continue to collect the installments." James Melik, *Microcredit 'Death Trap' for Bangladesh's Poor*, BBC NEWS, <http://www.bbc.co.uk/news/business-11664632> (last updated Nov. 2, 2010).

45. YUNUS, *supra* note 38, at 229.

46. *Id.* at 228-29.

47. *Historical Data Series in USD*, GRAMEEN BANK: BANK FOR THE POOR, http://www.grameeninfo.org/index.php?option=com_content&task=view&id=177&Itemid=144 (last visited Apr. 2, 2012).

48. *Id.*

49. *Id.*

50. Rajdeep Sengupta & Craig P. Aubuchon, *The Microfinance Revolution: An Overview*, 90 FED. RES. BANK OF ST. LOUIS REV. 9, 9 (2008) [hereinafter *The Microfinance Revolution*].

51. *Historical Data Series in USD*, *supra* note 47.

52. *Id.*

53. Michelle Nichols, "Banker to the Poor" Gives New York Women a Boost, GRAMEEN BANK: BANK FOR THE POOR (Apr. 23, 2009), http://www.grameen.com/index.php?option=com_content&task=view&id=589&Itemid=199.

54. *The Microfinance Revolution*, *supra* note 50, at 11.

55. Bellman & Chang, *supra* note 18; *The Nobel Peace Prize 2006*, GRAMEEN BANK: BANK FOR THE POOR (Oct. 13, 2006), http://www.grameen-info.org/index.php?option=com_content&task=view&id=197&Itemid=197.

II. HUMAN RIGHTS IMPLICATIONS OF MICROFINANCE

A. Introduction & Early Popularity

Microfinance was early lauded as the solution to poverty. It “became the darling of the development world, hailed as the long elusive formula to propel even the most destitute into better lives.”⁵⁶ The concept has become “hotly recognized,”⁵⁷ and even earned celebrity support.⁵⁸ Unfortunately, microfinance has recently suffered monumental media hits.⁵⁹ Still, scholars agree that microfinance has had an enormous impact on human rights, and that it has potential for further changing the international landscape.⁶⁰ One commentator suggests that: “[i]f you asked poverty experts to name the single most significant new concept in the field in the last few decades, chances are they would say microcredit.”⁶¹ Microfinance has had numerous successes in India and evidence shows that it enables the poor “to better withstand shocks, build assets, and link into the wider economy as fuller economic citizens.”⁶² However, the crucial question remains: has microcredit helped to alleviate poverty and spur development on a broader scale?

56. Neil MacFarquhar, *Banks Making Big Profits from Tiny Loans*, N.Y. TIMES, Apr. 13, 2010, <http://www.nytimes.com/2010/04/14/world/14microfinance.html?pagewanted=all>.

57. “Microlending abroad has become a hotly recognized and discussed topic in recent years, mainly through the successes of Nobel Prize laureate Muhammad Yunus and his international Grameen Bank.” Olivia L. Walker, *The Future of Microlending in the United States: A Shift from Charity to Profits?*, 6 OHIO ST. ENTREPRENEURIAL BUS. L.J. 383, 384 (2011).

58. “Natalie Portman and Michael Douglas lent their boldface names to the cause.” MacFarquhar, *supra* note 56. President Clinton championed microfinance in 1997. Vikas Bajaj, *Microlenders, Honored with Nobel, Are Struggling*, N.Y. TIMES (Jan. 5, 2011), <http://www.nytimes.com/2011/01/06/business/global/06micro.html?pagewanted=all>.

59. David Bornstein, *Microfinance Under Fire*, N.Y. TIMES OPINIONATOR (Mar. 21, 2011), <http://opinionator.blogs.nytimes.com/2011/03/21/microfinance-under-fire/>; *see infra* note 107; Biswas, *supra* note 29; Soutik Biswas, *Crisis Hits India's Small Loans Industry*, BBC NEWS, <http://www.bbc.co.uk/news/world-south-asia-12035909> (last updated Dec. 21, 2010).

60. “Clearly, microfinance programs have an impact on human rights Microfinance has great potential to empower people economically and engage women in developing nations in the global economy in ways they have never been involved before.” Farrer, *supra* note 21, at 480.

61. Tina Rosenberg, *When Microcredit Won't Do*, N.Y. TIMES OPINIONATOR (Jan. 31, 2011), <http://opinionator.blogs.nytimes.com/2011/01/31/when-microcredit-wont-do/>.

62. Mark Pickens et al., *Banking the Poor via G2P Payments*, 58 CGAP 1, 1 (2009), <http://www.cgap.org/gm/document-1.9.41174/FN58.pdf> (citing Fred M. Ssewamala et al., *A Novel Economic Intervention to Reduce HIV Risks Among School-Going AIDS Orphans in Rural Uganda*, 42 J. OF ADOLESCENT HEALTH 102 (2008); MARTHA A. CHEN & DONALD SNODGRASS, *MANAGING RESOURCES, ACTIVITIES, AND RISK IN URBAN INDIA: THE IMPACT OF SEWA BANK* (2001), pdf.usaid.gov/pdf_docs/PNACN571.pdf; MICHAEL W. SHERRADEN, *ASSETS AND THE POOR: A NEW AMERICAN WELFARE POLICY* (1991)).

B. Millennium Goals & International Law

At the international level, microfinance supports the international community's development goals and commitments. The 15th Global Microcredit Summit recently stated that microcredit "will ensure the attainment of the Millennium Development Goal (MDGs) target of halving absolute poverty."⁶³ The United Nations (UN) constructed the MDGs as an international framework for making the "planet more livable for all people."⁶⁴ The MDGs call for responsible international action to address such issues as poverty and gender inequity.⁶⁵ Importantly, because the MDGs have been endorsed by the UN's member states, they qualify as official commitments; thus, they form part of the international legal framework for human rights protections.⁶⁶ The MDGs embody and reinforce rights that many states already committed to protecting.⁶⁷ Significantly, several conventions provide a legal foundation obligating states to pursue the MDGs.⁶⁸

Microfinance can be a crucial international tool in supporting the MDGs.⁶⁹ One development advocate explains:

The success of a project can be measured by the changes it makes in the lives of individuals, families, and communities using local knowledge and practice. Key factors contributing to the success of such projects, especially ones designed with women in mind, include savings in time, realistic opportunities for learning, increased income levels, the empowerment of women, and project sustainability. Each of these factors simultaneously contributes to project success and

63. Obinna Chima, *Africa: Experts Harp on Microcredit for Poverty Eradication*, ALLAFRICA.COM (Dec. 26, 2011), <http://allafrica.com/stories/201112260222.html>.

64. Deborah K. Dunn & Gary Chartier, *Pursuing the Millennium Goals at the Grassroots: Selecting Development Projects Serving Rural Women in Sub-Saharan Africa*, 15 UCLA WOMEN'S L.J. 71, 71 (2006); see U.N. Millennium Development Goals, <http://www.un.org/millenniumgoals/> (last visited Apr. 17, 2012).

65. Dunn & Chartier, *supra* note 64, at 71-72; see U.N. Millennium Development Goals, *supra* note 64.

66. Dunn & Chartier, *supra* note 64, at 71-72 n. 5; see U.N. Millennium Development Goals, *supra* note 64.

67. Dunn & Chartier, *supra* note 64, at 71-72.

68. "[S]tates' pre-existing treaty obligations commit them, in many cases, to implementing the MDGs as a matter of international law." Dunn & Chartier, *supra* note 64, at 72-73. ("These include the International Covenant on Economic, Social, and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention on the Elimination of All Forms of Racial Discrimination (CERD), the Convention on the Rights of the Child (CRC), and the International Covenant on Civil and Political Rights (ICCPR).").

69. Farrer, *supra* note 21, at 451 ("The United Nations declared 2005 the International Year of Microcredit.").

embodies human rights protections mandated by the conventions that support the MDGs.⁷⁰

As scholars have shown, and this article enumerates, microfinance can be used to successfully support each of the above factors, thereby greatly supporting the MDGs.

C. Poverty Reduction

Microfinance is widely recognized for its monumental potential as a means of reducing poverty.⁷¹ The World Bank defines “poverty” as living on less than \$1.25 per day, and in 2005, approximately 1.5 billion people were living in poverty.⁷² In the same report, the World Bank stated that microfinance has helped the world’s poor by increasing their incomes using self-employment and empowerment.⁷³ Grameen Bank embodies these notions in its long-term goals: reducing “poverty, family size, and under and unemployment.”⁷⁴ In the past, microfinance was so widely-embraced and successful that the United Nations deemed 2005 the “International Year of Microcredit.”⁷⁵ The UN Secretary General at the time, Kofi Annan, added that microfinance “helps alleviate poverty by generating income, creating jobs, allowing children to go to school, enabling families to obtain health care, and empowering people to make choices that best serve their needs.”⁷⁶

D. Social Benefits

Supporters defend microfinance as providing broad social benefits such as improved health, greater gender equality, and increased educational participation.⁷⁷ Microfinance proponents argue that the “industry was the first to reach out to those that make less than \$1 a day” and was “so successful that it has spawned efforts to bring

70. Dunn & Chartier, *supra* note 64, at 82; Helen Hambly, *Grassroots Indicators for Sustainable Development*, 23 IDRC REP. (1997), <http://archive.idrc.ca/books/reports/V231/susdev.html>.

71. Farrer, *supra* note 21, at 451.

72. *Id.*

73. *Id.*

74. *Id.*, at 457; Rachel Errett Figura, *An End to Poverty Through Microlending: An Examination of the Need for Credit by Poor, Rural Women and the Success of Microlending Programs*, 8 NEW ENG. INT’L & COMP. L. ANN. 157, 172 (2002).

75. Farrer, *supra* note 21, at 451; Lisa Avery, *Microcredit Extension in the Wake of Conflict: Rebuilding the Lives and Livelihoods of Women and Children Affected by War*, 12 GEO. J. ON POVERTY L. & POL’Y 205, 224 (2005).

76. Farrer, *supra* note 21, at 451; Jay Lee, Note: *Equity and Innovation: Using Traditional Islamic Banking Models to Reinvigorate Microlending in Urban America*, 16 IND. INT’L & COMP. L. REV. 523, 524 (2006).

77. Ashley Hubka & Rida Zaidi, *Impact of Government Regulation on Microfinance: Improving the Investment Climate for Growth and Poverty Reduction* 4, 4-5 (2005) (paper prepared for the World Development Report), http://siteresources.worldbank.org/INTWDR2005/Resources/Hubka_Zaidi_Impact_of_Government_Regulation.pdf.

everything from insurance to cell phones to solar lights to groceries to the poor.”⁷⁸ Studies have shown that microfinance spurs a vast social impact. For example, “[a] number of studies have concluded that, as a result of the Bank’s involvement, borrowers have been more likely than the general population to use birth control, to be more articulate, and at least be aware of the positive effects of the directives.”⁷⁹ In Brazil, for example, the government’s welfare program has linked monetary aid to vaccination and schooling, thus using microfinance to support public health and education.⁸⁰ The government provides financial aid to 12 million families “on the condition that their children attend school and are vaccinated.”⁸¹ Microfinance has also been lauded as helping with dispute resolution.⁸² MFIs have been touted as providing vast social benefits.⁸³

E. Enhance Gender Equality and Empower Women

MFIs often focus their efforts on women. Microfinance is of particular import for women⁸⁴ because, worldwide, the borrowers are

78. Bellman & Chang, *supra* note 18.

79. Farrer, *supra* note 21, at 458 (citing Dyal-Chanda, *supra* note 27, at 258).

80. See Charles Kenny, *Big is Beautiful: Financial Access is Key to Helping the World’s Poor – and Tech-Savvy Big Banks, not Microcreditors, are our Best Hope for Providing it*, FOREIGN POLICY, Jan 18, 2011, at 2, http://www.foreignpolicy.com/articles/2011/01/18/big_is_beautiful?page=0,1.

81. *Id.*

82. CS Reddy & Sandeep Manak, *Self-Help Groups: A Keystone of Microfinance in India – Women Empowerment & Social Security*, APMAS: TOWARDS A SUSTAINABLE SELF-HELP MOVEMENT IN INDIA 13 (2005), available at http://www.aptsource.in/admin/resources/1273818040_SHGs-keystone-paper.pdf; A project in Andhra Pradesh used SHGs to improve the community through such means as exposing corruption, managing group activities, and fostering community leadership. U.N. Econ. & Social Commission for Asia and the Pac., Bulletin on Asia-Pacific Perspectives: Empowering Women Through Self-Help Microcredit Programmes vi (2003/03) [hereinafter Empowering Women Through Self-Help], <http://www.unescap.org/pdd/publications/bulletin2002/ch6.pdf>.

83. Grameen Bank takes a holistic approach to alleviating poverty through development; Grameen uses a portion of its profit for infrastructure, development, and charity. A portion of the profits go to social benefits, such as “student loans for the client’s children, go to a beggar’s program for the ultra-poor, and go to dividends to its owners, the poor women who borrow from it.” Kenny, *supra* note 80; Philip Willner, *Can the Profit Motive Improve Microfinance?*, ASIA SOCIETY (Oct. 25, 2010), <http://asiasociety.org/business-economics/development/can-profit-motive-improve-microfinance> (describing the actions of the Grameen bank as a holistic approach to alleviating poverty through development; Grameen uses a portion of its profit for infrastructure, development, and charity. A portion of the profits go to social benefits, such as “student loans for the client’s children, go to a beggars program for the ultra-poor, and go to dividends to its owners, the poor women who borrow from it.”).

84. See Farrer, *supra* note 21, at 450.

predominantly women.⁸⁵ In 2010, one study estimates that 82.3 percent of poor clients reached were women.⁸⁶ “Women earn only ten percent of the entire world’s income despite making up over fifty percent of the world’s population, and they own less than 10 percent of the world’s property.”⁸⁷ Despite these abysmal figures, women often hold critical roles as providers. In the developing world, women frequently provide for their families.⁸⁸ Because of this, “MFIs have specifically focused on women, and the majority of those receiving microfinance loans are female.”⁸⁹

Gender equality and women’s empowerment is one of the MDGs.⁹⁰ The three indicators to monitor this are: education, employment, and political representation.⁹¹ Overall, it is clear that microfinance can improve gender equality. Access to paid work, even work done in the home, “has the potential to shift the balance of power within the family.”⁹² For example, “[s]tudies of the impact of microcredit in societies where women have traditionally been excluded from the cash economy have found that women’s access to credit led to a number of positive changes in women’s own perceptions of themselves, and their role in household decision making.”⁹³ This access also helped to reduce domestic violence and increase women’s assets.⁹⁴ A study on MFIs in India showed that microfinance improved: political participation and self-confidence in politics, access to government programs, practical skills, and knowledge of the wider society.⁹⁵

Microfinance projects have concluded that women’s self-image and self-confidence was enhanced when they received training on women’s rights and social and political issues.⁹⁶ While financial access is crucial

85. *Id.* at 475; “Grameen Bank estimates that 97% of their borrowers are female but the same difficulties in calculating the number of microfinance loans present in ascertaining specific numbers.” *Id.* at 475, n. 137 (citing GRAMEEN BANK, <http://www.grameen-info.org>).

86. Jan P. Maes & Larry R. Reed, *State of the Microcredit Summit Campaign Report 2012*, MICROCREDIT SUMMIT CAMPAIGN 36 (2012) (“Of the 137.5 million poorest clients reached at the end of 2010, 82.3 percent (113.1 million) are women.”).

87. Farrer, *supra* note 21, at 452; Figura, *supra* note 74, at 159.

88. Farrer, *supra* note 21, at 452 (“It is common in several parts of the developing world for women to be responsible for providing food and water for their families.”).

89. *Id.*

90. Naila Kabeer, *Gender Equality and Women’s Empowerment: A Critical Analysis of the third Millennium Development Goal*, GENDER & DEV. 13, Mar. 2005, at 13, http://pages.uoregon.edu/aweiss/intl421_521/Sweetman%2013-24.pdf.

91. *Id.*

92. *Id.* at 18.

93. *Id.*

94. *Id.*

95. *Id.*

96. Empowering Women Through Self-Help, *supra* note 82.

in providing for families and empowering women,⁹⁷ it has also been heralded as an opportunity to "involve women in the global economy."⁹⁸ Numerous studies note that women are being empowered through microfinance,⁹⁹ and their empowerment is evident in their civic engagement:¹⁰⁰

One of the key benefits of SHGs [a type of microfinance institution] is women's empowerment and this can be seen with the number of women involved in public affairs. While the number of women actually involved in politics is still very low, research has indicated that of those women that stand for election, over 70% had won their seat. And, the female contribution to civil issues ranges from issue of ration cards, laying of pucca roads, building of school, ensuring appointments in vacant positions in schools and health centres, recovery of river bank lands from encroachers and laying of drinking water pipes.¹⁰¹

Women's empowerment in developing countries also spurs a plethora of social benefits.¹⁰² Empowering women, and providing them with capital to create income-generating businesses, helps to reduce trafficking¹⁰³ and to rebuild livelihoods post-war.¹⁰⁴ Women in post-war areas often want to participate in microfinance. "Women and children are particularly affected by war. And yet even in the most dire situations where women are living in extreme conditions in refugee camps, there are still women who seek assistance to start a business."¹⁰⁵ Because of this, "[m]icrocredit programs in war-torn areas have direct application to addressing women's human rights. It is often women who are left to support their households after wars. . . . The more self-reliant a woman can be, the safer she and her children will be."¹⁰⁶ Providing financial assistance for women in war torn areas to

97. Lee, *supra* note 76 (quoting the founder of the Women's World Banking stating, "Credit for women is our right and we must fight for it.").

98. Farrer, *supra* note 21, at 452-53 ("Microfinance has also been advanced as an excellent way to involve women in the global economy, with a particular focus in women in developing countries who have traditionally been limited in their access to and participation in economic markets.").

99. See discussion *supra* Part II.C-D; see discussion *infra* Part IV.B-C.

100. Reddy & Manak, *supra* note 82, at 12.

101. *Id.*

102. Reddy & Manak, *supra* note 82.

103. Katherine Driscoll, Comment, *Microcredit: Not Yet a Panacea to End Trafficking in Women*, 13 U. PA. J. BUS. L. 275, 297 (2010).

104. Farrer, *supra* note 21, at 479-80; Avery *supra* note 75, at 224.

105. Farrer, *supra* note 21, at 479.

106. *Id.* at 480.

create businesses can spur economic growth, and help to rebuild women's livelihoods.

III. CURRENT STATE OF MFIS

A. Introduction

From the world's excitement over Grameen's success came an abundance of MFIs. "After a decade of extraordinarily rapid growth, there were only about 154 million microfinance clients worldwide at the end of 2008 – around 130 million future customers were born that same year alone."¹⁰⁷ MFIs have spread through Asia, Africa, and South America.¹⁰⁸ Unfortunately, recent scandals in India and Bangladesh¹⁰⁹ contributed to tarnishing the industry's reputation, likely decreasing individual trust and interest in MFIs.¹¹⁰ Now, it is estimated that 2.5 billion adults have no access to formal financial services.¹¹¹ In 2009, microfinance's growth rates slowed for the first time in years¹¹² and many MFIs suffered stagnant or rising costs – in some cases, they even faced a slow rise in credit risk.¹¹³

B. Current State of MFIs in India

With an enormous population, and many people living in poverty, India is a crucial part of the microfinance industry.¹¹⁴ "India continues to be a driving force" among South Asian MFIs.¹¹⁵ Remarkably, even in the difficult economy, Indian MFIs keep growing.¹¹⁶ Overall, 30 million

107. Kenny, *supra* note 80.

108. Bellman & Chang, *supra* note 18.

109. Bangladesh ordered Muhammad Yunus to be removed from serving as managing director of Grameen Bank. Bornstein, *supra* note 59.

110. Kenny, *supra* note 80.

111. *Id.*

112. More specifically, "[a]fter years of steady global growth rates of 25 percent, MFIs from every region saw their borrower base expand more slowly in 2008 in all but a handful of markets." *Nigerian MFI Among Top Global 100 MFIs*, MICROFINANCE AFRICA (Sept. 13, 2010), <http://microfinanceafrica.net/tag/self-reliance-economic-advancement-programme/> (MIX's 2009 ranking "surveyed 955 institutions from nearly 100 countries.").

113. Anita Bhoir, *10 Indian MFIs in Global Top 100 Ranking*, LIVEMINT.COM & WALL ST. J. (Dec. 26, 2008), <http://www.livemint.com/2008/12/26224810/10-Indian-MFIs-in-global-top-1.html>.

114. "[W]ith its giant population and hundreds of millions of people living in poverty," it "is one of the most important markets." Bellman & Chang, *supra* note 18.

115. *Top 100 Microfinance Institutions in the World*, INDIA MICROFINANCE (Aug. 23, 2010), <http://indiamicrofinance.com/top-100-mfi-world.html> (explaining that an ideal MFI would be "a financially sound institution" that expands "outreach to clients at the lowest possible cost," and does so "in the public arena so that others may learn from the experience." MIX's ranking methodology incorporates "strong growth without compromising credit risk, improving efficiency without compromising portfolio quality, and expanding access while still offering an array of services.").

116. *Id.* at 5.

households have taken micro-credit in India.¹¹⁷ More than a third of those households live in the region of AP, and the majority of borrowers are women.¹¹⁸ For-profit companies hold nearly 90 percent of the total outstanding borrowings.¹¹⁹ In addition, India's microfinance industry has received both internal and international support.¹²⁰

C. Current State of MFIs in Andhra Pradesh

The AP region accounts for nearly half of the loans in India,¹²¹ and only four companies have doled out 80 percent of the region's loans.¹²² Self-help groups in the region include over 12 million women, and have distributed more than \$2.5 billion in loans.¹²³ The families that have borrowed "have an average debt of \$660, and an average annual income of \$1,060. This means that more than 60 percent of their fragile, uncertain income is being spent paying off loans."¹²⁴ Interest rates on these loans can vary greatly. Some sources say that annual interest rates are near 24-30 percent.¹²⁵ According to others, interest rates begin around 15 percent but can rise to as much as 40-100 percent.¹²⁶ Repayment collection varies greatly as well; however, repayments are generally due starting one week after they are taken out.¹²⁷ Many borrowers have suffered in attempts to pay back their loans: "[v]illagers are sending their children to work to help them make the repayments," debt collectors are insisting that borrowers "sell their cattle chickens and other household items."¹²⁸ Even "[s]elling agricultural land is . . . considered as a last desperate option."¹²⁹ As a political leader illustrated, "I have seen them sell their wedding jewelry to pay the installments."¹³⁰ Worse yet, the rural villagers have complained "of

117. Biswas, *supra* note 29.

118. *Id.*

119. *Financial Performance of Indian MFIs in 2010 - Sa Dhan Report*, INDIAN MICROFINANCE (Oct. 25, 2010), <http://indiamicrofinance.com/financial-performance-of-indian-mfis.html>.

120. "Mainstream Indian and international banks have backed the microlending industry in India with more than \$4 billion of loans this year, with private-equity funds pouring more than \$250 million into the industry in India last year alone." Bellman & Chang, *supra* note 18.

121. Biswas, *supra* note 59 (MFIs have given away over \$7bn in loans to borrowers in India, and accounts for "nearly half of the loans.").

122. *Id.*

123. *Id.*

124. Biswas, *supra* note 29.

125. "[A]nnual interest rates vary from 24-30% compared with the 36-120% charged by usurious money lenders." *Id.*

126. Melik, *supra* note 44.

127. *Id.*

128. *Id.*

129. *Id.*

130. Bellman & Chang, *supra* note 18.

harassment from the debt collectors and there have been allegations of physical assaults.”¹³¹

D. Suicide Epidemic in Andhra Pradesh

In the last few months of 2010, more than 80 people in the AP region of India committed suicide after defaulting on micro-loans.¹³² This, in turn, “triggered the worst ever crisis in India’s booming micro-finance industry.”¹³³

In another example, a loan taken to save a life ended up taking a life.¹³⁴ At only 45 years old, Mylaram Kallava hung “herself from the ceiling of her mud hut in the neighbouring village of Ghanapur after she defaulted on four micro-loans amounting to \$840.”¹³⁵ She had borrowed money to pay for medical expenses for her two daughters: one for appendicitis, and the other for a pregnancy that ended in miscarriage.¹³⁶ Mrs. Kallava lived more than 45 miles from the closest government hospitals, so she was forced to go to a private hospital, which was far beyond her budget.¹³⁷ With a sick and barely working husband, two months of defaults on her loans, and the recently ended job program in the village, Mrs. Kallava could not ignore the employment shortage in the area.¹³⁸ Her co-guarantors, from her local self-help group, went to the house to ask why she was defaulting and Mrs. Kallava was ashamed.¹³⁹ The last straw for Mrs. Kallava, perhaps, was the impending visit of the loan recovery agents. They were expected to arrive by the end of the week, but Mrs. Kallava did not wait for the agents.¹⁴⁰ The “very social fabric” that was formed through self-help groups, that of co-guarantors holding one another accountable as guarantors for one another’s loans, “has been disrupted with members blaming each other for private loan defaults.”¹⁴¹ In Mrs. Kallava’s suicide, her co-guarantors checking in on her could have been a contributing factor – her daughter says that the co-guarantors questioning her mother made her feel ashamed.¹⁴²

As if the suicide epidemic was not tragic enough, some analysts worry that AP’s floundering microfinance will infect other regions.¹⁴³

131. Melik, *supra* note 44.

132. Biswas, *supra* note 29.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. Biswas, *supra* note 29.

138. *Id.*

139. *Id.*

140. *Id.*

141. Biswas, *supra* note 59.

142. Biswas, *supra* note 29.

143. Biswas, *supra* note 59.

Vijay Mahajan suspects that "if repayments dry up in Andhra Pradesh, the contagion will spread to other states – and the entire micro-loan industry will be in peril."¹⁴⁴ He thinks the repayment problems could spread so far as to destroy microfinance in India, saying "[t]he biggest tragedy will be that the 30 million poor households, who got access to bank credit for the first time through micro-finance companies, will have to go back to moneylenders."¹⁴⁵ As the Wall Street Journal concurs: "what happens [in AP] is frequently a bellwether for microlending in India, and programs around the world."¹⁴⁶ Mahajan further extrapolates that the industry "could fold up in Andhra Pradesh and you could see a domino effect across the country."¹⁴⁷ This would likely drive people "back to the humiliation of moneylenders," who exploit borrowers with "interest rates as high as 100 per cent."¹⁴⁸

IV. DIFFICULTIES IN MICROFINANCE

A. Introduction

Despite all of microfinance's success stories, some are skeptical about whether microfinance has helped to alleviate poverty.¹⁴⁹ There are many reasons for this doubt, as there are substantial problems with microfinance as it stands. Some say that the industry has not helped eradicate poverty because it has not touched enough people.¹⁵⁰ Bangladesh's Prime Minister said that microfinance is "sucking blood from the poor."¹⁵¹ Others argue that a focus on profit has caused companies to ignore such development indicators as education.¹⁵² Yet other camps explain that politicians have stunted the proliferation of microfinance.¹⁵³ According to one organization, the primary challenge for MFIs is: "[d]ecreasing costs to clients through streamlined operations, low credit risk and, eventually, lower profit margins."¹⁵⁴ This daunting issue is compounded by the economic climate of the past few years, rising problems with loan repayment, and the costs of diverting further resources to loan collection.¹⁵⁵ Some scholars blame

144. *Id.*

145. *Id.*

146. Bellman & Chang, *supra* note 18.

147. *Indian Microlenders Facing Crisis*, *supra* note 1.

148. *Id.*

149. Bellman & Chang, *supra* note 18.

150. Willner, *supra* note 83.

151. *Indian Microlenders Facing Crisis*, *supra* note 1.

152. *See* Willner, *supra* note 83.

153. *See id.*

154. MICROFINANCE INFORMATION EXCHANGE, 2009 MIX GLOBAL 100: RANKING OF MICROFINANCE INSTITUTIONS, INC. 3 (Jan. 2010), available at <http://www.the mix.org/sites/default/files/2009%20MIX%20Global%20100%20Composite.pdf>.

155. *Id.* at 3-4.

greed, even comparing India's situation with that of the recent mortgage meltdown in the United States.¹⁵⁶

As one economic analyst says, "[e]verybody is at fault here."¹⁵⁷ He clarifies:

The banks are at fault for failing to provide inclusive finance. State government has failed to create dynamic economies that reduce poverty fast and make people credit-worthy. Self-help groups started well, yet failed to meet credit needs and are suffering loan defaults. Micro-finance companies provided enough finance, but it became too much! They engaged in gross over lending in a sad rush for profits.¹⁵⁸

While experts disagree as to a single cause of the problems with microfinance, it is clear that the flaws of microfinance are complex.

B. Loans for Non Income-Producing Items & "Income Shocks"

MFIs now give microloans for items that are not income-producing, and often fail to plan for income shocks. When microloans were first popularized in the Grameen era, they were "given out to help small traders sell vegetables or buy livestock, or for basic farming needs."¹⁵⁹ They were given for specific income-producing items, as capital to start businesses or to help budding entrepreneurs increase their trade.¹⁶⁰ In recent years, however, the loans have changed: "[i]n recent years those farming commercial crops (cotton, groundnut, vegetables) or larger livestock (high-yielding buffaloes and cows) received micro-credit."¹⁶¹ Loans have also been given to "build homes, repay old debts, buy consumer durables like TV sets and pay for family marriages."¹⁶² While loans were previously given for "productive purposes," the bulk of current micro-loans are given for "consumption-related expenses."¹⁶³

Since MFIs are now lending for larger, higher-yielding endeavors, modern borrowers need to be more adept at handling the assets they buy with the microloan.¹⁶⁴ For example, if a borrower buys larger

156. Unfortunately, "the difference in India is that the borrowers are even poorer, with zero social security." "India's micro-finance crisis mirrors the 2008 subprime mortgage meltdown in the US, where finance companies threw cheap and easy loans at homebuyers until prices crashed and borrowers were unable to sell their homes or pay their debts." Biswas, *supra* note 59.

157. *Id.*

158. *Id.*

159. *Id.*

160. *See id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

livestock like buffalo, the animal requires "sophisticated veterinary care and insurance."¹⁶⁵ Additionally, rural farmers are often unprepared to handle the "income shocks" from a difficult crop season or a change in the market leading to lowered prices.¹⁶⁶ While Grameen utilized an emergency fund program to prepare borrowers for natural disasters, many current programs do not provide similar opportunities. MFIs are not preparing borrowers for income shocks, nor ensuring that the borrowers they loan to are investing in income-producing items.

C. *Lack of Capacity*

Many people suggest that microfinance has not adequately helped alleviate poverty because it has not affected enough people and does not have strong enough financial backing. The founder of SKS Microfinance, India's largest microfinance institution, argues that the microfinance industry has made a fatal mistake because it "hasn't scaled large numbers."¹⁶⁷ He extrapolates that while three billion people survive on less than two dollars a day, "only twenty percent of the [world's] poor households" have reaped the benefits of microfinance.¹⁶⁸ He explains that this failure to affect as many people as possible is because non-profit banking institutions do not have access to enough capital.¹⁶⁹

D. *Greed & Measuring Success by Profit*

Yunus chastised, "[w]e created microcredit to fight the loan sharks; we didn't create microcredit to encourage new loan sharks . . . Microcredit should be seen as an opportunity to help people get out of poverty in a business way, but not as an opportunity to make money out of poor people."¹⁷⁰ Many agree that greed led to microfinance's current struggle.¹⁷¹ For-profit companies are making huge profits – "way above those of most banks, public and private."¹⁷² Experts are concerned that the profit-motive encourages the poor "to take on more debt than they can bear."¹⁷³ Likewise, some suggest that for-profit microfinance

165. *Id.*

166. *Id.*

167. Willner, *supra* note 83.

168. *Id.*

169. *Id.*

170. MacFarquhar, *supra* note 56.

171. "At the root of it, many say, is the increasing greed of the private microfinance industry in India." Biswas, *supra* note 59. Some camps say that MFI interest rates are often as high as money-lenders, which defeats "the supposed purpose of micro-credit, with all its talk about improving the lives of the poor." Biswas, *supra* note 29.

172. Biswas, *supra* note 59. SKS Microfinance, for example, "raised more than \$350m on the stock market [in August 2010]." Between 2007-2008, "private equity players pumped \$100m into India's private micro-credit companies." *Id.*

173. Bellman & Chang, *supra* note 18.

institutions have erred by measuring success in profit, thereby disregarding the purpose of microfinance institutions.¹⁷⁴ The president of the Grameen Foundation worries that for-profit companies use profit as their “main metric of success.”¹⁷⁵ Judging success based on profit means that these companies often ignore crucial development indicators,¹⁷⁶ and ignore such common-sense necessities such as measuring a borrower’s capacity to repay.

Many organizations simply do not ensure that borrowers will have the eventual capacity to repay their debts – “[c]ritics say avarice and rash business practices have led to India’s micro-credit meltdown.”¹⁷⁷ While banks are often cautious and check that the loans will be used for buying productive assets, private MFIs have “exploited the existing self-help group network and snared their members with easier and faster loans.”¹⁷⁸ In AP, companies “lend up to \$450 to a borrower with few questions asked about what she or he proposes to do with the loan and without sufficiently examining their capacity to repay.”¹⁷⁹ Some analysts say that for-profit MFIs, “[l]ike other high-profit industries” needed “to aim for high growth” and therefore lent recklessly.¹⁸⁰ Many of the companies lend repeatedly to the same borrowers, who then cannot repay.¹⁸¹ As Vijay Mahan, chairman of a network of private MFIs, explains: “[m]ultiple lending, over-indebtedness, coercive recovery practices and unseemly enrichment by promoters and senior executives [of microcredit companies] has led to this situation.”¹⁸² He blames “reckless lending and feckless borrowing by micro-credit companies and villagers respectively.”¹⁸³

E. Banks Stopped Lending to MFIs

Due to bad lending practices in some regions, such as in AP, banks stopped lending to MFIs, in fear that they will not recover \$4 billion in loans.¹⁸⁴ As one SKS Microfinance recovery agent declares, “it’s not business as usual.”¹⁸⁵ SKS used to have crowded weekly meetings

174. Willner, *supra* note 83.

175. *Id.*

176. *See id.*

177. Biswas, *supra* note 59.

178. *Id.* Quoting Reddy Subramanyam, Andhra Pradesh’s most senior rural development official.

179. *Id.*

180. *Id.*

181. *See id.*

182. Biswas, *supra* note 29.

183. Biswas, *supra* note 59.

184. Biswas, *supra* note 29.

185. Vishwanath Pilla, *Six Months on, Loan Defaults Mount*, LIVEMINT.COM & WALL ST. J. (Apr. 25, 2011), <http://www.livemint.com/2011/04/25223809/Six-months-on-loan-defaults-m.html>.

giving out new loans; now, few customers attend.¹⁸⁶ The company still goes out to meet with clients on a regular basis and attempts to persuade borrowers to repay their loans.¹⁸⁷ Unfortunately, only a few members are repaying, and "most of them refuse even to talk to us and attend our calls."¹⁸⁸ In one particular group, the SKS agent arrived and the self-help group wanted to repay its loans. However, the women explained that the group had been forbidden to repay by a local politician and their husbands.¹⁸⁹ The area's political leader arrived and "told the SKS agents not to harass his neighbors."¹⁹⁰ Recovery in AP has been called "dismal"¹⁹¹ and is around 10-20 percent.¹⁹² Because of AP's "mass default" in loan repayment, commercial banks and investors are nervous about loaning, which is hurting the overall operations of MFIs.¹⁹³

F. Political Rhetoric Has Exacerbated Problems

Political rhetoric has aggravated problems with microfinance in AP. Politicians opposed to microfinance "have already and could again stall loans to the poor, reversing the progress microfinance institutions have made in India."¹⁹⁴ In AP, repayment has dropped drastically because politicians have asked borrowers to stop repaying.¹⁹⁵ People in the government "would say the micro-finance meltdown serves as a lesson for an industry distorted by 'perverse' profit making and villagers who have borrowed imprudently."¹⁹⁶ Urged by government officials and campaigning politicians, thousands of borrowers have stopped repaying, even when they have the money.¹⁹⁷ Politicians "have blamed dozens of suicides on microlenders" and have urged "borrowers not to pay back what they owe."¹⁹⁸ For example, former Chief Minister N. Chandrababu Naidu instructed borrowers not to repay their loans – he "asked women to stop repaying loans until the government formed a

186. *Id.*

187. *Id.*

188. *Id.*

189. Bellman & Chang, *supra* note 18.

190. *Id.*

191. Pilla, *supra* note 185.

192. *Id.*

193. When MFIs borrow from banks, and are then unable to repay the banks, the MFIs become the defaulters, and banks become more reluctant to lend to them. *Indian Microlenders Facing Crisis*, *supra* note 1.

194. Willner, *supra* note 83.

195. Biswas, *supra* note 59.

196. *Id.*

197. Bellman & Chang, *supra* note 18.

198. *Id.*

regulator agency to oversee MFIs and interest rates were lowered from as high as 30 percent.”¹⁹⁹

V. RECOMMENDATIONS FOR EFFECTIVE USE OF MICROFINANCE

A. Introduction

Clearly, there are numerous problems with microfinance as it currently stands. However, as Sivamma and Jane demonstrate, microfinance has drastically changed women’s lives.²⁰⁰ Microfinance has had huge successes – it simply needs a change from the current system. The proffered solutions for strengthening microfinance are as diverse the plethora of reasons microfinance has been flailing. The debate on what solutions would help strengthen microfinance is controversial, with strong advocates on every side. The causes are multi-faceted and diverse; therefore, they require more than one simple solution.

B. Act as a “For-profit” to Aid More Borrowers

Some groups suggest privatizing microfinance.²⁰¹ This controversial question of solutions was recently epitomized when the founder of SKS Microfinance²⁰² and the president of Grameen Foundation debated what role profit should have in microfinance.²⁰³ After the debate, the audience was polled on whether SKS’s switch to for-profit represents the “ideal model” for microfinance.²⁰⁴ Not surprisingly, “the room was split, with many in the audience remaining undecided.”²⁰⁵ The debate between for-profit and non-profit MFIs is ongoing.²⁰⁶ The private MFIs appear “to be an oligopoly with a handful of companies dominating the market.”²⁰⁷ However, some people believe that stronger for-profit microfinance institutions could spread the benefits of microfinance to more people, therefore alleviating more poverty.²⁰⁸ The founder of India’s largest microfinance institution,

199. Pilla, *supra* note 185.

200. Kristof, *supra* note 7; Rai, *supra* note 2.

201. See, e.g., Willner, *supra* note 83; Walker, *supra* note 57, at 393 (“In order to move forward, microfinance must transform into an industry.”).

202. SKS Microfinance is one of “two major microlending organizations [that] have transitioned from traditional non-profits to for-profit corporations being traded on the public market.” Walker, *supra* note 57, at 384-85; Bruce Einhorn, *A Microfinance IPO in India*, BLOOMBERG BUSINESSWEEK (May 6, 2010), http://www.businessweek.com/magazine/content/10_20/b4178016201790.htm.

203. Willner, *supra* note 83.

204. *Id.*

205. *Id.*

206. See Biswas, *supra* note 59. This battle is particularly important in India, where “some 50 of the country’s 1,000-odd micro-finance institutions are privately owned.” *Id.*

207. *Id.*

208. Willner, *supra* note 83.

Vikram Akula, explains that when non-profit banking institutions become for-profit businesses, then they can have access to more capital.²⁰⁹ His company, SKS Microfinance, switched from non-profit to for-profit in the past few years.²¹⁰ As he explains, "In twelve years, we've reached 7.5 million clients," and most of them came since the change to a for-profit company.²¹¹ Grameen Bank, on the other hand, "today reaches 8 million clients, but it took the Grameen Bank thirty-five years to do that."²¹² The proponents of for-profit microfinance institutions also suggest that the profit motive gives them more opportunities for innovation.²¹³ For example, "SKS has adopted a couple of innovative models that create mutually beneficial effects, such as using advertising revenue from the pamphlets SKS distributes to its customers in order to reduce interest rates."²¹⁴

C. Create Buoyant Markets

One of the difficulties in microfinance is that borrowers need access to "buoyant markets,"²¹⁵ those with "plenty of trading activity," and where "prices are rising, rather than falling."²¹⁶ If a borrower is given a small sum of money to start a business but has no buyers to sell his products to, then the borrower's business is bound to fail.²¹⁷ Therefore, academics and entrepreneurs alike have been taking novel approaches to creating markets for borrowers.²¹⁸ The entrepreneurial proponents of this ideology support "capitalism as a force that can benefit the poor."²¹⁹ For example, William Bissell, the "ethnocol entrepreneur,"²²⁰

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. Biswas, *supra* note 59; Farrer, *supra* note 21 ("Another way to support women who have started businesses is by helping them gain greater access to global markets.").

216. *Definition of Buoyant Market*, QFINANCE, <http://www.qfinance.com/dictionary/buoyant-market> (last visited May 4, 2012).

217. As Professor Lee explains in the context of microtrade, "[a]ll trade, including microtrade, can take place only when there is a demand for goods to be supplied in trade." Yong-Shik Lee, *Theoretical Basis and Regulatory Framework for Microtrade: Combining Volunteerism with International Trade Towards Poverty Elimination*, THE LAW & DEV. INST. (Oct. 2010), http://www.lawanddevelopment.net/yslee_microtrade_october2010.pdf [hereinafter *Framework for Microtrade*].

218. Naazneen Karmali, *Fabindia*, FORBES (Feb. 16, 2009), <http://www.forbes.com/global/2009/0216/024a.html>; Terry M. Dworkin & Cindy A. Schipani, *Linking Gender Equity to Peaceful Societies*, 44 AM. BUS. L.J. 391, 406 n.78 (2007) (citing Keiko Morris, *Macy's Sells Rwandan "Peace Baskets"*, KNIGHT RIDER TRIB. BUS. NEWS (Mar. 15, 2006), at 1); *Framework for Microtrade*, *supra* note 217, at 8 n.33.

219. Karmali, *supra* note 218.

runs a business and provides trade support in India, with the mission of “[c]reating a link between those far-flung craftspeople and urban markets.”²²¹ Bissell manages Fabindia, a self-proclaimed “profitable business which conducts itself responsibly in the social context.”²²² Bissell thought that he could help India’s poor by expanding the domestic retail market rather than by focusing on exports.²²³ The company sells over 90 percent of its goods in India, but also has stores abroad in such places as Rome, Italy; Guangzhou, China; and Dubai, UAE.²²⁴ Bissell’s method of using for-profit companies to increase access to trade could be controversial, but in this instance, it can add revenue to an India-based company, provide work, and create more buoyant markets for India’s craftsmen.²²⁵

Numerous other organizations, both for-profit²²⁶ and non-profit,²²⁷ have provided borrowers with access to markets.²²⁸ Through the concept of “microtrade,”²²⁹ academia has taken a similar approach²³⁰ to

220. Seema Chowdhry, *William N. Bissell: The Ethnicool Entrepreneur*, LIVEMINT.COM & WALL ST. J. (Mar. 1, 2008), <http://www.livemint.com/2008/03/01004930/William-N-Bissell-The-ethni.html>.

221. Karmali, *supra* note 218.

222. Chowdhry, *supra* note 220.

223. *Id.*

224. *Id.*

225. Bissell’s “successive sales targets” from 2002-2007 were reached, and his 2007 goal is “attaining revenues of \$192 million a year.” Karmali, *supra* note 218.

226. Farrer, *supra* note 21, at 485 (Macy’s sells products that are handmade by Rwandan women. “For the Rwandan artisans and entrepreneurs, access to Macy’s customer base greatly expands the market for their products . . .”) (citing Dworkin & Schipani, *supra* note 218, at 391 n.78 and Keiko Morris, *Macy’s Sells Rwandan “Peace Baskets,”* KNIGHT RIDER TRIB. BUS. NEWS, Mar. 15, 2006, at 1); *About Us*, GLOBAL GIRLFRIEND, <http://www.globalgirlfriend.com/store/ggf/support/aboutus?1> (Global Girlfriend is a “fair-trade boutique [that] offers a line of trend-setting, women-made, fair-trade products including stylish apparel, accessories and gifts with one purpose – helping women in need help themselves”).

227. See, e.g., KIVA, <http://www.kiva.org/> (last visited May 4, 2012).

228. Additionally, social enterprise approaches show enormous potential for providing greater access to markets. “Social enterprise describes any non-profit, for-profit or hybrid corporate form that utilizes market-based strategies to advance a social mission.” Farrer, *supra* note 21, at 487; see SOCIAL ENTERPRISE ALLIANCE, <http://www.se-alliance.org/> (last visited May 2, 2012).

229. “The theory of microtrade was first developed in 2008 by Professor Y.S. Lee with support from the University of Hong Kong Faculty of Law.” *Origins of Microtrade Theory*, THE LAW & DEV. INST., <http://www.lawanddevelopment.net/microtrade.php> (last visited May 3, 2012).

230. “Elements of microtrade have also been discussed and put into practice by others. For example, some non-profit organizations, such as Oxfam, have been selling products from developing countries at their stores in developed countries.” *Id.* “A score of individual stores in developed countries, such as those of Oxfam, sell hand-made goods from developing countries and return profits to the developing country producers. The microtrade scheme proposes to organize and systemize these efforts on a global scale with

helping borrowers reach buoyant markets. Professor Lee defines "microtrade" as "international trade of small quantities of locally-produced products (LPPs) produced on a small scale."²³¹ Essentially, microtrade would provide an online database where merchants, many borrowing from MFIs, could sell their products to buoyant markets. It would enable the residents of least-developed countries (LDCs) to export their local products to more affluent markets in developed countries.²³² This theory would provide a market to borrowers in developing countries, while offering other logistical support.²³³ A microtrade organization would coordinate the "managing the online database for microtrade, monitoring microtrade activities, and assisting parties to microtrade by creating a favorable regulatory and economic environment for microtrade in cooperation with sovereign states, relevant international organizations such as the WTO, NGOs, and private corporations."²³⁴ This logistical support would make access to buoyant markets much more feasible for borrowers in developing countries.²³⁵

D. Increase Group Borrowing

Grameen Bank attributed much of its repayment success to group lending,²³⁶ proving through its success that MFIs should implement "social capital" more frequently.²³⁷ Group lending is easy to execute; borrowers simply form groups and then co-borrow.²³⁸ If an individual in the group defaults on a loan, the rest of the group is held liable and is unable to receive future credit.²³⁹ This takes the credit risk from the bank and gives it to the borrowers, who can then hold co-borrowers accountable.²⁴⁰ History proves that "by utilizing this unique group lending approach in conjunction with a formalized regulatory and supervisory framework . . . the creation of self sufficient, sustainable,

the assistance of an open online database and financial devices such as microfinance. . . ." *Framework for Microtrade*, *supra* note 217, at n.33.

231. *Framework for Microtrade*, *supra* note 217.

232. *See Id.* at n.33.

233. As Professor Lee explains, "[m]any of the problems facing microtrade such as lack of market information and difficulties with shipping and transportation may indeed be found in trade from developing countries in general." *Id.* at n.34.

234. *Id.* at 15.

235. Microtrade utilizes microfinance and could help to alleviate numerous difficulties associated with microfinance. While further analysis of microtrade is outside of the scope of this paper, more information is available. *See Framework for Microtrade*, *supra* note 217.

236. *The Microfinance Revolution*, *supra* note 50.

237. McNew, *supra* note 15, at 294; *see generally* Reddy & Manak, *supra* note 82; *see The Microfinance Revolution*, *supra* note 50, at 12.

238. *See The Microfinance Revolution*, *supra* note 50, at 12.

239. *Id.*

240. *Id.*

MFI is completely within the realm of possibility.”²⁴¹ Many scholars propose that instituting more self-help groups (SHGs)²⁴² and group borrowing would improve the microfinance system.²⁴³

The Maharashtra Rural Credit Project (MRCP), for example, found that its most successful work was in SHGs because it made credit delivery to the rural poor more sustainable and empowered women, by allowing for more women to borrow.²⁴⁴ Creating SHGs among village neighbors and friends based on affinity and trust gave borrowers the opportunity to practice group money management.²⁴⁵ SHGs “provided a channel for pooling tiny savings which would otherwise have not even been noticed or used less productively.”²⁴⁶ The organization concluded that their most successful work in microfinance was that of developing SHGs and strengthening their links to banks because this made rural credit delivery a sustainable endeavor and allowed for more empowerment of women.²⁴⁷ A project in AP had similarly successful results utilizing social capital.²⁴⁸ Like MRCP, the AP project concluded that SHGs were crucial in creating a sustainable method for microcredit and in promoting women’s empowerment.²⁴⁹

241. McNew, *supra* note 15, at 294.

242. SHGs are “small groups of rural and urban people banding together to form a savings and credit organization,” a practice that “is well established in India.” Reddy & Manak, *supra* note 82, at 6.

243. See Shana Hofstetter, Note, *The Interaction of Customary Law and Microfinance: Women’s Entry into the World Economy*, 14 WM. & MARY J. OF WOMEN & L. 337, 348-51 (2008); see also Farrer, *supra* note 21, at 474 (noting that “Hofstetter sees the Grameen Bank as utilizing women’s customary group norms in the use of social capital in a positive way. She notes that the peer group approach utilizes women’s traditional emphasis on social networks; noting that women in Kenya responded to the group pressure aspect of social collateral more than men did; and that a study in Zimbabwe showed that women were more willing to sanction other members, and that female sanctions in groups were more effective than male sanctions in groups.”); Reddy & Manak, *supra* note 82, at 6 (according to one research group utilizing SHGs provides stronger political and advocacy capabilities, more shared knowledge and experiences, and access to greater capital).

244. Raghav Gaiha, *Microcredit and the Rural Poor: A Review of the Maharashtra Rural Credit Project*, 3 J. MICROFINANCE 125, 129-30 (2001).

245. Kurien Thomas, *Andhra Pradesh Community Self Help Model 1* (Ctr. for Good Governance, Working Paper, 2003), <http://www.cgg.gov.in/pdfs/WP-77-92.pdf>.

246. Project Completion Review Rep. of India Maharashtra Rural Credit Project (IFAD Loan 325-IN), Asia & the Pac. Div. Programme Mgmt. Dep’t, 9 U.N. Report No. 1395-IN (May 2003).

247. *Id.* at 28.

248. IFAD also loaned money to help improve microfinance and development in the Andhra Pradesh region. The Andhra Pradesh Participatory Tribal Development Project took place from 1994-2002, costing a total of USD \$50.3 million, and was co-financed by the Government of Andhra Pradesh. Int’l Fund for Agric. Dev. (IFAD), External Review of the Results and Impact of IFAD Operations: Country Note on India 1, U.N. Doc. 271387 (July 10, 2002) (by Govind Kelkar & Lothar Caviezel).

249. SHGs have several positive benefits: cost effective credit delivery system, collective learning, democratic culture, imbibe norms of behavior, stable base for dialogue,

E. Change the MFI Model

Experts suggest that MFIs have no choice but to “review and recast their business model” in AP.²⁵⁰ This does not apply solely to AP; the MFI model must be updated in other places where microfinance is flailing.²⁵¹ Specifically, they need to “work more on product diversification,” and in the future, “micro-lenders will have to adopt a different model.”²⁵² Some MFIs have already begun this process.²⁵³ One option for changing the model is to incorporate “micro-savings.”²⁵⁴ Some scholars suggest that micro-savings are “just as important to the sustainability of MFIs” as microloans.²⁵⁵ Micro-savings are defined as small accounts for deposits “to lower income families or individuals as an incentive to store funds for future use.”²⁵⁶ While the concept often takes the backseat to microloans and many MFIs do not currently incorporate micro-savings services, experts project that “if given the opportunity, microfinance clients would utilize these services.”²⁵⁷ Experts purport that “mobilizing these small savings funds may be the key to creating self-sufficient, sustainable MFIs that can function without the help of NGOs or foreign donors.”²⁵⁸

F. Restructure Loan Repayment

One suggestion than many seem to agree on, and MFIs suggest, is that restructuring the loan repayments could improve the relationship between borrowers and the industry. Vijay Mahajan, head of a group of for-profit MFIs, recommends loan restructuring – “he recommends that loans of 20 percent of the worst-affected borrowers be restructured and the payment periods stretched.”²⁵⁹ Other MFIs have embraced this concept as well.²⁶⁰ “The biggest lenders who account for the majority of

management capacity, economic empowerment, and increased awareness levels about the society and community. Thomas, *supra* note 245, at 13-14.

250. Pilla, *supra* note 185.

251. *Id.*

252. *Id.*

253. “Spandana, for instance has already started giving loans with gold as collateral.” Similarly, SKS is “exploring possibilities of offering customized alternative products” to their target population – they are starting pilot programs “in housing finance and gold finance.” *Id.*

254. McNew, *supra* note 15, at 291.

255. *Id.*

256. *Id.*

257. McNew, *supra* note 15, at 291-92; see Consultative Group to Assist the Poor (CGAP), *Savings Mobilization Strategies: Lessons from Four Experiences*, CGAP Focus No. 13 (Aug. 1998) [hereinafter CGAP], http://www.cgap.org/docs/FocusNote_13.pdf.

258. McNew, *supra* note 15, at 291; see CGAP, *supra* note 257.

259. Biswas, *supra* note 59.

260. For example, Grameen Bank restructured its loan-repayment program in 2002. The new program “allows the borrower to slow down loan payments during difficult times so that instead of being ‘in default’ of payments, the borrower can opt to pay a higher

borrowing say they will cap their rates at around 24 percent and form a fund to help troubled borrowers reschedule their loan payments.”²⁶¹ Restructuring loan repayments could also be government-mandated; if the government regulated loan repayment, MFIs would likely work towards compliance.²⁶²

G. Utilize Technology for Social & Educational Benefits

Numerous projects have shown that utilizing technology can provide greater financial access to people in developing countries,²⁶³ and it can also provide numerous other educational and social benefits for borrowers. For example, Grameen Bank²⁶⁴ created a nonprofit Internet provider to “make the Internet available to educational and research institutions.”²⁶⁵ Through this program, borrowers had the opportunity to benefit from the latest innovations in their fields, without unnecessarily wasting time and money trying earlier products and methods in their businesses.²⁶⁶ The idea allowed for “rapid social change” in rural areas because it linked isolated women, that otherwise would have had difficulty sharing ideas.²⁶⁷ Additionally, it prevents villagers from wasting effort “getting messages to dispersed family members” because they could communicate through the Internet.²⁶⁸ Lastly, it helped to quickly address “income shocks,” like natural disasters, because it allowed for villagers to deal quickly with emergencies.²⁶⁹

interest rate for a short period of time, in order to stay in the program and still meet her obligations. This allows the Bank to ease the pressure it exerts on the borrower.” Farrer, *supra* note 21, at 456; see MUHAMMAD YUNUS, CREATING A WORLD WITHOUT POVERTY: SOCIAL BUSINESS AND THE FUTURE OF CAPITALISM 60-66 (2007).

261. Bellman & Chang, *supra* note 18.

262. MFIs “say they are ready to comply with more government restrictions as long as they are given time to meet new requirements.” Bellman & Chang, *supra* note 18.

263. Greater access is achieved due to expanding markets through e-commerce, promotion of self-employment, and by bringing education, knowledge and skill training to the poor. YUNUS, *supra* note 260, at 189-90.

264. Grameen’s founder, Yunus, agrees that technology is crucial, but he is wary of who may control it. “Technology is an essential prerequisite for raising productivity, but it must be directed so that the increased production does not simply end up in the hands of the wealthy.” YUNUS, *supra* note 38, at 221.

265. *Id.* at 227.

266. *Id.*

267. *Id.* at 227-28.

268. *Id.*

269. *Id.*

H. Utilize Technology & Government to Increase Financial Access

Financial access is crucial for borrowers; however, they often have difficulty accessing their banks.²⁷⁰ Banking technology that allows “banking without the need for a bank branch” could solve this dilemma.²⁷¹ Numerous companies now use cell phones to provide banking services.²⁷² To provide greater financial access, Kenya’s M-Pesa used cell phones for banking and “has turned 16,900 phone vendors into banking agents.”²⁷³ Even though Kenya is “a country with fewer than 1,500 physical bank branches,” M-Pesa now has 11.9 million customers, which comprises around 54 percent of Kenya’s adult population.²⁷⁴ Using phone vendors as banking agents greatly decreases costs,²⁷⁵ so banks “can operate in locales with far fewer users.”²⁷⁶ This idea of utilizing mobile communication for banking is picking up international steam.²⁷⁷ In 2008, “[t]here were 4 billion mobile subscribers worldwide,” while “[t]he global population over age 15 is only 4.9 billion,” suggesting that “it is now plausible to imagine universal access to basic financial services.”²⁷⁸ Government support has proved to be a critical tool in the proliferation of wireless banking.²⁷⁹ Governments can act as alternative banks for borrowers.²⁸⁰ “Governments [already] make regular payments to at least 170 million poor people worldwide – far more than the 99 million or so who have active microloans.”²⁸¹ Government-to-person payments “have the

270. Kenny, *supra* note 80 (“In India, four people in five who signed up for basic traditional bank accounts aimed especially at the poor said they would need to spend half a day’s wages and an entire day just to reach the nearest bank branch and make a transaction”).

271. Kenny, *supra* note 80.

272. *Id.*; see also Pickens, *supra* note 62, at 13 (asserting that Brazil has used the bank outsourcing system very effectively. “In 2001-2005 banks in Brazil used agents to expand across the country, with a service point in all of the country’s 5,567 municipalities,” and they were able to accomplish this feat with few agents).

273. Kenny, *supra* note 80.

274. *Id.*

275. *Id.* (noting that when banks like M-Pesa outsource services “to street vendors, their costs drop dramatically.”) (citing Pickens, *supra* note 62, at 13 (“In Pakistan, Tameer Bank discovered that the capital and operating costs for an agent are 76 times less than for its microfinance branches in the first year, and 89 times cheaper over five years.”)).

276. Pickens, *supra* note 62, at 13.

277. *Id.* (“According to the GSM Association (the trade association for the global communications industry), more than 80 percent of the world’s population is now within mobile coverage,” and “[f]inancial institutions increasingly make use of wireless networks to connect their infrastructure.”).

278. Kenny, *supra* note 80.

279. *Id.* (noting that, in the past, governments have been a crucial player in implementing “branchless banking” because banks need “cheap and effective ways to deliver cash transfers to their citizens.”).

280. Pickens, *supra* note 62, at 1.

281. *Id.*

potential to become a vehicle for extending financial inclusion and improving the welfare of poor people.”²⁸²

I. Increased Regulation & Government Support

Increased government support and regulation is also crucial in other contexts.²⁸³ Many scholars argue that increased regulation is the answer,²⁸⁴ and even governments agree that microlending needs government support.²⁸⁵ However, opponents of increased regulation believe restricting freedom for MFIs is damaging to the MFIs.²⁸⁶ As USAID has said, the goal of MFI reform or regulatory framework “should be to create an environment that supports the expansion of financial services to the poor, thereby increasing access.”²⁸⁷ Many MFIs purport that “regulation is essential for MFIs looking to fund themselves,” some think “regulation will promote their business and improve their operations,” while others believe “regulation is key in speeding the emergence of sustainable MFIs.”²⁸⁸ Local governments often also support a stronger regulatory framework, as they “are sometimes troubled by the weakness of many MFIs, and unimpressed with the coordination and supervision being exercised by the donors who fund them.”²⁸⁹ Therefore, they would like “someone to step in and

282. *Id.*

283. Walker, *supra* note 57, at 393 (noting that proponents of privatization claim government regulation is “inevitable” for the conversion of microfinancing into a for-profit industry).

284. *Id.* at 389 (citing David Bornstein, who “believes that the government can and should play a role in the microfinance industry . . . He believes that the government’s role should be to subsidize the costs of institutional development, but that this subsidy should not be infinite.”); see also Muhammad Yunus, *How Legal Steps Can Help Pave the Way to Ending Poverty*, 35 A.B.A. HUM. RTS. NO. 1, 23 (Winter 2008) (“The best option would be to create new law exclusively for establishing microfinance banks for low-income people and people on welfare” and “lawyers [should] form groups in each country to develop and revise laws that ultimately help the poor to help themselves.”).

285. Bellman & Chang, *supra* note 18 (noting that politicians and regulators have grown concerned “that unfettered expansion was leading to poor lending practices” and “multiple loans to the same borrowers.”).

286. McNew, *supra* note 15, at 288 (“[M]ore regulation of MFIs is needed, but too much regulation may make it impossible for MFIs, which by their nature require flexibility, to survive.”); see also, Alexandra O’Rourke, *Public-Private Partnerships: The Key to Sustainable Microfinancing*, 12 LAW & BUS. REV. AM. 179, 179 (2006) (discussing “legal barriers to the sustainability” of MFIs).

287. USAID, *Model Scope of Work: Legal & Regulatory Reform for Access to Finance Policy & Programming Toolkit* (2005), available at http://pdf.usaid.gov/pdf_docs/PNADF663.pdf.

288. McNew, *supra* note 15, at 295.

289. McNew, *supra* note 15, at 295; see also Robert Christen & Richard Rosenberg, *The Rush to Regulate: Legal Frameworks for Microfinance*, CGAP Occasional Paper No. 4, 1 (Apr. 2000), available at <http://www.cgap.org/gm/document-1.9.2699/OP4.pdf>.

clean up a situation that they think is hurting the development of microfinance in their country.”²⁹⁰

J. Andhra Pradesh Utilized a Regulatory Framework

AP recently approved microfinance regulations, in an attempt to improve microlending. Politicians and critics have accused MFIs of “using coercive practices to recover loans from overleveraged customers,” and claimed MFIs were “held responsible for suicides by debt-burdened borrowers.”²⁹¹ In response to this onslaught of criticism and the suicide epidemic, “the panicky state government has pushed through a tough new law that seeks to regulate the industry, much to the latter’s consternation.”²⁹² In October of 2010, AP “passed an ordinance – which later became law – tightening regulation of microfinance companies that lend to the unbanked poor” after MFIs were “accused of exploiting by charging high interest rates.”²⁹³ “The regulations require that all microfinance institutions register with the government, restrict the total interest payments charged from exceeding the amount of the loan, ban the taking of security for loans and impose penalties of jail time and hefty fines for coercing borrowers with strong-handed techniques.”²⁹⁴ The law has changed collection practices, prohibiting “companies from accepting weekly repayments” and demanding “clearance from local authorities to extend a second loan to a borrower.”²⁹⁵ It put loan applications “under government scrutiny,” asked lenders to stop “doorstop lending,” and switched “from a weekly to a monthly loan recovery system.”²⁹⁶ India has followed suit in regulating microfinance companies.²⁹⁷

K. Conclusion on Recommendations

It is clear that a multi-faceted approach will be required to fully address all the difficulties with microlending. There is no one simple solution for addressing the problem. Multiple approaches are required to adequately aid microfinance institutions. Luckily, in AP, MFIs and borrowers alike have agreed that change needs to occur and they have agreed to participate. While it is too soon to tell how the new

290. Christen & Rosenberg, *supra* note 289.

291. Pilla, *supra* note 185.

292. Biswas, *supra* note 59.

293. Pilla, *supra* note 185.

294. Walker, *supra* note 57, at 391-92.

295. Biswas, *supra* note 59.

296. Pilla, *supra* note 185.

297. Walker, *supra* note 57, at 391 (“As of early 2011, the Indian federal government and the Reserve Bank of India were working together on new federal regulations to oversee microlending.”); see Maes & Reed, *supra* note 86, for more information on Andhra Pradesh post-epidemic regulatory actions.

regulations in AP will influence the industry, it is clear that the government is making a concerted effort to address all the difficulties. With the continued support of NGOs and government institutions, a continued influx of capital, and global interest, there is no doubt that there is hope for the microfinance industry.

VI. CONCLUSION

Microfinance, as it currently stands, is clearly facing adversity. The suicide epidemic of borrowers in AP indicates that microfinance is flawed as it stands, but this does not mean that microfinance as an institution is dead. As Grameen Bank's beginnings demonstrate, microfinance has the ability to greatly aid the world's poor and to stimulate development. As Sivamma, Jane, and the millions of other women supported and empowered through microfinance demonstrate, microfinance is still thriving. In spite of microfinance's flaws, if microfinance institutions, governments, and non-profit organizations implement some of the recommendations, microfinance will continue to be used to achieve the MDGs and help women like Jane sew their way out of poverty.

SCIENCE FICTION NO MORE: CYBER WARFARE AND THE UNITED STATES

*Cassandra M. Kirsch**

ABSTRACT

Faced with the increased propensity for cyber tools to damage state computer networks and power grids with the click of a mouse, politicians and academics from around the world have called for the creation of a Geneva Convention equivalent in cyberspace. Yet, members of United Nations Security Council continue to disagree as to what cyber activities might rise to the level of an armed attack under the existing Law of Armed Conflict. Activities once limited to cyber espionage, and outside the reach of international law, are now the very same tools utilized in cyber operations to disable state communications and wreak havoc on state infrastructure. Wars, traditionally waged between nations and clearly defined groups, can now be fought behind the veil of anonymity inherent of the Internet. While acts of war have yet to happen openly on the Internet, accusations have already been made against Russia for the 2007 cyber attacks on Estonia and against Israel for the Stuxnet worm unleashed on Iran's nuclear reactors. Just as aerial bombing and nuclear arms revolutionized the battlefield, cyber attacks, and the mechanisms behind them, stand poised as the next evolution in weapons of war and any multilateral treaty must take these facts into consideration.

INTRODUCTION

Throughout history, technology has revolutionized the manner in which wars are fought. In the eighteenth century, gunpowder brought an end to the days of castles and knights, ushering in a period of battalions and infantrymen. Two hundred years later, the invention of the aircraft gave rise to the Hague Rules of Air Warfare after the widespread destruction caused by strategic bombing campaigns during the First World War. The atrocities wrought by the atom bomb at Hiroshima and Nagasaki still burn in the memories of many and is responsible for the proliferation of espionage and intelligence gathering continuing to this day in our international community. Now, at the dawn of the twenty-first century, information technology stands to once again change the landscape of war. While the Internet transformed society in the nineties by allowing computer users to access information across the globe with the click of a mouse, the spread of information technology comes at a cost. The more people become dependent on the

Internet, and the more data we move from paper to digital format, then the more vulnerable our society becomes to a cyber attack.

Formerly the substance of science fiction, cyber warfare is one of the most serious national security threats in recent years. Cyber warfare covers the doctrine regarding the tactics, techniques, and procedures of Computer Network Operations (CNO) including attacks, defense, and exploitation, plus the new aspect of social engineering.¹ While the technology used in cyber warfare has been traditionally characteristic of espionage activities in the last twenty years, this same technology is capable of creating real damage to a nation-state. In 2007, Estonia suffered the first ever reported state-wide incident of cyber assault when Estonia's banks, online newspapers, and government communications were shut down for two weeks by a group of Russian hackers who were believed to be tied to the Kremlin.² One of the most wired societies in the world, the people of Estonia quickly turned to the streets in riot, leaving at least one person dead and 150 people injured.³ Similar attacks predated the weeks leading up to the 2008 Georgian bombings by Russia, but it was not until the United States Department of Defense ("DoD") suffered a massive compromise of military defense networks that the United States issued a Cyberspace Policy Review and established the United States Cyber Command ("USCYBERCOM") to protect DoD networks.⁴

* J.D., University of Denver Sturm College of Law (2013); B.A., The University of Texas (2008). Cassandra M. Kirsch is a 2013 Juris Doctorate candidate at the University of Denver Sturm College of Law pursuing studies in the areas of information privacy law and Internet law. The author would like to extend special thanks to Professor John T. Soma, the Executive Director of the University of Denver Privacy Foundation, for his encouragement, mentorship, and support of her research on the implications of cyber warfare and cyber crime on international law.

1. STEPHEN NORTHCUTT, *Foreword to CYBER WARFARE: TECHNIQUES, TACTICS AND TOOLS FOR SECURITY PRACTITIONERS* xx (JASON ANDRESS & STEVE WINTERFELD, 2011).

2. See *War in the Fifth Domain*, ECONOMIST, July 3, 2010, at 25, available at <http://www.economist.com/node/16478792>; Noah Shachtman, *Kremlin Kids: We Launched the Estonian Cyber War*, WIRED (Mar. 11, 2009), <http://www.wired.com/dangerroom/2009/03/pro-kremlin-gro>. A Pro-Kremlin youth group took responsibility for the attacks on Estonia in 2007. However, the group has a track record of conducting operations on behalf of the government.

3. *Estonia Hit by "Moscow Cyber War"*, BBC NEWS, <http://news.bbc.co.uk/2/hi/europe/6665145.stm> (last updated May 17, 2007).

4. See William J. Lynn III, *Defending a New Domain: The Pentagon's Cyber Strategy*, FOREIGN AFFAIRS, Sept./Oct. 2010, at 97, available at www.foreignaffairs.com/articles/66552/william-j-lynn-iii/defending-a-new-domain; *US Needs "Digital Warfare Force"*, BBC NEWS, <http://news.bbc.co.uk/2/hi/technology/8033440.stm> (last updated May 5, 2009). In what was the most significant United States military computer data breach to date, an infected flash drive was inserted into a United States military laptop at a base in the Middle East and the code on the flash drive uploaded itself onto a network run by U.S. Central Command and transferred data to servers controlled by foreign intelligence agencies. The code resulted in "Operation Buckshot Yankee," a 14-month effort to remove

Despite various initial steps to deter a massive cyber attack on DoD networks, the United States is largely unprepared to respond to an act of cyber warfare. In fact, the United States military does not even have a definition for cyber warfare nor does the legal community understand how it applies to legal norms, specifically the Law of Armed Conflict.⁵ The lack of a definition of cyber warfare is especially problematic as the President, in responding to a cyber attack must first determine whether such an attack rises to the level of an "armed attack," and thus justifies self-defense. However, much of what transpires in the cyber realm does not resemble traditional military threats. Whether it is appropriate to characterize cyber attacks as "weapons, means or methods of warfare" and subject them to legal review is an issue because the legal architecture for the Law of Armed Conflict is founded on the concept of traditional military threats.

This paper focuses not only on the current state of the law regarding cyber warfare, but also what cyber warfare could and should be. Part I looks at the nature and history of cyber attacks to provide an understanding of their capabilities as weapons of war as compared to espionage. Part II examines the applicability of the Law of Armed Conflict to cyber attacks, including how the elements of proportionality, attribution, and necessity apply to the most common forms of cyber attacks. Part III discusses how cyber warfare is currently being addressed by the United States, the recent proposals for an international treaty on cyber warfare, and the obstacles to establishing a multilateral international treaty. Finally, Part IV looks ahead to the future of American civil liberties post-normalization of cyber warfare.

I. THE NATURE AND HISTORY OF CYBER ATTACKS: WEAPONS OF WAR OR ESPIONAGE?

In the last decade, the rate of cyber attacks increased exponentially, along with their propensity for actual harms. Faced with the growing reality of cyber attacks from foreign state actors, talk of a Geneva Convention equivalent for cyber space made headlines in the news and at academic conferences in 2010 and 2011.⁶ Politicians and

the code from all networks. See also Kim Zetter, *The Return of the Worm that Ate the Pentagon*, WIRED (Dec. 9, 2011), <http://www.wired.com/dangerroom/2011/12/worm-pentagon/#more-66316>.

5. See U.S. DEP'T OF DEF., DEPARTMENT OF DEFENSE STRATEGY FOR OPERATING IN CYBERSPACE, 2-4 (2011), available at <http://www.defense.gov/news/d20110714cyber.pdf>. While the Pentagon has concluded that computer sabotage may constitute an act of war in its first formal cyber strategy report, the report does not detail what kind of cyber attacks justify the use of force.

6. See, e.g., KARL FREDERICK RAUSCHER & ANDREY KOROTKOV, EASTWEST INST., WORKING TOWARDS RULES FOR GOVERNING CYBER CONFLICT: RENDERING THE GENEVA AND HAGUE CONVENTIONS IN CYBERSPACE 6-14 (2011), available at <http://www.isn.ethz.ch/isn/Digital-Library/Publications/Detail/?ots591=0c54e3b3-1e9c-be1e-2c24a6a8c70>

academics alike agree that a treaty would lessen the chance of a real cyber war, arguing the world is now in the early stages of a Cyber Arms Race.⁷ In evaluating how domestic and international law might be used by the United States in response to cyber attacks, the international legal community must first discern the nature, purpose, and scope of cyber attacks. While the use of terms like “war” and “attacks” espouse an offensive military nature, threats to our national computer systems frequently fall under the category of espionage due to their data gathering nature.⁸ Espionage, while punishable under domestic laws, is not listed as a crime by the International Court of Justice. Rather, the International Court of Justice reserves the term crime against international law for acts of aggressive war, serious war crimes or crimes against humanity, all of which presume harm to citizens to a nation-state.⁹ The establishment of any sort of international regime, consequently, turns on delineating cyber activities that are used as weapons versus those limited to state espionage.

Although cyber tools used for espionage activities are often the same tools used to attack a nation’s computer networks, acts of cyber warfare deviate from their espionage counterparts by going beyond compromising a computer network.¹⁰ Rather than passively monitor state activities on a computer network or copy data,¹¹ a cyber attack actively “penetrates another nation’s computer systems or networks for the purposes of causing damage or disruption.”¹² While the United States military has yet to settle on official definitions for both cyber

60233&lng=en&id=127333; Bruce Schneier, *It Will Soon Be Too Late to Stop the Cyberwars*, LONDON FINANCIAL TIMES, Dec. 2, 2010, at 9, available at <http://www.ft.com/intl/cms/s/0/f863fb4c-fe53-11df-abac-00144feab49a.html>; Maggie Shiels, *Cyber War Threat Exaggerated Claims Security Expert*, BBC NEWS, <http://www.bbc.co.uk/news/technology-12473809> (last updated Feb. 16, 2011). Cyber warfare and its relation to the Geneva Convention was a popular topic at the 2011 RSA Security Conference in San Francisco and the East West Institute has conducted a joint report between Russian and American scholars to define rules of cyber warfare based on the Geneva Convention. Although he has argued in the past that the threat of cyber war is exaggerated, IT Security Expert Bruce Schneier says that the Geneva Conventions need to be updated to manage the current reality of cyber war and cyber attacks.

7. Hamish Barwick, *Global Cyber War Treaties Urgently Needed: Bruce Schneier*, COMPUTERWORLD (Nov. 8, 2011), http://www.computerworld.com.au/article/406751/global_cyber_war_treaties_urgently_needed_bruce_schneier.

8. See JEFFREY T. RICHELSON, *Espionage*, in THE READER’S COMPANION TO MILITARY HISTORY 156-57 (Robert Cowley & Geoffrey Parker eds., 1996).

9. See LAWRENCE MALKIN, *Genocide*, in THE READER’S COMPANION TO MILITARY HISTORY 181 (Robert Cowley & Geoffrey Parker eds., 1996).

10. See JEFFREY CARR & LEWIS SHEPHERD, *INSIDE CYBER WARFARE: MAPPING THE CYBER UNDERWORLD* 1-5 (2009); RICHARD A. CLARKE & ROBERT K. KNAKE, *CYBER WAR* 228-32 (2010); RICHARD STIENNON, *SURVIVING CYBERWAR* 20 (2010).

11. STIENNON, *supra* note 10, at 20-22.

12. CLARKE & KNAKE, *supra* note 10, at 6.

attacks and cyber warfare,¹³ the DoD recently adopted an effects-based approach, or consequence-based model, for determining when a cyber activity becomes a cyber attack.¹⁴ Under the current approach by the DoD, the damage caused by the activity to computer networks and infrastructure is compared with the consequences of traditional armed attacks.¹⁵ In other words, when the effect of a cyber attack is analogous to those that would invoke U.N. Charter terms of "armed attack," then the cyber operation rises to the level of an armed attack. For example, if a cyber attack takes critical state infrastructure, such as an electricity grid offline or a dam, offline and collateral damage spills over into the civilian realm, then the cyber attack would likely count as an armed attack.¹⁶ On the other hand, a cyber operation that interferes with intelligence activities shares more similarities with espionage activities than the kinetic effects of armed attacks. Recently, NATO also adopted the effects-approach, concluding in an expert report led by Madeline Albright that a cyber attack on the critical infrastructure of a NATO country may equate to an armed attack and justifies retaliation.¹⁷ Despite support of this approach by the United States and NATO, Russia and China have both rejected the effects-approach in favor of a broad definition of cyber warfare that encompasses any use of a computer technology to wage an attack on another country, including online acts to undermine the political and social harmony of the state.¹⁸

13. See U.S. DEPT OF DEF., *supra* note 5, at 2-4.

14. See *id.* at 3-4. The Department of Defense refers to cyber attacks as cyber threats, stating adversaries may seek to "exploit, disrupt, deny, and degrade the networks and systems that DoD depends on." Also, cyber threats include "destructive action[s]" that threaten to destroy or degrade networks, as well as attacks on both military targets and critical civilian infrastructure. See also NAT'L RES. COUNCIL, TECHNOLOGY, POLICY, LAW AND ETHICS REGARDING U.S. ACQUISITION AND USE OF CYBER ATTACK CAPABILITIES (WILLIAM A. OWENS, et al. eds., 2009); U.S ARMY TRAINING & DOCTRINE COMMAND, THE UNITED STATES ARMY CYBERSPACE OPERATIONS CONCEPT CAPABILITY PLAN 2016-2028, at 67 (2010), available at <http://www.tradoc.army.mil/tpubs/pams/tp525-7-8.pdf>.

15. Michael N. Schmitt, *Computer Network Attacks and the Use of Force in International Law: Thoughts on a Normative Framework*, 37 COLUM. J. TRANSNAT'L L. 885, 913-14 (1999). This approach appears to draw on the kinetic-effect approach coined by Michael Schmitt. In an attempt to resolve the definitional problem of armed attack, Schmitt removes economic and political coercion by focusing on the kinetic effects of the cyber attacks on the actual nation-state.

16. YORAM DINSTEIN, WAR, AGGRESSION, AND SELF-DEFENCE 196 (4th ed. 2005). International Legal Scholar Yoram Dinstein agrees with the effects-approach. Dinstein argues that what counts in determining whether an electronic computer network attack rises to the level of an armed attack under the U.N. Charter is the consequence of the assault. In his opinion, shutting down computers that control dams and causing wide-scale flooding that results in casualties is the equivalent of an armed attack.

17. N. Atlantic Treaty Org., NATO 2020: Assured Security; Dynamic Engagement 6-7 (May 17, 2010), available at http://www.nato.int/nato_static/assets/pdf/pdf_2010_05/20100517_100517_expertsreport.pdf.

18. Declaration of the Heads of the SCO Member States on International Information Security, June 15, 2006, *unofficial translation available at* <http://www.fidh>.

Although Russia, China and the United States began official talks nearly two years ago,¹⁹ state representatives have yet to reach a consensus as to when a cyber attack rises to the level of an armed attack and, in turn, when a cyber attack violates international law.²⁰

Just as the definitions of cyber attacks vary among nations, the variety of hostile activities capable of being carried out over computer networks is equally vast, ranging from malicious defacement of websites to large-scale destruction of SCADA²¹ infrastructures that civilians depend upon. The most common cyber tools employed by private and state hackers are Structured Query Language (“SQL”) code injection, Distributed Denial of Service (“DDoS”), and Worms. While many of these cyber tools characterize recent developments in cyber espionage and the use of each tool alone does not result in damage, their objective and combined use can quickly breed an atmosphere of war. Keeping the United States effects-based approach in mind, the following descriptions illustrate the wide-range and scope of recent

org/IMG/article_PDF/article_a11315.pdf. The Shanghai Cooperation Organization, an intergovernmental mutual-security organization founded in 2001 by Russia and China, appears to have adopted an expansive vision of cyber-attacks to include the use of cyber-technology to undermine political stability. The organization has “express[ed] concern about the threats posed by possible use of [new information and communication] technologies and means for the purposes [sic] incompatible with ensuring international security and stability in both civil and military spheres.” See CARR, *supra* note 10, at 1-10.

19. See John Markoff & Andrew E. Kramer, *In Shift, U.S. Talks to Russia on Internet Security*, N.Y. TIMES, Dec. 12, 2009, at A1, available at <http://www.nytimes.com/2009/12/13/science/13cyber.html>; Claudine Beaumont, *US and Russia in “Secret” Cyber Warfare Talks*, TELEGRAPH (Dec. 14, 2009), <http://www.telegraph.co.uk/technology/news/6808883/US-and-Russia-in-secret-cyber-warfare-talks.html>; Cheng Guangjin, *US Official Rules Out Chance of “Cyber War” with China*, CHINA DAILY (Oct. 20, 2011), http://usa.chinadaily.com.cn/us/2011-10/20/content_13938436.htm. In 2009, the United States began talks with Russia and a United Nations arms control committee about limiting the militarization of cyberspace. The United States has also been holding discussions with China over the last two years as well.

20. Diane Bartz & Paul Eckert, *U.S. and China Face Vast Divide on Cyber Issues*, REUTERS (July 14, 2011), <http://www.reuters.com/article/2011/07/14/us-usa-china-cyber-idUSTRE76D3K020110714>; Guangjin, *supra* note 19; John Markoff, *Step Taken to End Impasse Over Cybersecurity Talks*, N.Y. TIMES, July 16, 2010, at A7, available at <http://www.nytimes.com/2010/07/17/world/17cyber.html>. A group of cyber security specialists and diplomats representing fifteen countries agreed on a set of recommendations to the United Nations Secretary General for negotiations on an international computer security treaty, but was subsequently rejected by the United States for censorship concerns. Two years later at the 2011 annual cabinet-level U.S.-China Strategic and Economic Dialogue, the conference included cyber security for the first time, but produced no breakthroughs. Bilateral discussions between the United States, China, and Russia are ongoing.

21. SCADA (supervisory control and data acquisition) generally refers to industrial control systems (ICS): computer systems that monitor and control industrial, infrastructure, or facility-based processes. See Donald B. Ashton & Daniel W. Nagala, *SCADA, PIPELINE AND GAS TECHNOLOGY*, Nov./Dec. 2004, at 26-27; Graham Nasby & Matthew Phillips, *SCADA Standardization*, INTECH, May/June 2011, at 18.

attacks, emphasizing that their objective use transforms them beyond tools for espionage and into weapons of war.

SQL Code Injection

Long used as an essential part of any hacking activity, the dangers of SQL code injection became known to the public in 2011 when online group Lulzsec shutdown the Sony Playstation Network for over a month.²² SQL code, an international programming language designed for managing data in relational database management systems ("RDBMS"),²³ serves as the current industry-standard for website database language.²⁴ However, such standardization of web sites makes it easy for hackers to gain access to multiple databases as the Achilles' heel of one website is often the same as another. SQL injections alter the predefined logical expressions within a predefined query by injecting operations which always result in true or false statements.²⁵ In turn, hackers can run random SQL queries and extract sensitive user information from applications or bypass security mechanisms and compromise the backend of server or network.²⁶ Hackers utilizing SQL injection techniques may gain legitimate username and password information to sensitive government databases and aid in intelligence gathering or espionage activities. However, passive cyber activities that merely observe or gather data, as previously mentioned, are not weapons or acts of war. Rather, SQL injection enters the realm of cyber warfare by operating as a stepping-stone for further cyber attacks: Once a computer network is infiltrated, a hacker can execute a variety of attacks, including planting logic bombs or other malicious coding to damage the computer network.

22. Adam Clark Estes, *The Hacks that Mattered in the Year of the Hack*, ATLANTIC WIRE (Dec. 28, 2011), <http://www.theatlanticwire.com/technology/2011/12/hacks-mattered-year-hack/46731>.

23. Christine McGeever, *Structured Query Language*, COMPUTERWORLD, May 15, 2000, at 70. Structured Query Language (SQL) is a programming language designed to get information out of and put it into a relational database. Queries are constructed from a command that lets you select, insert, update, and locate data.

24. See, e.g., KEVIN KLINE ET AL., TRANSACT-SQL PROGRAMMING 52 (1999); Orest Halustchak, *Proposed Spatial Data Handling Extensions to SQL*, in TOWARDS SQL DATABASE LANGUAGE EXTENSIONS: FOR GEOGRAPHIC INFORMATION SYSTEMS 69 (VINCENT B. ROBINSON & HENRY TOM eds., 1993); DEJAN SARKA, ITZIK BEN-GAN, LUBOR KOLLAR & STEVE KASS, INSIDE MICROSOFT® SQL SERVER® 2008: T-SQL QUERYING 273 (2009).

25. Theodoros Tzouramanis, *SQL Code Poisoning: The Most Prevalent Technique for Attacking Web Powered Databases*, in CYBER WARFARE AND CYBER TERRORISM 161 (Lech J. Janczewski & Andrew M. Colarik eds., 2008).

26. CHRIS ANLEY, NEXT GENERATION SEC. SOFTWARE RESEARCH, ADVANCED SQL INJECTION IN SQL SERVER APPLICATIONS 3-4 (2002), available at http://www.cgi-security.com/lib/advanced_sql_injection.pdf.

Distributed Denial of Service Attacks

DDoS attacks have been the most prevalent form of cyber attack in recent years²⁷ and predated both the 2007 attacks on Estonia and the 2008 Georgian bombings. DDoS attacks use an unknown number of servers to deny access to a specific site by overloading the network with data packets, thus preventing it from processing legitimate requests.²⁸ Using a DDoS attack disguises the attack as a legitimate attempt to access the server or web site through controlling a collective of computers at different locations called “zombies.” Although current software can detect basic DDoS attacks, prevention remains extremely difficult as intrusion software cannot distinguish whether the data request is an attack or real connection attempt.²⁹

Although damages from a DDoS attack against a web site range from user inconvenience from lack of site reliability to the complete shut down of the server and delay,³⁰ a strong enough DDoS attack may effectively serve as the equivalent of a military blockade. Just like the blockade of East Germany during World War II, the DDoS attacks on Estonia might also be analogized to a military blockade. For example, the 2007 DDoS attacks on the government of Estonia were so severe that the attacks effectively shut down government communications for weeks, knocking out the emergency lines for hours.³¹ Georgia fell under a similar fate in 2008, when a DDoS attack prevented it from communicating with the outside world.³² Though inconvenience and delay in communications are often not considered acts of war, these scenarios are analogous to a missile being used to take out a government’s communication center: such a DDoS attack would constitute an act of war.

Worms

Worms have come to light in recent years with the advent of wide-scale disabling network attacks, such as the Conficker worm and the Stuxnet attack on Iran’s nuclear reactors. Another threat to cyber security and military networks across the globe, worms are self-

27. George Disterer et al., *Denial-of-Service (DoS) Attacks: Prevention, Intrusion Detection, and Mitigation*, in CYBER WARFARE AND CYBER TERRORISM 262-63 (Lech Janczewski & Andrew M. Colarik eds., 2008).

28. John Worthy & Martin Fannin, *Denial-of-Service: Plugging the Legal Loopholes*, COMPUTER LAW & SECURITY REPORT 194-98 (2007).

29. Disterer et al., *supra* note 27, at 263.

30. *Id.*

31. *Cyberwarfare: Newly Nasty*, ECONOMIST, May 24, 2007, available at <http://www.economist.com/node/9228757>.

32. Jonathan A. Ophardt, *Cyber Warfare and the Crime of Aggression: the Need for Individual Accountability on Tomorrow’s Battlefield*, 2010 DUKE L. & TECH. REV. 3, 3-6 (2010).

replicating malware computer programs, which use a computer network to send copies of itself to computers on a network, sometimes without any user intervention.³³ Due to the security shortcomings on the target computer, the worm begins replicating and sending out hundreds or thousands of copies of itself. Unlike DDoS attacks, the presence of a worm almost always results in damage to the computer network.³⁴ Although worms wreak havoc on computer networks, the nature of worms is rooted in espionage and data gathering through electronic eavesdropping.³⁵ Worms function primarily by hiding on a computer and through their presence granting access to the device. While the presence is not generally enough to cause a problem, worms more often than not multiply at an unprecedented rate, consuming large amounts of bandwidth and corrupting computer network performance³⁶

Over the last half decade, worms have become major tools in toppling entire computer networks. In the summer of 2010, a computer worm coined "Stuxnet" had the world's leading cyber security experts up in arms as the self-replicating computer worm made its way through computers the world over. The goal of the Stuxnet worm was to physically, not figuratively, destroy a military target.³⁷ Believed to be distantly related to the Conficker³⁸ worm, Stuxnet targeted Siemens industrial software and equipment, specifically the computer systems that run Iran's main nuclear enrichment facilities, by activating when

33. Kevin Curran et al., *Hacking and Eavesdropping*, in CYBER WARFARE AND TERRORISM 308 (Lech Janczewski & Andrew M. Colarik eds., 2008).

34. See O. Toutonji & S. Yoo, *An Approach against a Computer Worm Attack*, 1.2 INT'L J. COMM. NETWORKS AND INFORMATION SEC. 47, 53 (2009); R.D. VINES, WIRELESS SECURITY ESSENTIALS, DEFENDING MOBILE SYSTEMS FROM DATA PIRACY 200 (2002).

35. Curran et al., *supra* note 33.

36. *United States v. Morris*, 928 F.2d 504, 505 (2d Cir. 1991). The Morris worm on November 2, 1988, was one of the first computer worms distributed via the Internet. According to its creator, the Morris worm was not written to cause damage, but to gauge the size of the Internet. A supposedly unintended consequence of the code, however, caused it to be more damaging: a computer could be infected multiple times and each additional process would slow the machine down, eventually to the point of being unusable.

37. William J. Broad, et al., *Israeli Test on Worm Called Crucial in Iran Nuclear Delay*, N.Y. TIMES, Jan. 16, 2011, at A1, available at http://www.nytimes.com/2011/01/16/world/middleeast/16stuxnet.html?_r=3&pagewanted=all.

38. *Protect Yourself from the Conficker Worm*, MICROSOFT (Apr. 4, 2009), <http://www.microsoft.com/security/pc-security/conficker.aspx>; John Markoff, *Worm Infects Millions of Computers Worldwide*, N.Y. TIMES, Jan. 23, 2009, at A12, available at <http://www.nytimes.com/2009/01/23/technology/internet/23worm.html>; John Markoff, *Defying Experts, Rogue Computer Code Still Lurks*, N.Y. TIMES, Aug. 27, 2009, at A1, available at <http://www.nytimes.com/2009/08/27/technology/27compute.html>. Conficker uses flaws in Windows software to co-opt machines and link them into a virtual computer that can be commanded remotely by its authors. With more than five million of these zombies now under its control — government, business and home computers in more than 200 countries.

the worm detected the presence of a specific configuration of Siemens controller that appear to exist only in a centrifuge plant.³⁹ Creators of Stuxnet designed the computer worm to remain inert long periods before accelerating the spinning rotors in the centrifuges beyond the burst frequency, resulting in both the bearings and tubes of the rotors breaking.⁴⁰ Stuxnet also included a man-in-the-middle code that sent out false industrial process control signals, rendering the aberrant behavior undetectable to diagnostic systems.⁴¹ In turn, the man-in-the-middle code prevented the safety system from engaging, which would shut down the centrifuge plant before self-destruction.

As demonstrated in the preceding paragraphs, cyber tools, like Stuxnet and the wide-scale DDoS attacks on Estonia, have the potential to inflict massive amounts of damage on a state computer network, or even a nuclear reactor. On their own, these tools of the hacker trade may look like espionage activities, but used in conjunction and with the right intent, may bring about effects similar or equivalent to those of an armed attack. Recognizing that cyber tools can rise to the level of armed attacks, the next issue facing the United States and the international community is how to regulate and limit the use of this technology in the fifth domain of battle, cyberspace.

In the last fifty years, the control of the production and use of certain weapons has taken on increasing urgency as technological progress during the Cold War opened doors for the development of far more devastating weapons than any means of prior conventional warfare.⁴² In the post-WWII environment, arms control treaties have burgeoned, prohibiting or regulating under the Law of Armed Conflict the use of new weaponry developments ranging from chemical and biological, to nuclear arms.⁴³ As little to no difference exists between benevolent and malevolent coding⁴⁴ and the use of coding is available to anyone with a computer, completely banning these cyber weapons remains highly unlikely and equally ineffective. Cyber weapons, with their increasing propensity for harms to state infrastructure and computer networks, stand posed as the next evolution of warfare and in turn, weapons governed or prohibited by the Law of Armed Conflict.

39. Broad, et al., *supra* note 37.

40. *Id.*

41. *Id.*

42. See GEOFFREY BEST, HUMANITY IN WARFARE 304-05 (1983); WILLIAM BOOTHBY, WEAPONS AND THE LAW OF ARMED CONFLICT 357 (2009); MICHAEL E. O'HANLON & MICHAEL A. LEVI, THE FUTURE OF ARMS CONTROL 1-12 (2004).

43. O'HANLON & LEVI, *supra* note 42, at 62, 159.

44. J. Morales et al., Symptoms-Based Detection of Bot Processes, Proceedings of the Mathematical Methods, Models and Architectures for Computer Network Security Conference (Sept. 7-10, 2010).

II. THE LAW OF ARMED CONFLICT AND CYBER WARFARE

The Law of Armed Conflict is the legal corpus comprised of the Geneva Conventions and the Hague Conventions, as well as subsequent treaties, case law, and customary international law.⁴⁵ The Law of Armed Conflict "arises from a desire among civilized nations to prevent unnecessary suffering and destruction while not impeding the effective waging of war."⁴⁶ A part of public international law, the Law of Armed Conflict regulates armed hostilities and applies to military operations and related activities conducted during an international armed conflict.⁴⁷ In the case of cyber attacks, the form and degree of network attacks are a major factor in determining whether a nation may respond by force in self-defense. The language used to develop these rules does not easily translate into cyberspace so there is no common understanding on how they will apply to this new war-fighting domain. Not only must Internet activity rise to the level of an armed attack under the Law of Armed Conflict, but must also meet the required elements of necessity, proportionality, and attribution.

Serving as the pillar of the right to self-defense within the Law of Armed Conflict, Article 51 of the U.N. Charter provides for the right of countries to engage in military action in self-defense, including collective self-defense, if they come under an "armed attack" from another state.⁴⁸ If the attack is real or the threat has proceeded beyond the point of no return, the victim state of a cyber attack, without any alternative means, may use self-defense to justify reasonable, necessary, and proportional measures to maintain the security of the state under Article 2(4) of the U.N. Charter.⁴⁹ In turn, the armed attack requires a precondition that the use of force produces or is liable to produce serious consequences. When no such results materialize, Article 51 does not come into play. However, many nations, particularly members of the U.N. Security Council, have yet to arrive at a consensus

45. GARY SOLIS, *THE LAW OF ARMED CONFLICT* 7-10 (2010); *What is International Humanitarian Law?*, INT'L COMMITTEE OF THE RED CROSS, 1 (July 2004), http://www.icrc.org/eng/assets/files/other/what_is_ihl.pdf.

46. Solis, *supra* note 45; Leslie Green, *What is--Why is there- the Law of War?*, in 71 *INTERNATIONAL LAW STUDIES: THE LAW OF ARMED CONFLICT INTO THE NEXT MILLENNIUM* 141, 161 (Schmitt & Green eds., 1998); Thomas W. Pittman & Linda S. Murnane, *The Law of Armed Conflict in Modern Warfare*, 42 *JUDGES' J.* 18, 18 (2003).

47. SOLIS, *supra* note 45, at 23; ROBERT KOLB & RICHARD HYDE, *AN INTRODUCTION TO THE INTERNATIONAL LAW OF ARMED CONFLICTS* 65 (2008); William Taft, *The Law of Armed Conflict after 9/11: Some Salient Features*, 28 *YALE J. INT'L L.* 319, 319 (2003).

48. U.N. Charter art. 51.

49. JEFFREY CARR & LEWIS SHEPHERD, *INSIDE CYBER WARFARE: MAPPING THE CYBER UNDERWORLD* 56 (2009).

on what the right to self-defense means in the event of an attack on a country's computer networks.⁵⁰

In determining whether a cyber attack constitutes an armed attack warranting self-defense, any examination under Article 51 must also consider Articles 41 and 42. Article 41 lists measures "not involving the use of armed force," including "complete or partial interruption . . . of telegraphic, radio, and other means of communication."⁵¹ Since Article 41 describes actions not involving the use of force, a cyber attack initially does not appear to fall into the category of armed attack. However, this ignores the vast propensity described in Part I of this paper for a cyber attack to wreck wide-spread damage and harm on vital civilian and military networks, resulting in equally or more devastating harm than that brought about by more traditional modes of warfare.

If a cyber attack is determined to have risen to the level of an armed attack, the response of the state must be necessary, proportional, and attributive.⁵² In its *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, the International Court of Justice stated, "the submission of the exercise of the right of self-defense to the conditions of necessity and proportionality is a rule of customary international law" and "this dual condition applies equally to Article 51 of the Charter, whatever the means of force employed."⁵³ Necessity entails that the state invoking self-defense establish that a genuine armed attack, not an accident or mistake, was launched by a particular country and that the immediacy of the danger provides no reasonable alternative means for responding.⁵⁴ However, the condition of necessity is inherent in responding to any state-sponsored cyber attack; all cyber attacks call for immediate self-defense if there is any chance for the extremely destructive potential of cyber tools to be stopped from spreading into the civilian realm or wreck wide-spread damage.

Under the Law of Armed Conflict, the proportionality doctrine forbids the use of any kind or degree of force that exceeds that required to fulfill the military objective.⁵⁵ Article 51(5)(b) of the U.N. Charter codifies proportionality and directs that attacks on a specific military objective are impermissible if they "may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a

50. Matthew C. Waxman, *Cyber-Attacks and the Use of Force: Back to the Future of Article 2(4)*, 36 YALE J. INT'L L. 421, 426-27 (2011).

51. U.N. Charter art. 41.

52. CARR, *supra* note 18, at 56.

53. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, 245 (July 8).

54. Beth M. Polebaum, *National Self-Defense in International Law: An Emerging Standard for a Nuclear Age*, 59 N.Y.U. L. REV. 187, 198 (1984).

55. *Id.* at 198-200.

combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”⁵⁶ A responsible state actor intent on a particular target must then first determine if it is a military objective, and then whether the collateral damage from destruction of the target is proportionate to the military advantage of destroying it.⁵⁷ These articles do not entirely prohibit civilian casualties under international law, but rather attempt to minimize the number of civilian casualties as much as possible and ensure that any injury is sufficiently justified.⁵⁸ In preparation for an attack, Article 57 requires planners to “take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.”⁵⁹ In other words, if a weapon cannot discriminate between military and civilian objects, the use of such weapon is illegitimate.⁶⁰

Due to the high level of interconnectivity between civilian and military networks, cyber warfare operations risk producing collateral damage in the civilian realm that is far beyond the intended effects of the attack.⁶¹ Regardless of whether cyber attacks result in damage beyond the target computer program or data, the estimated amount of damage done would need to come from the victim state as the effects on civilian networks or infrastructure are often not immediately visible.⁶² For example, 95 percent of the United States military information transfers, and 90 percent of major corporation information transfers, take place or depend on civilian networks.⁶³ Should a state interfere

56. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 51, 1125 U.N.T.S. 3 (entered into force Dec. 7, 1978) [hereinafter Protocol I].

57. Jefferson D. Reynolds, *Collateral Damage on the 21st Century Battlefield: Enemy Exploitation of the Law of Armed Conflict, and the Struggle for a Moral High Ground*, 56 A.F. L. REV. 1, 25 (2005).

58. See Protocol I, *supra* note 56 (stating an indiscriminate attack is one that an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated); Thomas & Murnane, *supra* note 46; Wolff Heintschel von Heinegg, *Asymmetric Warfare: How to Respond*, 87 INT'L L. STUD. 463, 470 (2011).

59. Protocol I, *supra* note 56, art. 57.

60. *Id.* art. 51(4) (stating that indiscriminate attacks are prohibited and include attacks that indiscriminate attacks are not directed at a specific military objective, employ a method or means of combat which cannot be directed at a specific military objective; or which employ a method or means of combat the effects of which cannot be limited).

61. JASON ANDRESS & STEVE WINTERFIELD, *CYBER WARFARE: TECHNIQUES, TACTICS AND TOOLS FOR SECURITY PRACTITIONERS* 233 (2011).

62. *Id.*

63. Vida M. Antolin-Jenkins, *Defining the Parameters of Cyberwar Operations: Looking for Law in All the Wrong Places?*, 51 NAVAL L. REV 132, 132-33 (2005).

with a military information transfer, the attack could easily spillover into civilian communications by sheer virtue of occurring on the same computer network.

While the effects of a proposed cyber attack may be difficult to estimate, ascertaining or gauging the extent of damage to civilians is not impossible. In fact, cyber attacks generally target a specific database or network through code design. Although criticized for allowing a specifically targeted attack to enter into public networks around the globe,⁶⁴ the creators of Stuxnet could feasibly have refined the coding so as not to spread outside the intended network.⁶⁵ In addition to code design, deleting military files, or even disabling military computer networks, would limit damages to a proper military target. Combining these aforementioned activities with proper intelligence gathering and operational planning, the state hacker could restrict their activities to military networks and avoid networks dedicated solely to medical or other public facilities. Otherwise, the cyber attacks will likely be indiscriminate and spillover into the civilian realm.

Even if a response meets the requirements of proportionality and necessity, an attack must be attributable to a state because the laws governing an action of self-defense depend upon whether the attacker is a nation-state or a non-state actor.⁶⁶ Generally, the international law of self-defense prohibits the use of force by a victim state, unless the act of aggression can be conclusively attributed to a state or an agent thereof.⁶⁷ As the Article 2(4) prohibition on the use of force applies only

64. Michael Gross, *A Declaration of Cyber-War*, VANITY FAIR (Apr. 2011), <http://www.vanityfair.com/culture/features/2011/04/stuxnet-201104>; Gregg Keizer, *Secrets of the Stuxnet Worm's Travels*, COMPUTERWORLD (Oct. 3, 2010), http://www.pcworld.com/article/206822/secrets_of_the_stuxnet_worms_travels.html?tk=hp_new (explaining that Stuxnet was aimed at a specific target list, but spread to thousands of PCs outside Iran, in countries including China, Germany, Kazakhstan, and Indonesia); John Markoff, *A Silent Attack, but Not a Subtle One*, NY TIMES, Sept. 27, 2010, at A6, available at <http://www.nytimes.com/2010/09/27/technology/27virus.html?partner=rss&emc=rss>; Kim Zetter, *How Digital Detectives Deciphered Stuxnet, the Most Menacing Malware in History*, WIRED (July 11, 2011), <http://www.wired.com/threatlevel/2011/07/how-digital-detectives-deciphered-stuxnet/all/1>.

65. Gregg Keizer, *supra* note 64; *Unraveling Stuxnet*, KASPERSKY LABS (Jan. 16, 2011), <http://www.youtube.com/watch?v=5YpwNBtdO18>. Senior Antivirus Expert at Kaspersky Lab Roel Schouwenberg believes that because an initial infected-USB based attack failed, the creators of Stuxnet took the risk of it spreading by adding more functionality to the worm. Liam O Murchu, operations manager with Symantec's security response, agrees with Schouwenberg.

66. Matthew Hoisington, *Cyberwarfare and the Use of Force Giving Rise to the Right of Self-Defense*, 32 B.C. INT'L & COMP. L. REV. 439, 451 (2009).

67. JACKSON NYAMUYA MAOGOTO, *BATTLING TERRORISM: LEGAL PERSPECTIVES ON THE USE OF FORCE AND THE WAR ON TERROR* 169 (2005); Michael Glennon, *The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*, 25 HARV. J.L. & PUB. POL'Y 539 (2002); Levi Grosswald, *Cyberattack Attribution Matters*

to states and not to individuals, attribution to a state actor is inescapable.⁶⁸ However, knowledge of the state of origin of a cyber attack, alone, does not identify the individual, or country, that initiated the attack.

An experienced hacker can easily hide their tracks by routing through zombie computers that are hacked or compromised without the knowledge of the owner, as seen in the attacks on Estonia.⁶⁹ More recently, a detailed study by the Information Warfare Monitor uncovered "Ghostnet," a cyber espionage plot based in China that compromised more than a thousand sensitive government and commercial computer systems from around the world.⁷⁰ The plot managed to infiltrate computer systems belonging to embassies, foreign ministries and other government offices in India, London, and New York City.⁷¹ However, the report could not conclude whether the Chinese government or private hackers working in their own political interest controlled the plot. At the same time, the report could neither reject the possibility that a state other than China was behind the plot, routing through zombie computers in China to "deliberately mislead observers as to the true operator and purpose of the Ghostnet system."⁷² Even with today's highly advanced trace-back and forensic technologies, the attribution of a cyber attack remains exceedingly difficult.⁷³ Consequently, states acting on the legal requirement of attribution continue to handle transnational cyber attacks as any other criminal matter on the Internet, resorting to traditional public sector cyber security measures and leaving investigation and prosecution to the originating state. However, even the best cyber security framework is not invincible and countries are often unwilling to investigate.

Under Article 51 of the U.N. Charter, 36 BROOK. J. INT'L L. 1151, 1155 (2011). Article 51 U.N. Charter requires that the attack be carried out as an "act of a state," which means that it must be attributable to a state.

68. Eric Talbot Jensen, *Computer Attacks on Critical National Infrastructure: A Use of Force Invoking the Right of Self Defense*, 38 STAN. J. INT'L L. 207, 232-35 (2002).

69. Ryan Singel, *Zombie Computers Decried as Imminent National Threat*, WIRED (Apr. 9, 2008), <http://www.wired.com/threatlevel/2008/04/zombie-computer>.

70. John Markoff, *Vast Spy System Loots Computers in 103 Countries*, N.Y. TIMES, Mar. 29, 2009, at A1, available at <http://www.nytimes.com/2009/03/29/technology/29spy.html?pagewanted=all>.

71. *Id.*

72. Jack Goldsmith, *The New Vulnerability*, NEW REPUBLIC (June 7, 2010), <http://www.tnr.com/article/books-and-arts/75262/the-new-vulnerability?page=0,2>.

73. Andre Arnes, *Identification and Localization of Digital Addresses on the Internet*, in CYBER WARFARE AND CYBER TERRORISM 368-69 (Lech J. Janczewski & Andrew M. Colarik eds., 2008).

Duties Between States and The Doctrine of Imputability

Given the difficulties raised by the attribution requirement of the Law of Armed Conflict and increasing fear of another attack similar to Stuxnet, the international community has seen considerable activity by various state actors over the last half decade in the pursuit of feasible options to conclusive attribution. Prior to 1972, state responsibility only extended to those acts committed through state "agents."⁷⁴ International law, nevertheless, started to shift towards a doctrine of indirect responsibility with the International Tribunal for the former Yugoslavia's seminal opinion on state responsibility in the *Tadic* case.⁷⁵ In *Tadic*, the court found that even though the state may not have directed a particular act, the state still exercised "overall control" for the actions of combatants.⁷⁶ Although overall control denotes a manner of direct state control, the *Tadic* ruling signals a shift in international law towards holding states responsible for the acts of persons within their borders.

This shift continued through the last decade with the events of the September 11 terrorist attacks on the United States. Now, a large amount of the international community generally accepts that non-state actors who have committed armed attacks against other states can impute responsibility onto the state they are operating within.⁷⁷ This doctrine of state imputability rests upon the premise of a positive obligation of states to prevent their territories from being used as safe havens for not only terrorist attacks, but any attack that would inflict harm on a foreign state.⁷⁸ Consequently, U.N. declarations have increasingly concerned cyber attacks, with the U.N. General Assembly calling upon states to institute domestic criminal charges for persons engaging in malicious cyber activity and to take proactive measures to prevent becoming safe havens for such criminals.⁷⁹

74. The Diplomatic and Consular Staff Case (U.S. v. Iran), 1980 I.C.J. 3, 29 (May 24).

75. *Prosecutor v. Tadic*, Case No. IT-94-1, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995). See also Rachael Lorna Johnstone, *State Responsibility: A Concerto for Court, Council and Committee*, 37 DENV. J. INT'L L. & POL'Y 63 (2008).

76. *Tadic* ¶ 70. The court distinguished between state responsibility for individual actors and responsibility for operations of "organized and hierarchical structured groups," such as military units where effective control may not be necessary to carry out state objectives. The court also drew on the substantial political, military, and financial aid provided to the combatants. The court found that atrocities only need to be committed in part with the state resources and that the state have knowledge of the circumstances by an organ of the state to be responsible.

77. CARR, *supra* note 18, at 53.

78. TAL BECKER, *TERRORISM AND THE STATE: RETHINKING THE RULES OF STATE RESPONSIBILITY* 3 (2006).

79. G.A. Res. 55/63, U.N. Doc. A/RES/55/63 (Dec. 4, 2000).

The doctrine of state imputability turns upon the requirement of due diligence, a long held principle of international law.⁸⁰ Under international law, a state must "use due diligence to prevent the commission within its dominions of criminal acts against another nation or its people."⁸¹ Following on this principle, the U.N. General Assembly maintains that a state has an obligation to prevent and punish these injurious acts.⁸² When the actions of a state do not conform to this international obligation, that obligation is breached. As such, a breach of an international obligation is an international wrong and that state is then responsible to other states for the injury inflicted as a result of that wrongful act.⁸³ In order to effectively impute responsibility onto a nation-state for a breach of due diligence, the victim state must at "minimum examine a sanctuary state's criminal law dealing with cyber attacks, its enforcement of the law, and its demonstrated record of cooperation with the victim states' own investigations and prosecutions of cyber offenders who have acted across borders."⁸⁴ This became a recent political reality when responsibility for the September 11 attacks by al Qaeda was extended to the Taliban Government of Afghanistan after evidence revealed that the Taliban Government following the September 11 attacks continued to provide safe harbor to al Qaeda after multiple warnings to stop.⁸⁵ Adhering to this rationale, a sanctuary state's indifference to cyber attacks launched from within its borders and its failure to cooperate with investigation efforts may very well result in charges of imputed responsibility.

Admittedly, placing the responsibility on states for cyber attacks committed within their borders potentially unleashes a Pandora's box of

80. See Robert Perry Barnidge Jr., *The Due Diligence Principle Under International Law*, 8 INT'L COMMUNITY L. REV. 81 (2006); Jan Hessbruege, *Historical Development of the Doctrines of Attribution and Due Diligence in International Law*, 36 N.Y.U. J. INT'L L. & POL'Y 265 (2004).

81. S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 9 (Sept. 7). See also Corfu Channel (U.K. v. Alb.), 1949, I.C.J. 4, 18 (Apr. 9). The post-Charter court ruled that every state has an obligation to not knowingly allow its territory to be used for acts contrary to the rights of other states.

82. Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, U.N. Doc. A/RES/56/83 (Jan. 28, 2002). See also U.N. Charter art. 2, para. 4. Any state acquiescing to terrorist activities will be held in violation of Article 2(4).

83. G.A. Res. 56/83, *supra* note 82, art. 31, para. 1.

84. David E. Graham, *Cyber Threats and the Law of War*, 4 J. NAT'L SEC. L & POL'Y 87, 94 (2010).

85. Vincent-Joël Proulx, *Babysitting Terrorists: Should States Be Strictly Liable for Failing to Prevent Transborder Attacks?*, 23 BERKELEY J. INT'L L. 615, 619-20 (2005). See also S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001). Security Council Resolution 1368 includes the harboring of those perpetrators, organizers, and sponsors of terrorist acts as imputing state responsibility. The term "those" is sufficiently broad to include non-state actors.

problems, particularly in determining whether the state initiated adequate control measures over the hackers. Regardless, the current status quo is unacceptable; in several recent cases of cyber attacks on states, countries from which the attacks originated refused to accept responsibility and even refused to cooperate with investigations.⁸⁶ Furthermore, many countries have yet to enact any sort of cyber crime laws or the existing laws are rendered ineffective through gaps in the statutory language.⁸⁷ In light of these considerations, the international community must continue to advocate for greater recognition of each state's positive duty under international law to actively prevent the use of its territory for acts harmful to another state and the international community.

III. THE FUTURE OF U.S. CYBER WAR STRATEGY: BILATERAL TREATIES

Expanding the doctrine of state imputability to attacks waged in cyberspace requires codification, similar to an arms control treaty,⁸⁸ recognizing the role of computer technology and the Internet to conduct attacks on other nations within the Geneva Convention and the Law of Armed Conflict. Much as arms control treaties are used to limit the damage done in warfare by restricting the usage of new innovative

86. Matthew J. Sklerov, *Solving the Dilemma of State Responses to Cyberattacks: A Justification for the Use of Active Defenses Against States Who Neglect Their Duty to Prevent*, 201 MIL. L. REV. 1, 46 (2009).

87. Jonah Fisher, *Efforts to steer young Nigerians away from cybercrime*, BBC (Dec. 15, 2011), <http://www.bbc.co.uk/news/world-africa-16192839>; John Leyden, *Nigeria Fails to Enact Cyber Crime Laws*, REGISTER (Apr. 1, 2011), http://www.theregister.co.uk/2011/04/01/nigeria_cybercrime_law_fail; *Brazilian justice minister urges inclusion of cyber crime into criminal code*, XINHUA NEWS (June 30, 2011), http://news.xinhuanet.com/english2010/world/2011-06/30/c_13957924.htm. Both Brazil and Nigeria continually rank high for cyber crime, but neither country has a set of cyber crime laws.

88. Paul Wagenseil, *Cyberweapons Treaties Might Help Prevent Cyberwar*, SECURITY NEWS DAILY (Oct. 26, 2011), <http://www.securitynewsdaily.com/cyberweapons-treaties-cyberwar-1276/>. At the 2011 Hacker Halter cyber security conference, BT chief cyber security officer, Bruce Schneier, proposed establishing a cyber weapons treaty, crediting former presidential adviser Richard Clarke for the idea from his 2010 book "Cyber War: The Next Threat to National Security and What to Do About It." Schneier claims that just as there are mechanisms for enforcing nuclear arms and chemical weapons treaties, the same could be developed for cyber weapons. He recommends a no first use policy, outlawing unaimed weapons, and mandating weapons that self-destruct at the end of hostilities. See also Hamish Barwick, *Global cyber war treaties urgently needed: Bruce Schneier*, COMPUTERWORLD (Nov. 8, 2011), http://www.computerworld.com.au/article/406751/global_cyber_war_treaties_urgently_needed_bruce_schneier; Barbara Honegger, *Former Counterterrorism Czar Richard Clarke Calls for New National Cyber Defense Policy to Prevent a Cyber 9/11*, NAVAL POSTGRADUATE SCH. NEWS (Dec. 9, 2011), <http://www.nps.edu/About/News/Former-Counterterrorism-Czar-Richard-Clarke-Calls-for-New-National-Cyber-Defense-Policy-to-Prevent-a-Cyber-9/11-.html>; Bruce Schneier, *It Will Soon be Too Late to Stop the Cyberwars*, LONDON FIN. TIMES (Dec. 2, 2010), <http://www.ft.com/cms/s/f863fb4c-fe53-11df-abac>.

weaponry,⁸⁹ states have a similar interest in limiting the use of cyber tools in armed conflicts to minimize, or altogether prevent, collateral damage to civilian populations and damage of both critical governmental and civil infrastructure.⁹⁰ Unfortunately, the United States and several Security Council members vary widely as to what activity by a state on the Internet arises to the level of an act of aggression or armed attack in the digital world. For example, the Shanghai Cooperation Organization, of which members include China and Russia, asserts cyber war includes the dissemination of information "harmful to the spiritual, moral and cultural spheres of other states."⁹¹ Russia maintains that anytime a government promotes ideas on the Internet with the goal of subverting another country's government that it has committed an illegal act of aggression under the U.N. Charter.⁹² In contrast, the United States would rather not include political acts that may result in censorship and freedom of speech issues, and instead focuses on the physical and economic damage and injury caused by cyber attacks.⁹³ The United States also remains skeptical of Russian ideas of an international agreement, since a multilateral treaty could provide cover for totalitarian regimes to censor the Internet in the fashion of Egypt and Libya prior to the Arab Spring.⁹⁴ This difference in opinion has led to reluctance by the United States to pursue multilateral international cyber arms control agreements with both Russia and China.

Following recent international treaty trends, the United States is pursuing bilateral treaty agreements to fit the DoD effects-based

89. GUIDO DEN DEKKER, *THE LAW OF ARMS CONTROL: INTERNATIONAL SUPERVISION* 22 (2001). Arms control agreements refer to all agreements between two or more states to limit or reduce certain categories of weapons or military operations to diminish tensions and the possibility of conflict.

90. *Id.* at 1. The international community benefits more from limited warfare than a peaceful situation in which a state is allowed to pose a serious threat to international peace. See also Siobhan Gorman, *U.S. Backs Talks on Cyber Warfare*, WALL ST. J. (June 4, 2010), available at <http://online.wsj.com/article/SB10001424052748703340904575284964215965730.html> Markoff, *supra* note 19, at A1; Andrew Nagorski, *Cyberwar Is Hell*, NEWSWEEK, July 28, 2011, available at <http://www.thedailybeast.com/newsweek/2010/07/28/cyberwar-is-hell.html>. After years of talks that went nowhere, the United States, Russia, China, India, and several others have agreed to begin cyber war limitation talks at the United Nations due to the increase in cyber attacks and their transnational nature.

91. Tom Gjelten, *Seeing the Internet as an "Information Weapon,"* NAT'L PUB. RADIO (Sept. 23, 2010), <http://www.npr.org/templates/story/story.php?storyId=130052701>.

92. Sergei Korotkov, *Legal Aspects of Informational Operations*, U.N. INSTITUTE FOR DISARMAMENT RESEARCH (Apr. 24, 2008), http://www.unidir.org/audio/2008/Information_Security/08-Korotkov.m3u (last visited Oct. 3, 2011).

93. See Grosswald, *supra* note 67, at 1158 n. 39.

94. John Markoff & Andrew E. Kramer, *U.S. and Russia Differ on a Treaty for Cyberspace*, N.Y. TIMES, June 28, 2009, at A1, available at <http://www.nytimes.com/2009/06/28/world/28cyber.html?pagewanted=all>.

approach to cyber warfare.⁹⁵ Through the course of the last five decades, the international economic legal regime transformed from one of multilateralism to that of a bilateral regime, in large part, due to conflicting national interests, global imbalances and lack of effective global governance. Presumably, nation-states are rational actors, acting out of a cost-benefit mindset of absolute and relative gains.⁹⁶ As rational actors, nation-states ratify treaties when the anticipated net-transaction benefits are positive for all ratifying parties at the time of signing.⁹⁷ However, treaties generally involve transaction costs for administration, communications, enforcement, and monitoring; all of which can hamper treaty formation and adherence. Monitoring can be extremely difficult and costly in larger treaties as each party must monitor the other in order to guard against treaty violations.⁹⁸ Even after detecting a violation, the cost of enforcement is generally high and often uncertain.⁹⁹ If countries anticipate a net gain from adhering to treaty stipulations, despite changing circumstances, the treaty becomes self-enforcing.¹⁰⁰ While the treaty must be incentive compatible, signing parties must also perceive a net gain over the threshold transaction

95. White House, *INTERNATIONAL STRATEGY FOR CYBERSPACE: PROSPERITY, SECURITY, AND OPENNESS IN A NETWORKED WORLD* (2011), available at http://www.whitehouse.gov/sites/default/files/rss_viewer/international_strategy_for_cyberspace.pdf.

96. Robert Powell, *Absolute and Relative Gains in International Relations Theory*, 85 AM. POL. SCI. REV. 1303, 1316 (1991). Both contemporary competing theories of Structural Realism and Neoliberal Institutionalism focus on the states balancing gains and losses, however they differ on whether the focus is primarily on absolute or relative gains. Powell resolves the two systems by arguing that states initially look at absolute gains, but then consider the future relative losses that affect the gains.

97. Robert E. Scott & Paul B. Stephan, *Self-Enforcing International Agreements and the Limits of Coercion*, 2004 WIS. L. REV. 551, 583 (2004).

98. U.S. Costs of Verification and Compliance Under Pending Arms Treaties, Congressional Budget Office, xi-xii (1990), available at <http://www.cbo.gov/ftpdocs/77xx/doc7775/90-CBO-043.pdf>. Costs of treaties can be illustrated by the 1990 CBO report on the cost of pending arms treaties. For the five accords together, the total one-time costs of compliance and on-site inspection would range from \$0.6 billion to \$3.0 billion in 1990 dollars. Recurring costs, beginning with the first year of implementation and continuing indefinitely, are estimated to range from \$0.2 billion to \$0.7 billion per year for the five accords. More recently, the estimated cost of ratifying the Additional Protocol to the Nuclear Non-Proliferation Treaty was estimated at \$20-\$30 million in one time fees, and then a recurring \$10-\$15 million per year. An estimated \$160 million would go to the salaries of 230 inspectors and 200 administrative personnel. See also *The Cost of Implementing the Additional Protocol to the Treaty on the Non-Proliferation of Nuclear Weapons*, Congressional Budget Office (2004), <http://www.cbo.gov/doc.cfm?index=5160&type=0>.

99. George Downs & Michael Jones, *Reputation, Compliance, and International Law*, 31 J. LEGAL STUD. 95, 104 (2002); Andrew Guzman, *The Design of International Agreements*, 16 EUR. J. INT'L. L. 579, 590 (2005).

100. Todd Sandler, *Treaties: Strategic Considerations*, 2008 U. ILL. L. REV. 155, 157 (2008); Scott Barrett, *Self-Enforcing International Environmental Agreements*, 46 OXFORD ECON. PAPERS 878 (1994).

costs. Consequently, nonparticipating nations to a multilateral treaty risk altogether negating the net gains of the treaty.

Nonparticipating states are considered *sine qua non*¹⁰¹ states by some academics as the absence of their participation gives the law no realistic meaning.¹⁰² These states are pertinent to achieving the objectives of the treaty for without them, there is no restriction or change regarding the cause of the problem.¹⁰³ Support for the necessity of *sine qua non* states can be found in recent political and legal reality. For example, in recent years, nations have attempted to create regional agreements to fight terrorism by agreeing not to provide their territories as safe havens for such activities.¹⁰⁴ A single nation, however, offering sanctuary to terrorists can undermine much of the gains for states who deny safe havens by allowing such activities to persist unchecked.¹⁰⁵ Other examples of this are found in the area of environmental law, such as the International Convention for the Prevention of Pollution from Ships (MARPOL) requires the treaty only enters into force after participation by states that represent over 85 percent of the world's gross merchant tonnage.¹⁰⁶ While signatories to the treaty totaled less than half of the globe, the signatories represented over 85 percent of the world's major shipping states and in turn ensured gains by limiting the activities of the biggest polluters.¹⁰⁷

101. Latin for "without which not." An indispensable condition or thing; something on which something else necessarily depends. BLACK'S LAW DICTIONARY (9th ed. 2009)

102. Gary L. Scott & Craig L. Carr, *Multilateral Treaties and the Formation of Customary International Law*, 25 DENV. J. INT'L L. & POL'Y 71, 87 (1997). See also Review of the Multilateral Treaty-making Process, U.N. Doc. ST LEG SER.B 21, U.N. Sales No. E F.83.V.8 (1985) (stating that a treaty cannot be effective if not ratified by states whose participation is crucial for implementation of the provision); Andrew Michie, *Provisional Application of Arms Control Treaties*, 10 J. CONFLICT & SEC. L. 349 (2005). Several major arms treaties, including the 1972 Biological Weapons Convention and the 1963 Partial Test Ban Treaty, require that their entry into force is conditional upon the adherence of those states that are militarily or technologically the most significant as the subject matter of the treaty. Arms control treaties that fail to attract adherence of states actually possessing weapons have little practical value.

103. Scott & Carr, *supra* note 102, at 87.

104. See Eric Rosand et al., *The UN Global Counter-Terrorism Strategy and Regional and Subregional Bodies: Strengthening a Critical Partnership*, CENTER ON GLOBAL COUNTERTERRORISM COOPERATION (2008), available at http://www.globalct.org/images/content/pdf/reports/strengthening_a_critical_partnership.pdf.

105. Todd Sandler, *Collective Versus Unilateral Responses to Terrorism*, 124 PUB. CHOICE 75, 85-87 (2005). See also Michie, *supra* note 102 (explaining that the failure of pertinent states to ratify can compromise the security of those states that become party to the agreement because it allows the non-signatory parties to pursue a strategic advantage).

106. Marine Pollution: International Convention for the Prevention of Pollution from Ships (MARPOL), Nov. 2, 1973, 34 U.S.T. 3407, 1340 U.N.T.S. 184.

107. List of Contracting Parties to MARPOL Convention, available at <https://imo.amsa.gov.au/public/parties/marpol78.html>.

The area of cyber crime further reflects this reality as many countries have been hesitant to sign the Convention on Cyber Crime following Russia and China's refusals to sign.¹⁰⁸ As China and Russia serve as the two main hubs for international cyber crime and activity, their absence from the treaty arguably negates the gains in failing to manage the source of the problem.¹⁰⁹ NATO has recommended pushing "notable" non-participants Russia and China to sign onto the Convention on Cyber Crime as a recommended cyber defense initiative.¹¹⁰ In sum, no net gains exist if the cause of the problem is not part of the agreement and bound by restrictions.

With China, Russia, and the United States unable to reach a consensus, a multilateral international treaty on cyber war currently seems implausible. However, their absence does not mean that states have no options to build a regulatory regime for cyber warfare. While establishing accepted international norms for behavior on the Internet requires time, bilateral treaties provide an alternative to allowing the global community to act arbitrarily as to their own views of cyber warfare. Bilateral treaties not only codify existing customary international law, but also "begin an evolution that creates it."¹¹¹ As it currently stands, the United States has committed itself to working "with like-minded states to establish an environment of expectations or norms of behavior, that ground foreign and defense policies and guide international partnerships."¹¹² The United States viewpoint is that only after governments widely come to a general consensus will analysts be able to develop coordinated policy recommendations and will countries be able to act multilaterally to create a sufficient treaty. In turn, the United States has signed a Memorandum of Understanding with India on Cyber Attacks and added an extension to the Australia, New Zealand, United States Security Treaty (ANZUS or ANZUS Treaty) that extension allows the United States and Australia to use technology

108. Markoff & Kramer, *supra* note 94.

109. Lolita C. Baldor, *U.S. Report Blasts China, Russia For Cyber Crime*, USA TODAY (Nov. 3, 2011), <http://www.usatoday.com/money/industries/technology/story/2011-11-03/Cyber-attacks/51058852/1>. The United States has known for years, but finally publicly announced that China and Russia are responsible for harboring cyber crimes and stealing sensitive United States technology data in an attempt to highlight the risks of cyber attacks in a growing high-tech society.

110. Sverre Myrli, *173 DSCFC 09 E bis - NATO and Cyber Defense - 2009 Annual Session*, ¶ 64, available at <http://www.nato-pa.int/default.Asp?SHORTCUT=1782>.

111. M. Cherif Bassiouni, *INTERNATIONAL CRIMINAL LAW: MULTILATERAL AND BILATERAL ENFORCEMENT MECHANISMS* 127 (2008).

112. White House, *supra* note 95, at 9. The United States is currently prepared to build bilateral and multilateral partnerships, to work with regional organizations, and to collaborate with the private sector.

to cooperate in the event of a large-scale cyber attack.¹¹³ The United States has chosen to first pursue bilateral arms-control and defense treaties since multilateral treaties are inherently harder to monitor and figure out which states follow their obligations, rather than hiding behind the guise of proxies.¹¹⁴ In turn, the United States posits itself to quickly determine which countries will be not only accept their definition of cyber warfare, but also adhere to the guidelines being established.

While the turning point for Russia and China is the dissemination of information harmful to "political, economic, and social systems" as well as "spiritual, moral and cultural,"¹¹⁵ parties to a multilateral treaty could feasibly tackle these discrepancies in the future by treaty reservations or reaching a compromise. However, such resolutions of divergent views on cyber attacks cannot be resolved for a country housing one of the largest cyber commands: Iran. The Iranian government blames the United States and Israel for the release of the debilitating Stuxnet work into its nuclear reactor computer networks.¹¹⁶ Exactly who created Stuxnet remains unproven, but many experts now acknowledge the high likelihood that Israel was behind the attack, possibly aided by the United States.¹¹⁷ As a result, Iran believes that the United States and Israel initiated the first stages of cyber war, setting the stage for Iran to create their own cyber command to respond to a future Stuxnet.¹¹⁸ Part of the mission of Iran's new cyber command is the implementation of "retaliatory measures" against a host of nations the Iranian government deems hostile, including the United States and Israel.¹¹⁹ In fact, Iranian engineers claim the recent drone "crash" in Iran is the beginning of cyber attacks by the Iranian cyber

113. See Press Release, *United States and India Sign Cybersecurity Agreement*, DEP'T OF HOMELAND SEC. (July 19, 2011), <http://www.dhs.gov/ynews/releases/20110719-us-india-cybersecurity-agreement.shtm>.

114. Clarke, *supra* note 10, at 235, 237. See also Gabriella Blum, *Bilateralism, Multilateralism, and the Architecture of International Law*, 49 HARV. INT'L L.J. 323, 351-57 (2008).

115. Tom Gjelten, *Seeing the Internet as an "Information Weapon"*, NAT'L PUB. RADIO (Sept. 23, 2010), <http://www.npr.org/templates/story/story.php?storyId=130052701>.

116. Broad, *supra* note 37; *Stuxnet Worm Hits Iran Nuclear Plant Staff Computers*, BBC (Sept. 26, 2010), <http://www.bbc.co.uk/news/world-middle-east-11414483>. Following Stuxnet, Mahmoud Liayi, head of the information technology council at the ministry of industries announced to the press that "an electronic war has been launched against Iran." See also Gross, *supra* note 64.

117. Broad, *supra* note 37.

118. Atul Aneja, *Under Cyber-attack, Says Iran*, HINDU (Sept. 26, 2010), <http://www.thehindu.com/news/international/article797363.ece>.

119. Ilan Berman, *Iranian Cyberwar: U.S. Must Prepare for Possible Confrontation*, DEFENSENEWS (Sept. 11, 2011), <http://mobile.defensenews.com/story.php?i=7650158>.

command to hijack and redirect the drones.¹²⁰ Following the drone crash, Iran removed 90 percent of all websites to a local server to protect against anticipated cyber attacks.¹²¹ These factors combined with the fact that the United States has not had formal diplomatic relations with Iran in over three decades,¹²² contribute to the unlikelihood that Iran will participate in any multilateral treaty or bilateral treaty involving the United States.

Due to their contribution and potential to wage cyber attacks, Iran is a net loss for any international multilateral cyber warfare treaty. Rather than view Iran's absence from the treaty as destroying its effectiveness, the United States can mitigate the loss with net gains through collective defense and creating international intolerance for certain conduct when engaging in cyber warfare. As Iran now houses one of the largest cyber commands in the world and have stated their intent to implement "retaliatory measures" against hostile nations, it is even more imperative that widespread international norms and guidelines are established before the United States or any other nation is put in the position of another Estonia.

120. Rick Gladstone, *Iran Complains to Security Council About Spy Drone*, N.Y. TIMES, Dec. 10, 2011, at A12, available at <http://www.nytimes.com/2011/12/10/world/middleeast/iran-complains-to-security-council-about-spy-drone.html?ref=iran>; Adam Rawnsley, *Iran's Alleged Drone Hack: Tough, but Possible*, WIRED (Dec. 14, 2011), www.wired.com/dangerroom/2011/12/iran-drone-hack-gps. Iran claims to have managed to jam the drone's communication links to American operators by forcing it to shift into autopilot mode. With its communications down, the drone allegedly kicked into autopilot mode, relying on GPS to fly back to base in Afghanistan. With the GPS autopilot on, the engineer claims Iran spoofed the drone's GPS system with false coordinates, fooling it into thinking it was close to home and landing into Iran's clutches.

121. Ramin Mostafavi, *Iran Moves Websites to Guard Against Cyber Attacks*, REUTERS (Dec. 20, 2011), <http://www.reuters.com/article/2011/12/20/us-iran-internet-idUSTRE7BJ1VB20111220>; *Iran Hosts Local Websites to Avoid Cyber Attacks*, XINHUA NEWS (Dec. 21, 2011), http://news.xinhuanet.com/english/sci/2011-12/21/c_131319917.htm. Iran's deputy minister for communications and information technology said that the Islamic republic transferred the locations more than 30,000 Iranian websites from foreign-based hosting agencies to new computer facilities inside the country to avert potential cyber attacks.

122. Bureau of Near Eastern Affairs, *Background Note: Iran*, U.S. DEP'T OF STATE (Feb. 1, 2012), <http://www.state.gov/r/pa/ei/bgn/5314.htm>; Lionel Beehner, *Timeline: U.S.-Iran Contacts*, COUNCIL ON FOREIGN RELATIONS (Mar. 9, 2007), <http://www.cfr.org/iran/timeline-us-iran-contacts/p12806>. Following the Iranian Hostage Crisis in 1979, on April 7, 1980, the United States broke diplomatic relations with Iran, and on April 24, 1981, the Swiss Government assumed representation of United States interests in Tehran. Due to poor relations between the two countries, instead of exchanging ambassadors Iran maintains an interests section at the Pakistani embassy in Washington, D.C., while the United States, since 1980, has maintained an interests section at the Swiss embassy in Tehran.

IV. POST NORMALIZATION OF CYBER WARFARE: U.S. CONSTITUTIONAL IMPACTS

While the creation of norms for the realm of cyber warfare is imperative, conflating cyber conflicts with the language of war poses dangers for the future of the Internet and how Americans everywhere use it. Following the passing of the Patriot Act, government agencies have expanded their ability to control the Internet and monitor computer use under the guise of the War on Terror.¹²³ Should the United States government officially announce the onset of a "Cyber War," the American public could quickly witness the militarization of the Internet, where traditional notions of freedom of information are displaced by national security concerns.¹²⁴

Although there is no direct reference or declaration on rights to privacy in the United States Constitution, the American people have come to expect at the very least the right "to be secure in their persons, houses, papers, and effects against unreasonable search and seizure."¹²⁵ The framers of the Constitution intended the Fourth Amendment as a prohibition on law enforcement from gathering more information than is required, but unfortunately, the phrase "unreasonable" was never well defined, and its definition has become increasingly blurred by the technological advances of the last century.¹²⁶ For example, the Supreme Court ruled in *United States Telecommunications Association v. FCC* that the Fourth Amendment protects digits that convey context,¹²⁷ however Title II of the Patriot Act (Enhanced Surveillance Procedures) was passed in part to allow for the FBI to run packet-sniffing software to intercept email sent by a suspect.¹²⁸ The software can be configured

123. See Laurie Thomas Lee, *The USA Patriot Act and Telecommunications: Privacy Under Attack*, 29 RUTGERS COMPUTER & TECH. L.J. 371, 373-78 (2003); Sunya Kashan, *The USA Patriot Act: Impact on Freedoms and Civil Liberties*, 7 ESSAI 87, 88 (2010).

124. See William J. Lynn III, *The Pentagon's Cyberstrategy, One Year Later*, FOREIGN AFFAIRS (Sept. 28, 2011), <http://www.foreignaffairs.com/articles/68305/william-j-lynn-iii/the-pentagons-cyberstrategy-one-year-later?page=show> (referencing William J. Lynn III, Deputy Secretary of Defense, Remarks on the Department of Defense Cyber Strategy (July 14, 2011), available at www.defense.gov/speeches/speech.aspx?speechid=1593). Ninety percent of United States military voice and Internet communications travel over the same private networks that service private homes and businesses.

125. U.S. CONST. amend. IV.

126. Thomas Y. Davies, *The Supreme Court Giveth and the Supreme Court Taketh Away: The Century of Fourth Amendment "Search and Seizure" Doctrine*, 100 J. CRIM. L. & CRIMINOLOGY 933, 1020 (2010); Orin S. Kerr, *Applying the Fourth Amendment to the Internet: A General Approach*, 62 STAN. L. REV. 1005, 1006-07 (2010).

127. *United States Telecom Ass'n v. Fed. Comm'n Comm'n*, 227 F.3d 450 (D.C. Cir. 2010).

128. Stefanie Olsen, *Patriot Act Draws Privacy Concerns*, CNET (Oct. 26, 2001), <http://news.cnet.com/2100-1023-275026.html>. See also Tom Cohen, *Obama Approves Extension of Expiring Patriot Act Provisions*, CNN (May 27, 2011), <http://articles>

either to record the email content, which are arguable digits that convey a plethora of personal context.¹²⁹ Beyond allowing the FBI to intercept emails, Title II of the Patriot Act covers all aspects of the surveillance of suspected terrorists, those suspected of engaging in computer fraud or abuse, and agents of a foreign power who are engaged in clandestine activities.¹³⁰ Specifically, Title II authorizes government agencies to gather “foreign intelligence information” from both U.S. and non-U.S. citizens.¹³¹ As Title II of the Patriot Act is still in effect and allows for a government agency to at-will monitor a person’s e-mails, Congress could very well create another extension or strengthen the U.S Patriot Act that provide for heightened surveillance of electronic transmissions from personal computers.

Considering that hundreds of American computers were used unsuspectingly to wage the DDoS attacks that shut Estonia’s government down for weeks,¹³² the FBI and other agencies could feasibly argue that the risk of infected zombie computers within our nation’s borders should grant the federal government access to monitor electronic transmissions in order to protect national security interests.¹³³ The domino effect this sort of precedent could cause is

.cnn.com/2011-05-27/politics/congress.patriot.act_1_lone-wolf-provision-patriot-act-provisions-fisa-court?_s=PM:POLITICS; David Kravets, *Patriot Act Turns 10, With No Signs of Retirement*, WIRED (Oct. 26, 2011), <http://www.wired.com/threatlevel/2011/10/patriot-act-turns-ten/>. Section 505 of the Patriot Act gives the government powers to acquire phone, banking, and other records via the power of a so-called “national security letter,” which does not require a court warrant. National security letters, perhaps the most invasive facet of the law, are written demands from the FBI that compel Internet service providers, financial institutions, and others to hand over confidential records about their customers, such as subscriber information, phone numbers, and e-mail addresses, and arguably websites you have visited. They require no probable cause or judicial oversight and also contain a gag order, preventing the recipient of the letter from disclosing that the letter was ever issued. In addition, the “lone wolf” measure under Section 207 of the Patriot Act allows FISA court warrants for e-monitoring of non-U.S. citizens, even without showing that the suspect is an agent of a foreign power or a terrorist. It has never been invoked, but the authority is retained. The provision has been extended through June 1, 2015.

129. Olsen, *supra* note 128.

130. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

131. *Id.*

132. Mark Landler & John Markoff, *Digital Fears Emerge After Data Siege in Estonia*, N.Y. TIMES (May 29, 2007), <http://www.nytimes.com/2007/05/29/technology/29/estonia.html?pagewanted=all>. Estonian officials reported that over a million computers were used during the 2007 DDoS attacks, including American computers. See also James Sterngold, *U.S. on Guard Against Computer Attacks*, SAN FRANCISCO CHRONICLE, June 24, 2007, at A4, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2007/06/24/MNGCDQKS241.DTL&ao=all>.

133. Singel, *supra* note 69. Department of Homeland Security representative Jordana Siegel said botnets were imminent threats to national security. See also Ryan Singel, *NSA*

frightening: any American computer could be logged into and monitored for suspicion of being a zombie computer for a future DDoS attack. With that in mind, cyber warfare tactics and policy need to recognize that much of the American public, despite the ease millions place private information onto Facebook, still expect a level of privacy in the home and at work in this post-September 11 society. In respecting and honoring the rights of the American people, any resulting domestic cyber warfare policy needs to take privacy concerns into consideration.¹³⁴

CONCLUSION

When the Law of Armed Conflict was first codified into the Geneva Convention, the Internet may as well have been the subject of a science fiction novel. Now the United States and the international community are faced with questions of how to apply nearly a century-old charter to a technology that allows the aggressor to hide behind a veil of anonymity. Despite this obstacle to enforcing the current Law of Armed Conflict, cyber warfare remains a serious threat that can no longer be swept under the proverbial rug. At the onset of the decade, cyber attacks, with their inherent anonymity and propensity to cause real transnational harms, pose one of the most serious and evasive asymmetric threats to the United States and all other members of the international community, along with terrorism and nuclear proliferation.¹³⁵ Under the current environment, international peace is threatened, unless the United States and other nations have the ability to respond in self-defense to cyber attacks without being restrained by outdated interpretations of international law governing the right to

Must Examine All Internet Traffic to Prevent Cyber Nine-Eleven, Top Spy Says, WIRED (Jan. 15, 2008), www.wired.com/threatlevel/2008/01/feds-must-exami; Lawrence Wright, *The Spymaster: Can Mike McConnell Fix America's Intelligence Community?*, NEW YORKER (Jan. 21, 2008), http://www.newyorker.com/reporting/2008/01/21/080121fa_fact_wright. Though he later retracted his statement, one of the lead United States spies initially argued for monitoring all Internet traffic after the attacks on Estonia.

134. Compare IBOPE Zogby International, *What is Privacy? Poll Exposes Generational Divide on Expectations of Privacy, According to Zogby/Congressional Internet Caucus Advisory Committee Survey*, Jan. 31, 2007, <http://www.zogby.com/news/2007/01/31/what-is-privacy-poll-exposes-generational-divide-on-expectations-of-privacy-according-to-zogbycongre/> (explaining in 2007, IBOPE Zogby found that over 80 percent of Americans polled were concerned about the security and privacy of their personal information on the Internet.) with Mary Madden & Aaron Smith, *Reputation Management and Social Media*, PEW RESEARCH CENTER (May 2010), <http://www.pewInternet.org/Reports/2010/Reputation-Management/Summary-of-Findings.aspx>. IBOPE Zogby's number is comparable with the 2010 Pew Research Center poll that found nearly 44 percent of adults 18-29 actively take steps to limit the amount of their personal information that is available online, while 71 percent of social network users actively changed their privacy settings to limit what is shared.

135. Symposium, *Cyber Threats to National Security*, CACI INTERNATIONAL (2010).

respond in self-defense with force. The global and open architecture of the Internet, while an environment necessary to encourage innovation, makes defending against cyber attacks an exceedingly onerous task for state actors; effective international cooperation and trust building are critical to successfully protecting both state and non-state actors on the Internet in the years to come.

Although state practice in the aftermath of cyber attacks suggests widespread condemnation, cyber warfare remains a legal gray zone. Recently, policy debates on the subject have yielded little consensus in the way of an agreement on how to address a cyber attack, or even at what level a cyber attack becomes an armed attack. In the absence of custom, bilateral treaty regimes may provide a basis for the regulation of cyber attacks in international law. The regional and bilateral treaty regimes pursued by the United States not only offer some form of recourse in the absence of a comprehensive multilateral treaty, but also begin setting the early stages of precedent, based on their effectiveness, for a future treaty regime. However, while establishing accepted international norms through bilateral treaties is useful, doing so does not provide governments a codified definition of cyber attack or written guidelines on how states should respond in the event of a foreign-state taking aggression against them over the Internet. Cyber attacks are by their very nature transnational; cyber weapons are often designed by authors in multiple countries to run through computer networks without respect of state borders in hopes of undermining a computer system on the other side of the globe. In turn, this global threat can only be effectively met by increased diplomatic relations between the United States and the international legal community working together to solidarize a new treaty regime for cyber attacks.

A CONFLICT OF DIAMONDS:
THE KIMBERLEY PROCESS AND ZIMBABWE'S MARANGE DIAMOND FIELDS

*Julie Elizabeth Nichols**

ABSTRACT

In 2003, the Kimberley Process Certification Scheme ("KPCS") entered into force as a novel approach to regulate the diamond industry and combat associated atrocities regarding "conflict diamonds." Fueled by the recent history of bloody civil wars, and graphically publicized slaughters and amputations by rebel groups funded by African diamonds, diamond-producing nations, the diamond industry's leaders and human rights groups created a process whereby "conflict diamonds" are identified and systematically excluded from the legitimate trade. However, the KPCS definition of "conflict diamond" has proved unacceptably restrictive. Diamonds from Zimbabwe's Marange fields are mined using systematic relocation, mass murdering campaigns and, recently discovered, torture camps. Yet, because Zimbabwe's "legitimate" government, not a rebel group, controls the Marange mines, the KPCS has certified these diamonds as conflict-free, fit for international trade. To stop this unacceptable situation, in which perpetrators of systematic and violent human rights abuses benefit from their crimes, the KPCS's definition of "conflict diamonds" must change. The diamond industry must support such a change by refusing to allow trade of any diamond mined through such systematic abuse. If these changes are not adopted, the United States must use all additional means, including legislative boycotts and civil suits, to stop the atrocities occurring today in Zimbabwe's Marange diamond fields.

Over the past few years, the world became quite familiar with the term "blood diamonds." Recent commercials proclaim diamond retailers who exclude the middleman offer better quality, less expensive stones that come with guarantees about their safe, blood-free origin.¹ When

* J.D. graduate 2012, University of Denver Sturm College of Law; M.S.W., Columbia University. I would like to thank my parents, Jill and Robert Nichols, for their never-ending support. Additional thanks to Professors Ved Nanda, Eli Wald, Rebecca Aviel, Rashmi Goel, David Akerson, Beto Juárez and Ann Scales for their time and invaluable advice. Finally, I would like to thank the entire board and staff of the Denver Journal of

Valentine's Day comes around, sparkling stones with "Conflict-Free" certificates receive attention from the more conscientious consumers. Hollywood informed audiences about the atrocities of Sierra Leone's diamond-fueled civil war through Leonardo DiCaprio's 2006 movie *Blood Diamond*.² The movie ends with a conference of concerned parties seeking an end to the problem of blood diamonds. The film's conference is a reference to an actual meeting, which eventually led to the creation of the Kimberley Process Certification Scheme – and the "Conflict-Free" certificates that received so much positive attention.³ The world knows now about blood diamonds and how countries have eliminated them from their stores – or so it appears on the surface.

Blood Diamond's final scenes depict the first meeting of what became the Kimberley Process ("KP"), the watchdog organization designed to prevent the sale of "conflict diamonds." The KP is a tri-branch organization, consisting of participating states ("Participants"), which make all official decisions, and representatives of both the diamond industry and of civil society – NGOs and activist groups – who serve as official observers.⁴ The KP regulates aspects of the diamond industry through the Kimberley Process Certification Scheme ("KPCS"),⁵ which is intended to eliminate conflict diamonds from the market while preserving the legitimate diamond trade.⁶ The KPCS identifies and certifies rough diamonds that can legitimately enter the market.⁷ It prohibits Participants from importing or exporting "conflict diamonds," which it very specifically defines,⁸ and from trading any rough diamonds with non-participating states.⁹ As more states join, fewer markets exist for conflict diamonds and, in theory, such stones

International Law and Policy for their encouragement and assistance throughout the process of preparing this paper.

1. See, e.g., Diamond FAQs, THE SHANE COMPANY, <http://www.shaneco.com/Jewelry/DiamondFAQ.htm>.

2. BLOOD DIAMOND (Warner Bros. 2006).

3. KIMBERLY PROCESS, <http://www.kimberleyprocess.com:8080/web/kimberley-process/kp-basics> [hereinafter KP website].

4. See *id.*; Liz Ford, *Global Witness Quits Kimberley Process in Protest at "Diamond Laundering,"* GUARDIAN (Dec. 5, 2011), <http://www.guardian.co.uk/globaldevelopment/2011/dec/05/kimberley-process-global-witness-withdraws> [hereinafter Ford].

5. See Kimberly Process Certification Scheme, Nov. 2002 [hereinafter KPCS], available at <http://www.kimberleyprocess.com/> (follow "Documents" hyperlink; then follow "Core Documents" hyperlink; then follow "KPCS Core Document" hyperlink).

6. Jolyon Ford, *The Kimberley Process and Diamond Demand*, AFRICAN ARGUMENTS (Dec. 5, 2011), <http://africanarguments.org/2011/12/05/the-kimberley-process-and-diamond-demand-%E2%80%93-by-jolyon-ford-at-oxford-analytica/>.

7. KP Website, *supra* note 3.

8. KPCS, *supra* note 5, § I.

9. *Id.* § III(c).

will eventually no longer be sold at all.¹⁰ In many ways, it has been very successful; conflict diamonds now make up less than one percent of all diamonds on the legitimate market.¹¹

Yet that very specific definition of conflict diamond has caused a serious dilemma. According to the KPCS, "conflict diamonds" are "rough diamonds used by *rebel* movements or their allies to finance conflict aimed at undermining legitimate governments."¹² In Zimbabwe, there are no rebel movements campaigning to overthrow the government, therefore there can be no conflict diamonds in that country. However, diamond miners suffer gross human rights violations on a daily basis.

On August 8, 2011, the BBC program "Panorama" aired a documentary disclosing torture camps run by Zimbabwean police and military.¹³ Witnesses described one camp, known as "Diamond Base," where police send miners who want a larger profit share or villagers caught mining for their families.¹⁴ Men receive severe beatings three times a day and women are raped repeatedly.¹⁵ Former paramilitary police officers describe handlers directing their dogs to maul prisoners and local doctors report frequently treating such wounds.¹⁶ Apparently, these camps have been operating at least since late 2008.¹⁷ Though this BBC documentary may have shocked the public, non-governmental organizations ("NGOs") that have been monitoring Zimbabwe's diamond mines for years were not even surprised.¹⁸ They have been reporting similar human rights abuses since 2006.¹⁹

10. Daniel Feldman, *Conflict Diamonds, International Trade Regulation, and the Nature of Law*, 24 U. PA. J. INT'L ECON. L. 835, 867 (2003).

11. See KP Website, *supra* note 3.

12. KPCS, *supra* note 5, § I (emphasis added).

13. See *Zimbabwe Torture Camp Discovered*, BBC NEWS (Aug. 8, 2011), <http://www.bbc.co.uk/news/world-africa-14445087>; *Victims Speaking of Massacre in Zimbabwe Diamond Fields*, BBC NEWS (Aug. 8 2011), http://news.bbc.co.uk/panorama/hi/front_page/newsid_9557000/9557246.stm.

14. Hilary Andersson, *Marange Diamond Field: Zimbabwe Torture Camp Discovered*, BBC NEWS (Aug. 8, 2011), <http://www.bbc.co.uk/news/world-africa-14377215> [hereinafter Andersson].

15. *Id.*

16. Alan Cowell, *Britain Urges Zimbabwe to Examine Diamond 'Torture Camp' Report*, N.Y. TIMES (Aug. 8, 2011), <http://www.nytimes.com/2011/08/09/world/africa/09zimbabwe.html>.

17. Andersson, *supra* note 14.

18. *Chiadzwa Torture Camps Exposed*, ZIMBABWEAN (Aug. 8, 2011) [hereinafter *Chiadzwa Torture Camp Exposed*], <http://www.thezimbabwean.co.uk/news/zimbabwe/51591/chiadzwa-torture-camps-exposed.html>.

19. *Id.*; Ford, *supra* note 4.

Thus, the situation in Zimbabwe brought the conflict diamond dilemma to a head: Zimbabwe is in compliance with the KPCS²⁰ and is yet responsible for gross human rights violations perpetrated for the sake of diamonds.

In response to Zimbabwe receiving official certification under the KPCS, the KP lost one of its most valued supporters.²¹ In December 2011, Global Witness, an advocacy organization that helped establish the KPCS, left the coalition.²² According to Annie Dunnebacke, senior campaigner for Global Witness, Zimbabwe is “the most egregious situation that we’ve seen since the Kimberley Process was launched, where diamonds have been fueling violence and human rights violations . . . and the Kimberley Process has really failed to deal with that effectively.”²³ A year earlier, Martin Rapaport, Chairman of the Rapaport Group and the associated Rapaport Diamond Trading Network (“RapNet”), which is the world’s largest diamond trading network, made similar statements.²⁴ He called the KP a scam and told the public that relying on KP Certificates alone does not guarantee that such diamonds have not been associated with human rights abuses.²⁵ Between them, these groups assert powerful arguments that the KP cannot, or will not, appropriately face the new realities of conflict diamonds.

Is it time to give up on the KPCS? Does Global Witness’s exit mark the end of a failed project? Or is abandoning the scheme altogether appropriate in light of its other successes? Regardless of how we answer those questions, the situation in Zimbabwe remains deeply troubling. Are these diamonds “conflict diamonds”? If not, are they not yet still covered in blood? Perhaps most importantly, notwithstanding the efficacy of the KPCS, what should the international community do with regard to these issues?

This article seeks to address these questions. The situation is extremely complex. Part I examines the KPCS in detail. It first looks at the historical context that led to the KPCS. Each branch of the KP –

20. *Zimbabwe: Official Lauds Diamond Trade*, N.Y. TIMES (Nov. 3, 2011), <http://www.nytimes.com/2011/11/03/world/africa/zimbabwe-official-lauds-diamond-trade-ruling.html?ref=diamonds>.

21. Andersson, *supra* note 14.

22. John Eligon, *Global Witness Quits Group on ‘Blood Diamonds’*, N.Y. TIMES, Dec. 6, 2011, at A5, available at <http://www.nytimes.com/2011/12/06/world/africa/global-witness-quits-group-on-blood-diamonds.html?ref=diamonds>.

23. *Id.*

24. Martin Rapaport, *Stop Buying and Selling Blood Diamonds: The Kimberley Process and World Diamond Council are a Sham*, DIAMONDS.NET (Jan. 29, 2010), <http://www.diamonds.net/News/NewsItem.aspx?ArticleID=29578>.

25. *Id.*

diamond-producing states, representatives of the diamond industry, and human rights activists – wanted this regulatory scheme for different, sometimes competing, reasons. These reasons provide insight into the KPCS's current situation. Part I continues by examining the original structure and requirements of the KPCS (subsection B) and the additions and developments it has achieved since (subsection C). Finally, subsection D illustrates some of the KP's current statistics.

Part II describes Zimbabwe and its Marange diamond fields. Initially, subsection A provides a brief description of Zimbabwe's complicated political history. This background is important to understand arguments regarding the KPCS's relation to the Marange diamonds. Part II then provides a chronology of events related to Marange – starting with the discovery in 2006 and continuing through the present.

Part III illustrates the interactions between Zimbabwe and the KP since 2006. It provides a timeline of the KP's actions and decisions through the November 3, 2011 decision to certify Marange diamonds. Additionally, Part III describes two arguments illustrating how Zimbabwe violated the KPCS.

Part IV presents two currently proposed “solutions”: to change elements of the KPCS so it can prohibit diamonds like those from Marange – diamonds that do not fit the definition of “conflict diamonds,” but cause the same harms – or to abandon the KPCS altogether and take another route to regulate the diamond industry and prevent financial gain from blood-covered diamonds.

Finally, Part V provides a brief analysis and recommendations, and Part VI presents a conclusion. There is no simple answer to this complicated problem. However, abandoning a regulatory scheme that, with all its shortcomings, has successfully prevented certain illicit diamonds from entering the market seems irresponsible. Further, as the 2012 Chair, the United States (“U.S.”) is now in a position to take a leading role and lead the KP in more constructive directions. The KPCS must learn from its own mistakes, observe other industries attempts to emulate it, and work with the diamond industry to establish additional workable compliance regulations. The KPCS failed to keep Marange diamonds off the market; yet that failure does not guarantee that it will inevitably fail forever.

PART I: THE KIMBERLEY PROCESS CERTIFICATION SCHEME

In 2003, the KPCS entered into force as a unique²⁶ approach to regulating the diamond industry and combating associated atrocities regarding “conflict diamonds.”²⁷ Regulation of international industries – particularly the diamond industry, which has been notoriously “opaque” – is difficult and frequently unsuccessful.²⁸ However, at that particular time, with those particular players, everyone agreed on a regulatory scheme. They made compromises and though details proved more complex than ideal, the KPCS became a functional mechanism to regulate diamonds.

A. *Historical Context*

An unusual combination of factors led to unlikely partners meeting in Kimberley, South Africa for a common purpose.²⁹ Diamond-producing states, mainly African, had witnessed the devastation caused by diamond-fueled wars and wanted to find a politically acceptable end – an end that did not name governments as guilty partners.³⁰ At the same time, the diamond industry, dominated by De Beers, recognized its vulnerability to bad press; if consumers associated their product with the African wars the industry was doomed.³¹ And human rights activists and related NGOs recognized this moment as the time to act and address as many of the diamond-related human rights abuses as possible.³² These partners, therefore, each had different goals for what became the KPCS.³³

B. *African States*

By 2000, the African diamond-producing countries wanted peace. Wars ravaged the African continent during the 1990s and early 2000s.³⁴

26. Ann C. Wallis, *Data Mining: Lessons from the Kimberley Process for the United Nations Development of Human Rights Norms for Transnational Corporations*, 4 NW. U. J. INT'L HUM. RTS. 388, 390 (2005).

27. *Id.* at 388; Lesley Wexler, *Regulating Resource Curses: Institutional Design and Evolution of the Blood Diamond Regime*, 31 CARDOZO L. REV. 1717, 1721 (2010).

28. Nikos Passas & Kimberly Jones, *Commodities and Terrorist Financing: Focus on Diamonds*, 12 EUR. J. CRIM. POL'Y & RES. 1, 6 (2006).

29. See Wallis, *supra* note 26, at 388.

30. Wexler, *supra* note 27, at 1732.

31. Wallis, *supra* note 26, at 399-400.

32. *Id.* at 401.

33. See Tracey Michelle Price, *The Kimberley Process: Conflict Diamonds, WTO Obligations, and the Universality Debate*, 12 MINN. J. GLOBAL TRADE 1, 32-33 (2003).

34. Shannon K. Murphy, *Clouded Diamonds: Without Binding Arbitration and More Sophisticated Dispute Resolution Mechanisms, the Kimberley Process Will Ultimately Fail*

Fourteen African nations were at war in 1996 and, in that year alone, these “account[ed] for more than half of all war-related deaths worldwide and result[ed] in more than eight million refugees, returnees and displaced persons.”³⁵ In many countries, rebel groups opposed to the then-current governments captured resource-rich areas and used diamonds to fund their violent campaigns. By 2003, an estimated 3.7 million Africans had died in diamond-funded wars and 6.5 million people were driven from their homes.³⁶ The most widely publicized of these wars occurred in Angola, Sierra Leone, and the Democratic Republic of the Congo (“DRC”).

C. Angola

From its independence in 1975 until 1989, Angola fought a bitter civil war to determine which of two main political parties would govern the new country.³⁷ As with many other small nations at that time, this political conflict provided a battleground for the world’s super powers to fight their Cold War.³⁸ *Movimento Popular de Liberatacao de Angola* (“MPLA”), backed by the Soviet Union, effectively seized control in 1975 against *Uniao Nacional para la Independencia Total de Angola* (“UNITA”), backed by the United States.³⁹ Although today the international community recognizes MPLA as Angola’s legitimate government and the country is in a relative state of peace, UNITA still uses diamonds to purchase illegal weapons.⁴⁰ In the 1990s, UNITA controlled the diamond trade and diamond mines, which allowed the rebel group to

in *Ending Conflicts Fueled by Blood Diamonds*, 11 PEPP. DISP. RESOL. L.J. 207, 209 (2011).

35. U.N. Secretary-General, *The Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa: Report of the Secretary-General*, ¶ 4, U.N. Doc A/52/871-S/1998/318 (Apr. 13, 1998) [hereinafter *Causes of Conflict*]; Muna Ndulo, *The Democratization Process and Structural Adjustment in Africa*, 10 IND. J. GLOBAL LEGAL STUD. 315, 315 (2003).

36. Julie L. Fishman, *Is Diamond Smuggling Forever? The Kimberley Process Certification Scheme: The First Step Down the Long Road to Solving the Blood Diamond Trade Problem*, 13 U. MIAMI BUS. L. REV. 217, 231-32 (2005); see also Clean Diamond Trade Act of 2003, 19 U.S.C. § 3901 (2011) [hereinafter CDTA].

37. Seth A. Malamut, *A Band-Aid on a Machete Wound: The Failures of the Kimberley Process and Diamond-Caused Bloodshed in the Democratic Republic of the Congo*, 29 SUFFOLK TRANSNAT'L L. REV. 25, 29 (2005); see also *Angola*, CIA WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/ao.html> (last visited Apr. 7, 2012).

38. *Causes of Conflict*, *supra* note 35, ¶ 10; Edward R. Fluet, Comment, *Conflict Diamonds: U.S. Responsibility and Response*, 7 SAN DIEGO INT'L L.J. 103, 105 (2005).

39. Malamut, *supra* note 37, at 30; Gretchen A. Vetter, Note, *The Forgotten Million: Assessing International Human Rights Abuses in the Artisanal Diamond Mining Industry*, 16 TRANSNAT'L L. & CONTEMP. PROBS. 733, 738 (2007).

40. Murphy, *supra* note 34, at 210.

finance the war through an estimated \$4 billion from illicit diamond sales.⁴¹ Over the course of the war, 500,000 died, 3.5 million were displaced, and an additional 300,000 sought asylum in other countries.⁴²

D. Sierra Leone

Some of the most prosperous diamond mines in the world funded Sierra Leone's civil war from 1991 until 2002.⁴³ The Revolutionary United Front ("RUF") relied on controlling most of the country's diamond mines to pay for its efforts to overthrow the government.⁴⁴ RUF's brutal atrocities – primarily amputating limbs to prevent people from mining diamonds to support the government⁴⁵ and burning children and other civilians alive⁴⁶ – eventually received enough attention to bring diamond-funded wars to the attention of the international community.⁴⁷ The United Nations Security Council sanctioned Sierra Leone and threatened a weapons embargo.⁴⁸ Eventually, the RUF was disarmed, but only after capturing five hundred UN peacekeepers⁴⁹ and recruiting thousands of child soldiers to fight their war.⁵⁰ The war killed between 50,000 and 75,000, displaced 1.5 to 2.25 million, and forced 500,000 refugees to leave Sierra Leone.⁵¹ Today there are more UN peacekeeping troops patrolling Sierra Leone's diamond mines than there are in any other part of the world.⁵²

41. Joseph Hummel, Comment, *Diamonds Are a Smuggler's Best Friend: Regulation, Economics and Enforcement in the Global Effort to Curb the Trade in Conflict Diamonds*, 41 INT'L LAW. 1145, 1155 (2007).

42. Jamila D. Holmes, *The Kimberley Process: Evidence of Change in International Law*, 3 BYU INT'L L. & MGMT. REV. 213, 215 (2007).

43. Hummel, *supra* note 41, at 1150; Malamut, *supra* note 37, at 30-31.

44. Hummel, *supra* note 41, at 1151 ("At one time during the civil war, the RUF controlled nine-tenths of the country's diamond mines, generating between \$25 and \$125 million annually in diamond sales." (internal cites omitted)).

45. Transcript of Sorious Samura, *CNN Presents: Return to Freetown* (CNN television broadcast Dec. 23, 2001), available at <http://transcripts.cnn.com/TRANSCRIPTS/0112/23/cp.00.html>.

46. Fluet, *supra* note 38, at 106; Margo Kaplan, Comment, *Carats and Sticks: Pursuing War and Peace Though the Diamond Trade*, N.Y.U. J. INT'L L. & POL'Y 559, 571 (2003).

47. Feldman, *supra* note 10, at 840.

48. Malamut, *supra* note 37, at 31.

49. Holmes, *supra* note 42, at 215.

50. Fluet, *supra* note 38, at 106.

51. Holmes, *supra* note 42, at 215.

52. *Causes of Conflict*, *supra* note 35, ¶ 29; Murphy, *supra* note 34, at 211.

E. The Democratic Republic of the Congo

The DRC provides a final example, though many more exist. In what has been coined "Africa's World War,"⁵³ an estimated 2.5 million people died in the DRC between 1999 and 2003 alone.⁵⁴ Many African countries have participated in this war, including Zimbabwe, Chad, Namibia, Angola, Uganda, Burundi, and Rwanda.⁵⁵ Approximately \$50 to \$60 million in rough diamonds are smuggled out of the country each year and continue to fund the conflict.⁵⁶ And the war continues today. The DRC is one of the richest countries in the world in terms of natural resources, particularly diamonds.⁵⁷ However, nearly eighty-five percent of Congolese diamonds are smuggled out of the country, depriving the country of *at least* \$40 million in taxes at the lowest estimates.⁵⁸ Moreover, more than three million people have died since 1998⁵⁹ and sixteen million people were reported starving in 2001.⁶⁰

Each of these examples were all, at least mostly, *civil* wars, fought between rebel groups and "legitimate" governments. This was essential for the KPSC. Convincing countries to regulate their own natural resources is very challenging.⁶¹ Impoverished, undeveloped nations with valuable natural resources have every incentive to sell to the highest bidder.⁶² During the 1990s in Africa, however, only rebels set on revolution and overthrow benefited from the diamond wealth in these countries. Their governments found regulating *rebels'* use of diamond exports distinctively appealing.⁶³

F. Diamond Industry

Certain characteristics of the diamond industry, as opposed to other commodities, gave the KPSC a better chance of success than

53. Price, *supra* note 33, at 16.

54. Sally Hardcastle, *Congo Pays the Price for War*, BBC NEWS (Sept. 26, 2001), <http://news.bbc.co.uk/2/hi/business/1564653.stm>.

55. Malamut, *supra* note 37, at 32.

56. *Id.* at 32-34 (noting that the diamonds are smuggled out of the DRC and into the Republic of Congo ("ROC"), which has already established trade routes and low export taxes).

57. Fishman, *supra* note 36, at 220; Hummel, *supra* note 41, at 1156.

58. Fishman, *supra* note 36, at 220-21; Price, *supra* note 33, at 26.

59. Fishman, *supra* note 36, at 223; Paul Orogun, "Blood Diamonds" and Africa's Armed Conflicts in the Post-Cold War Era, 166 WORLD AFF. 151, 157 (2004), available at <http://www.gpia.info/files/u16/OrogunBloodDiamondsAfricasArmedConflicts.pdf>.

60. *Congo in Dire Trouble, Say Agencies*, BBC NEWS (Aug. 7, 2001), <http://news.bbc.co.uk/1/hi/world/africa/1477003.stm>.

61. Wexler, *supra* note 27, at 1733-34.

62. *See id.* at 1723.

63. *See id.* at 1733.

regulation schemes of other industries. This is initially counterintuitive; the diamond industry is historically opaque and difficult to regulate.⁶⁴ However, the industry was also a quasi-monopoly controlled by De Beers; convince De Beers, and the entire industry was on board.⁶⁵

Diamonds are luxury items, whose value and sale depend significantly on consumer opinion.⁶⁶ As Holly Burkhalter, then advocacy director of Physicians for Human Rights said, the industry knows that “diamonds have no intrinsic value, and they are not rare. If the public learns to associate them with hacked-off limbs and the rape of children, the notion of diamonds as a symbol of love could evaporate forever.”⁶⁷ American consumers, just like the United Nations, noticed those images of children with missing limbs and began associating them with diamonds.⁶⁸ Furthermore, human rights NGOs – Global Witness and Partnership Africa Canada among them – threatened to tarnish the entire diamond trade if De Beers did not participate in the KPSC.⁶⁹ Other groups, specifically People for the Ethical Treatment of Animals (“PETA”), had recently damaged the consumer fur industry beyond repair.⁷⁰ De Beers recognized the very creditable threat.

Additionally, helping form the KPSC allowed De Beers to limit the definition of “conflict diamond” and maintain the untarnished label of all other diamonds. Moreover, this focus on distinguishing some diamonds from others coincided with De Beers’ new branding campaign, which specifically identified the benefits of “De Beers Diamonds.”⁷¹ With the KPSC, they could add written guarantees their diamonds were

64. *Id.* at 1733-34 (citing Passas & Jones, *supra* note 28, at 6).

65. Wallis, *supra* note 26, at 400; Wexler, *supra* note 27, at 1734; Nicholas Stein, *The De Beers Story: A New Cut on an Old Monopoly*, FORTUNE, Feb. 19, 2001, at 186 (noting that, while De Beers is still a major player, its hold on the industry is slipping); Erez Yoeli, In December, Diamonds Are Forever: Empirical Evidence of Counter-Cyclical Pricing in a Durable Goods Market 13-14 (May 12, 2003) (unpublished Honors dissertation, Stanford University), available at http://economics.stanford.edu/files/Theses/Theses_2003/Yoeli.pdf.

66. Wexler, *supra* note 27, at 1734 n.77 (citing Stefan Kanfer, *The Last Empire: De Beers, Diamonds, and the World* 271 (1993) (stating that the first advertising campaign De Beers ran attempted to convince Americans that “the Diamond Industry . . . operates fairly and in a manner that accords with American interests.”)).

67. Holly Burkhalter, *Deadly Diamonds*, LEGAL TIMES (Sept. 18, 2000), <http://www.calbaptist.edu/dskubik/diamonds.htm>.

68. Feldman, *supra* note 10, at 840-41.

69. Wexler, *supra* note 27, at 1734.

70. Feldman, *supra* note 10, at 841; Holmes, *supra* note 42, at 231; Price, *supra* note 33, at 42.

71. Donna J. Bergenstock & James M. Maskulka, *The De Beers Story: Are Diamonds Forever?*, 44 BUS. HORIZONS 37, 42 (2001); Feldman, *supra* note 10, at 866.

"conflict-free."⁷² Without De Beer's participation, it is highly unlikely that the KPSC could have ever come to fruition.⁷³ De Beers controlled virtually the entire industry and knew the risk it faced. It thus concluded that some regulation, in this situation, was good for business.⁷⁴

G. Activist Groups (Civil Society)

NGOs and other human rights organizations started reporting diamond-related abuses years before they eventually convened the meeting in Kimberley. Specifically, in 1998, Global Witness released a report entitled *A Rough Trade: The Role of Companies and Governments in the Angolan Conflict*.⁷⁵ The report specifically accused De Beers of purchasing diamonds from Angolan rebels.⁷⁶ Other NGOs quickly joined the cause; a European NGO-led campaign, "Fatal Transactions Campaign,"⁷⁷ and Partnership Africa Canada's *The Heart of the Matter: Sierra Leone, Diamonds and Human Security*⁷⁸ proved particularly persuasive.

Together these groups effectively threatened an international campaign to convince consumers that diamonds were the "physical embodiment of human rights abuses."⁷⁹ PETA's recent success enabled activists to simply note the unmistakable similarities between the two luxury items. However, unlike the fur industry, which *necessitates* killing animals, only a small percentage of the global diamond trade involved blood diamonds.⁸⁰ People can safely mine diamonds and overseers do not always commit abuses.⁸¹ Additionally, diamonds can be a source of natural wealth for the often-impooverished nations that mine them.⁸² Therefore, the active NGOs at the time compromised with

72. Wallis, *supra* note 26, at 400.

73. See Holmes, *supra* note 40, at 216-17.

74. Wallis, *supra* note 26, at 399-400; Wexler, *supra* note 27, at 1734-35.

75. GLOBAL WITNESS, *A ROUGH TRADE: THE ROLE OF COMPANIES AND GOVERNMENTS IN THE ANGOLAN CONFLICT* (1998) [hereinafter *A ROUGH TRADE*], available at http://www.globalwitness.org/sites/default/files/pdfs/A_Rough_Trade.pdf.

76. See Wallis, *supra* note 26, at 392.

77. *Id.*

78. IAN SMILLIE ET AL, PARTNERSHIP AFRICA CANADA, *THE HEART OF THE MATTER: SIERRA LEONE, DIAMONDS AND HUMAN SECURITY* (2000), available at http://www.pacweb.org/Documents/diamonds_KP/heart_of_the_matter-full-2000-01eng.pdf.

79. Wexler, *supra* note 27, at 1737.

80. KPSC, *supra* note 5, pmbl. (stating that conflict diamonds should not be allowed to "negatively affect the trade in legitimate diamonds, which makes a critical contribution to the economies of many of the producing, processing, exporting and importing states, especially developing states").

81. See Wexler, *supra* note 27, at 1738.

82. Fluet, *supra* note 38, at 105-06.

diamond-producing states and De Beers, and framed the issue of “conflict diamonds” such that it did not incorporate all violations committed for the stones, but took an important step in the right direction.

This compromise was essential for the KPCS. Without limiting “conflict diamonds” to a small percentage of all diamonds, De Beers would have backed out; without focusing on rebel movements’ use of diamonds, the governments would not have agreed. Yet this compromise received significant criticism over the years⁸³ and recently prevented the KP from banning Marange diamonds.

Against this complicated background, the KPSC came into being. May 2000 saw strange bedfellows cooperating to resolve the “blood diamond problem.”⁸⁴ In December 2000, the United Nations General Assembly unanimously voted to support the KPSC.⁸⁵ Two years later, on January 1, 2003, thirty-nine diamond-trading countries adopted and implemented the scheme.⁸⁶

H. Original KPCS Requirements

The details of the KPCS are codified in the original document. The Preamble recognizes “the devastating impact of conflicts fuelled by trade in conflict diamonds on the peace, safety and security of people in affected countries and the systematic and gross human rights violations that have been perpetrated in such conflicts.”⁸⁷ The KPCS then sets out standards and a process by which rough diamonds produced in member states (Participants) are evaluated and certified.⁸⁸ If a shipment of rough diamonds contains a Kimberley Certificate, that certificate (theoretically) provides that the country of origin has 1) established “internal controls designed to eliminate the presence of conflict diamonds” imported to or exported from that country, enforced through domestic laws and penalties;⁸⁹ 2) imported and exported all rough diamonds in tamper resistant containers;⁹⁰ and 3) not imported or exported any rough diamonds to or from a non-Participant state.⁹¹ In theory, as more Participants join the Scheme, fewer markets will

83. See Wallis, *supra* note 26, at 388; see *infra* note 96.

84. KP Website, *supra* note 4.

85. See G.A. Res. 55/56, U.N. Doc. A/RES/55/56 (Jan. 29, 2001), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N00/562/75/PDF/N0056275.pdf?OpenElement>; Murphy, *supra* note 34, at 214.

86. Fishman, *supra* note 36, at 224-25.

87. KPCS, *supra* note 5, at 1.

88. *Id.* at 6-11.

89. *Id.* at 7.

90. *Id.* at 6.

91. *Id.*

exist for non-certified diamonds. This will decrease the value of non-certified diamonds, while preserving the legitimate diamond trade. In addition, Participants agree to make all decisions regarding participation in the KPCS and resolve all disputes that may arise by consensus.⁹² The original document sets out the bare-bones framework of a dispute resolution process, but the details and mechanisms are vague and imprecise.⁹³

The original KPCS was met with severe criticism at the outset. Critics focused on the vague language,⁹⁴ the nearly impossible requirement of complete consensus,⁹⁵ the gap in regulation between mine and export,⁹⁶ the fact that virtually all "obligations" are, in fact, voluntary,⁹⁷ and on the complete lack of an enforcement mechanism.⁹⁸ However, the greatest – and most consistent and still ongoing – criticism regards the definition of the very thing the KPCS seeks to eliminate: conflict diamonds.⁹⁹

The KPCS's primary goal is to eliminate "conflict diamonds" from the market, thereby cutting the link between diamonds and the warfare they funded, while simultaneously preserving the legitimate diamond trade.¹⁰⁰ According to the KPCS, conflict diamonds are "rough diamonds used by rebel movements or their allies to finance conflict aimed at undermining legitimate governments."¹⁰¹ If particular diamonds do not meet every aspect of this definition, yet still contribute to serious human rights abuses and crimes, they are not conflict diamonds and the KPCS cannot regulate them.

92. *Id.* at 9.

93. *Id.* at 10.

94. Fluett, *supra* note 38, at 112; Murphy, *supra* note 34, at 218.

95. *The Marange Diamond Fields – an Overview*, THIS IS ZIMBABWE – SOKWANELE (Nov. 2, 2011), <http://www.sokwanele.com/thisiszimbabwe/archives/7074>.

96. Vetter, *supra* note 39, at 746.

97. Fluett, *supra* note 38, at 116; Malamut, *supra* note 37, at 47-49; Murphy, *supra* note 34, at 219-20.

98. Fishman, *supra* note 36, at 218; Holmes, *supra* note 42, at 226; Hummel, *supra* note 41, at 1164; Wallis, *supra* note 26, at 403.

99. See, e.g., Tina Muscarella Gooch, *Conflict Diamonds or Illicit Diamonds: Should the Difference Matter to the Kimberley Process Certification Scheme?*, 48 NAT. RESOURCES J. 189, 190 (2008); Vetter, *supra* note 39, at 766; Mark Kersten, *Justice and Diamonds in Zimbabwe: Saving Kimberley from Itself*, JUSTICE IN CONFLICT (Oct. 10, 2011), <http://justiceinconflict.org/2011/10/10/justice-and-diamonds-in-zimbabwe-saving-kimberley-from-itself/>.

100. KPCS, *supra* note 5, at 1-2; see also *infra* notes 192-97.

101. KPCS, *supra* note 5, at 3.

I. KPCS Additions and Developments

The KPCS and its associated requirements have developed. Notably, the original document itself does not prohibit alterations, improvements or amendments.¹⁰² Certain subsequent actions indicate the KPCS scope can expand.¹⁰³

In 2004, KP members formed a new ad hoc group on Artisanal-Alluvial Production to address concerns about how local diggers operate in illicit diamond trade.¹⁰⁴ This is now an official Working Group, which also addresses concerns about the mine's environmental conditions and how this affects miners' health, matters not addressed in the original KP document.¹⁰⁵

In addition, the KP works with both the Diamond Development Initiative ("DDI") and the Extractive Industries Transparency Initiative, to examine broader issues involving the diamond industry. The DDI aims to "address, in a comprehensive way, the political, social and economic challenges facing the artisanal diamond mining sector in order to optimize the beneficial development impact of artisanal diamond mining to miners and their communities" ¹⁰⁶ The Extractive Industries Transparency Initiative seeks to decrease governmental corruption and help local populations benefit from their own natural resources by publicizing government revenue figures.¹⁰⁷

102. Wexler, *supra* note 27, at 1736-37.

103. See, e.g., *Zimbabwe Diamond Trade Under Spotlight*, VOICE OF AMERICA (Nov. 3, 2009), available at <http://www1.voanews.com/english/news/a-13-2009-11-03-voa49.html> (quoting Ian Smillie, who helped design the KPCS as saying "nobody could imagine at the beginning of this thing that human rights were going to become a problem in the diamonds fields of the countries that are members. But it is an issue and I think this is the beginning of a more mature Kimberley Process that can deal with some of the fundamental issues that consumers are concerned about.").

104. Wexler, *supra* note 27, at 1739-40; Global Witness, *Making It Work: Why the Kimberley Process Must Do More to Stop Conflict Diamonds*, GLOBAL WITNESS 15 (Nov. 2005), http://www.globalwitness.org/sites/default/files/import/GW_Making_it_work.pdf [hereinafter *Making It Work*]; Global Witness & Partnership Africa Canada, *Implementing the Kimberley Process* 5 (June 2005), <http://www.globalwitness.org/sites/default/files/import/Implementing%20the%20Kimberley%20Process%20-%20June%202005.pdf> [hereinafter *Implementing the Kimberley Process*].

105. KIMBERLEY PROCESS PLENARY MEETING, GABORONE, BOTS., NOV. 6-9, 2006, FINAL COMMUNIQUÉ 1-3 (2006) [hereinafter GABORONE PLENARY COMMUNIQUÉ], available at <http://www.state.gov/documents/organization/77110.pdf>; Wexler, *supra* note 27, at 1739-40.

106. Vetter, *supra* note 39, at 759; DDI Mission Statement, *Diamond Development Initiative*, <http://www.ddiglobal.org/pages/mission.php> (last visited Apr. 11, 2011).

107. *What Is the EITI?*, EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE, <http://eiti.org/eiti> (last visited Apr. 10, 2012).

The KP works with each of these organizations and functions as a liaison between them.¹⁰⁸

The KP also works with the World Diamond Council ("WDC"), which is one of the first two non-governmental Observers invited to participate in the KP (Global Witness was the other).¹⁰⁹ The WDC was created in 2000 to represent the diamond industry's interests during formation of the KPCS.¹¹⁰ Eli Izhakoff, a veteran in the diamond industry, was elected chairman and formed a broad coalition, bringing important players from national and international industry organizations, major jewelry manufacturers and retailers, mining companies, gem labs, and bank representatives to the WDC table.¹¹¹ In 2000, the WDC devised and utilized a system of warrantees to supplement the KP certificates.¹¹² That system requires that all diamond traders, polishers, dealers, and manufacturers confirm "[t]he diamonds herein invoiced have been purchased from legitimate sources not involved in funding conflict and in compliance with United Nations resolutions. The seller hereby guarantees that these diamonds are conflict free, based on personal knowledge and/or written guarantees provided by the supplier of these diamonds."¹¹³ While these warrantees really parallel the KPCS requirements, the WDC requirements are directed more specifically at industry players and are intended to work in conjunction with them.¹¹⁴

Finally, the KP further extended its own system of monitoring compliance. Originally, the KPCS required only self-monitoring by individual participants through reports on each country's own "relevant laws, regulations, rules, procedures and practices."¹¹⁵ Eventually, participants agreed to peer reviews of individual states conducted by teams including representatives from each branch of the KP.¹¹⁶ Now, the KP periodically reviews the entire scheme as a whole group.¹¹⁷

108. Wexler, *supra* note 27, at 1740.

109. Feldman, *supra* note 10, at 850-51.

110. See *History*, WORLD DIAMOND COUNCIL, <http://www.worlddiamondcouncil.org/about-wdc/history> (last visited Apr. 10, 2012) [hereinafter WDC Website].

111. *Id.*; Feldman, *supra* note 10, at 850.

112. See Fishman, *supra* note 36, at 227; Hummel, *supra* note 41, at 1160; *Mission Statement*, WORLD DIAMOND COUNCIL, <http://www.worlddiamondcouncil.org/aboutwdc/mission-statement> (last visited Apr. 10, 2012).

113. See THE WORLD DIAMOND COUNCIL, *THE ESSENTIAL GUIDE TO IMPLEMENTING THE KIMBERLEY PROCESS 5* (2003), available at <http://www.jvclegal.org/KimberleyProcess.pdf>.

114. Michael Maggi, *The Currency of Terrorism: An Alternative way to Combat Terrorism and End the Trade of Conflict Diamonds*, 15 PACE INT'L L. REV. 513, 533 (2003).

115. KPCS, *supra* note 5, § V(a).

116. Wexler, *supra* note 22, at 1745.

117. *Id.*

These steps expanded the initial enforcement mechanisms and demonstrate that, while steps may be small and slow, the KPCS is capable of growth and development.

J. Current KPCS Statistics

Currently, forty-nine member states representing seventy-five countries (the European Union is an individual Participant) are part of the KPSC and subject to its requirements.¹¹⁸ These Participants produce approximately 99.8 percent of all the rough diamonds in the world.¹¹⁹ Though Africa remains the world's poorest and most underdeveloped continent,¹²⁰ sixty-five of the world's diamonds originate in Africa and Africa exports approximately \$8.5 billion in diamonds each year.¹²¹ According to the official website – and there is only limited disagreement – the KPCS has been extremely successful at achieving its stated goal: “Diamond experts estimate that conflict diamonds now represent a fraction of one percent of the international trade in diamonds, compared to estimates of up to fifteen percent in the 1990s.”¹²² Even Partnership Africa Canada, which frequently criticizes KP Participants' behavior, acknowledges that the diamonds the KPSC sought to eliminate are now virtually non-existent in the legitimate diamond trade.¹²³ Furthermore, the market value of non-certified, illicit diamonds has fallen.¹²⁴ It is difficult to argue with these numbers; so far as its stated goals (and accepted definitions) are concerned, the KPCS has been a success.

118. WORLD DIAMOND COUNCIL, *Countries Participating in the Kimberley Process*, http://www.diamondfacts.org/pdfs/conflict/Kimberley_Process_Participants.pdf (last visited Apr. 10, 2012).

119. See Ford, *supra* note 4; KP Website, *supra* note 4.

120. See U.N. DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT 2011: SUSTAINABILITY AND EQUITY - A BETTER FUTURE FOR ALL, 19-20, U.N. Sales No. 11.III.B.1 (2011), available at http://hdr.undp.org/en/media/HDR_2011_EN_Summary.pdf; Mark Doyle, *Why is the African Continent Poor?*, BBC NEWS (Aug. 24, 2009), <http://news.bbc.co.uk/2/hi/africa/8215083.stm>.

121. See *Diamond Facts*, WORLD DIAMOND COUNCIL, <http://www.diamondfacts.org/facts/index.html> (last visited Apr. 10, 2012).

122. See KP Website, *supra* note 4.

123. THE DIAMONDS & HUMAN SEC. PROJECT, P'SHIP AFR. CAN., KILLING KIMBERLEY? CONFLICT DIAMONDS AND PAPER TIGERS 3 (Josée Létourneau & Ian Smillie eds., rev. ed. 2006) [hereinafter KILLING KIMBERLEY], available at http://www.pacweb.org/Documents/diamonds_KP/15_KillingKimberley_Revised%20Edition_Eng-Nov2006.pdf.

124. AD HOC WORKING GROUP ON THE REVIEW OF THE KIMBERLEY PROCESS CERTIFICATION SCHEME, THE KIMBERLEY PROCESS CERTIFICATION SCHEME THIRD YEAR REVIEW 21 (Oct. 2006) [hereinafter KPCS THIRD YEAR REVIEW], available at http://www.gjpec.org/pdf/trade_information/KPCS_3rd_Year_review_Final_report.pdf.

Its greatest test, according to scholars and activists alike, was how it would handle Zimbabwe's Marange Diamonds.¹²⁵

PART II: ZIMBABWE'S MARANGE DIAMOND FIELDS

The diamonds from Marange do not fit comfortably within the KP's codified scope; no rebel group uses these diamonds to fund war. And yet, assuming the allegations are true, similar atrocities are happening today in Marange as happened during the 1990s in Sierra Leone. Furthermore, while no "rebel movement" is directly linked to the Marange diamonds, Zimbabwe's government faces significant opposition.

A. *Zimbabwe's Political History*

A complete account of Zimbabwe's political drama over the past decades is well beyond the scope of this article. However, a brief sketch is necessary to understand the intersection between Marange and the KPCS. Zimbabwe achieved independence from Britain in 1980. Though there was initial competition, current president Robert Mugabe and his Zimbabwe African National Union ("ZANU") party maintained an uninterrupted, though violent, rule for twenty-eight years.¹²⁶ Following a horrific period of massacres between 1982 and 1985, ZANU and its main political opposition, the Zimbabwe African People's Union ("ZAPU"), reached an agreement, which merged the two parties, creating ZANU-PF and maintaining Mugabe's presidency.¹²⁷

Zimbabwe's economy suffered catastrophic damage as President Mugabe focused on maintaining control. This triggered further opposition to ZANU-PF. The Movement for Democratic Change ("MDC"), led by Morgan Tsvangirai and established in 1999, rapidly gained support and effectively challenged President Mugabe.¹²⁸ The ZANU-PF government responded by further suppressing civil liberties and intimidating its way through multiple fraudulent elections.¹²⁹

125. Thierry Vircoulon, *Time to Rethink the Kimberley Process: The Zimbabwe Case*, INT'L CRISIS GRP. (Nov. 4, 2010), <http://www.crisisgroup.org/en/regions/africa/southern-africa/zimbabwe/op-eds/time-to-rethink-the-kimberley-process-the-zimbabwe-case.aspx>.

126. *Id.*

127. See *Zimbabwe Profile*, BBC NEWS (Nov. 1, 2011), <http://www.bbc.co.uk/news/world-africa-14113618>.

128. Vircoulon, *supra* note 125.

129. INT'L CRISIS GRP., AFRICA REPORT NO. 93, POST-ELECTION ZIMBABWE: WHAT NEXT? 1-2 (June 7, 2005), available at <http://www.crisisgroup.org/~media/Files/africa/southern-africa/zimbabwe/Post-Election%20Zimbabwe%20What%20Next.pdf>.

“Operation Restore Order” effectively displaced 700,000 mostly poor MDC supporters from Harare, Zimbabwe’s capital city.¹³⁰

In the 2008 presidential elections, Tsvangirai received the most votes, but not enough to secure the office after the first round of Zimbabwe’s electoral process.¹³¹ ZANU-PF’s response was so violent, immediate, and widespread that Tsvangirai withdrew.¹³² However, international pressure eventually convinced the leaders to establish a transitional power-sharing agreement, in which Mugabe retained the presidency and Tsvangirai became prime minister.¹³³ Since September 15, 2008, this hotly contested and extremely controversial coalition has been Zimbabwe’s legitimate government.¹³⁴ Regardless of the on-going tensions between the two parties and the persistent divides, the military forces that control the Marange diamond fields technically answer to Zimbabwe’s legitimate government. Therefore, according to the KPCS and international law, Zimbabwe itself, not a particular group, controls and uses the Marange diamonds.

B. *Discovering the Diamond Fields*

In 2006, local villagers discovered the Marange diamond fields in the Chiadzwa district near the Zimbabwe/Mozambique border.¹³⁵ These fields are rich with alluvial deposits, which, in total, have an estimated worth of up to U.S. \$800 billion and could be a viable source of wealth for the next 80 years.¹³⁶ For a country like Zimbabwe, which has suffered from a crippled economy for decades, such a find could have ushered in a new period of growth and prosperity.¹³⁷ Unfortunately,

130. INT’L CRISIS GRP., AFRICA REPORT NO. 122, ZIMBABWE: AN END TO THE STALEMATE? 4 (Mar. 5, 2007), available at <http://www.crisisgroup.org/~media/Files/africa/southern/africa/zimbabwe/Zimbabwe%20An%20End%20to%20the%20Stalemate.pdf>.

131. Vircoulon, *supra* note 125, at 2; *Zimbabwe: Tsvangirai Wins Parliamentary Vote*, ALLAFRICA (Aug. 25, 2008), <http://allafrica.com/stories/200808251079.html>.

132. See *Tsvangirai Withdrawal: Key Quotes*, BBC NEWS (June 23, 2008), <http://news.bbc.co.uk/2/hi/7468091.stm>.

133. Celia W. Dugger, *Zimbabwe Rivals Strike a Bargain to Share Power*, N.Y. TIMES (Sept. 12, 2008), <http://www.nytimes.com/2008/09/12/world/africa/12zimbabwe.html?em>.

134. LAUREN PLOCH, ZIMBABWE: THE TRANSITIONAL GOVERNMENT AND IMPLICATIONS FOR U.S. POLICY 2-4 (Oct. 27, 2011), available at www.fas.org/sgp/crs/row/RL34509.pdf.

135. Alan Cowell, *Group Allows Limited Sale of Zimbabwe’s Diamonds*, N.Y. TIMES (July 16, 2010), <http://www.nytimes.com/2010/07/17/world/africa/17diamonds.html>; Ecologist, *Export of Zimbabwean Diamonds Threatens Ethical Jewellery Trade*, GUARDIAN (Aug. 8, 2011), <http://www.guardian.co.uk/environment/2011/aug/08/zimbabwean-diamonds-ethical-jewellery-trade>.

136. Ecologist, *supra* note 135.

137. Wexler, *supra* note 27, at 1723.

this did not happen.¹³⁸ Some scholars examine this fact in light of the modern economic concept of “resource curses.”¹³⁹ Resource curses “occur when an open market and an abundance of natural resources combine to create or exacerbate a governance problem” – such as internal conflicts.¹⁴⁰ Marange diamonds are such a curse.

The Marange fields are unique in Zimbabwe; miners reach these diamonds without complicated tools or expensive extraction methods.¹⁴¹ Rather than give private companies exclusive rights to these fields,¹⁴² the government initially opened them and unlicensed miners descended.¹⁴³ Between late 2006 and October 2008, police financially and physically exploited the miners; “killings, torture, beatings and harassment,”¹⁴⁴ as well as arbitrary arrests and detentions of local miners were common. By the end of this period, the police established elaborate syndicates to systematically increase the bribes they demanded from miners.¹⁴⁵ Then, in the summer of 2007, reports from Zimbabwe indicated the illegal mining was under control.¹⁴⁶

However, tens of thousands of illegal diamond miners returned to Marange in the last months of 2008.¹⁴⁷ In October 2008, the Zimbabwean government sent in military forces – whether to combat

138. The discovery of significant alluvial diamond deposits in the Marange area of eastern Zimbabwe [Manicaland Province] in June 2006 should have been a means of salvation for the virtually bankrupt country after ten years of chaos that saw world record inflation and the nation brought to its knees. Instead, it has led to greed, corruption and exploitation on a grand scale, the use of forced labour - both adults and children - horrifying human rights abuses, brutal killings, degradation of the environment and massive enrichment of a select few; SOKWANELE, *supra* note 95, at 2.

139. See Wexler, *supra* note 27, at 1723; Kersten, *supra* note 99.

140. See Wexler, *supra* note 27, at 1718.

141. Alluvial diamonds do not require the same type of deep mines as kimberlite deposits and are significantly easier to extract. Vetter, *supra* note 39, at 742. THE DIAMONDS & HUMAN SEC. PROJECT, P'SHIP AFR. CAN., ZIMBABWE, DIAMONDS AND THE WRONG SIDE OF HISTORY 3 (Josée Létourneau & Ian Smillie eds., 2009) [hereinafter ZIMBABWE, DIAMONDS AND HISTORY], available at http://www.pacweb.org/Documents/diamonds_KP/18_Zimbabwe-Diamonds_March09-Eng.pdf.

142. African Consolidated Resources (“ACR”), British company, initially received exclusive rights to the fields, but the Zimbabwe government revoked ACR's license when they realized the extent of the Marange field's value. See Vircoulon, *supra* note 125, at 2.

143. Vircoulon, *supra* note 125, at 2 (stating this discovery “unleashed a diamond rush of 15,000 to 20,000 unlicensed artisanal miners and uncontrolled smuggling”).

144. HUMAN RIGHTS WATCH, DIAMONDS IN THE ROUGH: HUMAN RIGHTS ABUSES IN THE MARANGE DIAMOND FIELDS OF ZIMBABWE 19 (2009) [hereinafter DIAMONDS IN THE ROUGH]. Critics regularly claim that reports from this type of organization is biased, however newspaper articles (many cited below) suggest that much of this report is accurate.

145. *Id.* at 21; Wexler, *supra* note 27, at 1770.

146. See Vircoulon, *supra* note 125, at 2.

147. DIAMONDS IN THE ROUGH, *supra* note 144, at 27.

the existing lawlessness or as a reward for dedication to Mugabe is debated.¹⁴⁸ The military initiated "Operation Hakudzokwi" (No Return) on October 27, 2008.¹⁴⁹ Within three weeks, army helicopters and soldiers shot miners and villagers indiscriminately in an attempt to clear the area.¹⁵⁰ The operation ended with more than 200 dead.¹⁵¹ Military forces smuggled diamonds, generally through Mozambique (a non-KP Participant),¹⁵² and utilized forced child labor.¹⁵³

C. Marange Today

The abuses continue.¹⁵⁴ In addition to the BBC reports of torture camps,¹⁵⁵ the military forces, still in Marange,¹⁵⁶ are allegedly involved in illegal digging, trading, and smuggling.¹⁵⁷ Local Focal Point ("LFP"), a group established by the KP's Working Group on Monitoring to independently monitor Zimbabwe, reported that security guards protecting the Mbada mine in Marange set dogs on illegal miners, children, and elderly villagers between August and October, 2011.¹⁵⁸ In response to the November announcement that KP officially lifted its ban on Zimbabwe,¹⁵⁹ Shamiso Mtisi, Coordinator of LFP, stated "[t]his deal only reinforces the perception that there is no limit to how far the KP is prepared to go in lowering the ethical bar on Marange Given the chance to keep Zimbabwe to its previous commitments, the KP has

148. *Id.* at 29; Wexler, *supra* note 27, at 1770.

149. Vircoulon, *supra* note 125, at 2.

150. DIAMONDS IN THE ROUGH, *supra* note 144, at 30-34; Nokuthula Sibanda, *Zimbabwe: Harare Denies Diamond Field Abuses*, RELIEFWEB (June 30, 2009), <http://reliefweb.int/node/315325>.

151. Vircoulon, *supra* note 125, at 2.

152. *Zimbabwe: End Repression in Marange Diamond Fields*, HUMAN RIGHTS WATCH (June 26, 2009), <http://www.hrw.org/news/2009/06/26/zimbabwe-end-repression-marange-diamond-fields>.

153. David Smith, *Children Forced to Mine Zimbabwe Diamonds*, GUARDIAN (June 26, 2009), <http://www.guardian.co.uk/world/2009/jun/26/zimbabwe-diamonds-children-mugabe> ("It is estimated that up to 300 children continue to work for soldiers in the diamond fields.").

154. Veneranda Langa, *Mbada Diamonds Guards Brutalise Villagers: Report*, NEWS DAY (Nov. 7, 2011), <http://www.newsday.co.zw/article/2011-11-07-mbada-diamonds-guards-brutalise-villagers-report>.

155. *See supra* notes 1-17.

156. Despite agreeing to withdraw all troops under the Joint Working Agreement. Vircoulon, *supra* note 125, at 4.

157. Langa, *supra* note 154.

158. *Id.*; *Marange Diamonds: Zimbabwe Denies 'Torture Camp'*, BBC NEWS (Aug. 9, 2011), <http://www.bbc.co.uk/news/world-africa-14468116> [hereinafter *Marange Diamonds*].

159. *See Zimbabwe: Official Lauds Diamond Trade Ruling*, *supra* note 20.

shown itself incapable of doing the right thing.”¹⁶⁰ Human rights abuses in Marange have decreased.¹⁶¹ However, a reduction that leaves abuses such as these in place is decidedly insufficient.

PART III: ZIMBABWE'S CERTIFICATION STATUS

Human rights activists immediately reported the first abuses and the KP responded.¹⁶² Their responses never satisfied the activists, however. They consistently argued the KP could and should do more. Yet, the steps the KP took and its eventual decision in November clearly indicate that the KP does not believe it has any authority to regulate the Marange diamonds.

A. KPCS Reactions – A Timeline

Human rights groups directly associated with the KP began documenting the situation at Marange as early as 2006.¹⁶³ Zimbabwe denied any misconduct.¹⁶⁴ The KP responded with limited action: a peer review visit in June 2007 indicated Zimbabwe had sufficiently implemented KPCS minimum requirements and the abuse accusations were not mentioned.¹⁶⁵ The following year, KP expressed “growing concerns” about the Marange fields and recommended additional monitoring.¹⁶⁶

160. *Civil Society Activists Criticise Diamond Deal*, SADOCC (Nov. 2, 2011), <http://www.sadocc.at/news/2011/2011-232.shtml>.

161. Langa, *supra* note 154.

162. See Ecologist, *supra* note 135.

163. Wexler, *supra* note 27, at 1771; *Zimbabwe and its Diamonds: Forever Dirty*, ECONOMIST (June 30, 2011), <http://www.economist.com/node/18898238>.

164. Edahn Golan, *KP Meeting: Renewed Calls for Improvements in Monitoring as KP Fails Where it's Critical*, IDEX (June 25, 2009), http://www.idexonline.com/portal_FullNews.asp?id=32542; *Marange Diamonds*, *supra* note 158.

165. [T]hrough a dedicated and comprehensive effort, the Government of Zimbabwe has managed to bring th[e] situation under control in the first half of 2007 It is the view of the review team that the overall structure of the implementation of the [KPCS] appears to be working in a satisfactory manner in Zimbabwe, and, in general, meets the minimum requirements of the KPCS. Kimberley Process, Review Visit, Zimb., May 29-June 1, 2007, Summary of the Report of the KP Review Visit to Zimbabwe 2, *available at* http://www.kimberleyprocess.com/web/kimberleyprocess/annualreports;jsessionid=471AC601453D3FDB607AE56637E5D11?p_p_id=110_INSTANCE_7D811n2qTtI3&p_p_lifecycle=0&p_p_state=normal&p_p_mode=view&p_p_col_id=column2&p_p_col_count=2&_110_INSTANCE_7D811n2qTtI3_struts_action=%2Fdocument_library_display%2Fview_file_entry&_110_INSTANCE_7D811n2qTtI3_redirect=http%3A%2F%2Fwww.kimberleyprocess.com%2Fweb%2Fkimberley-process%2Fannualreports%3Bjsessionid%3D471AC601453D3FDB607AE56637E5D11%3Fp_p_id%3D110_INSTANCE_7D811n2qTtI3%26p_p_lifecycle%3D0%26p_p_state%3Dnormal%26p_p_mode%3Dview%26p_p_col_id%3Dcolumn-2%26p_p_col_count%3D2&_110_INSTANCE_7D811n2qTtI3_fileEntryId=17256.

166. Wexler, *supra* note 27, at 1771.

In June 2009, a review mission to Zimbabwe reported that it was not compliant.¹⁶⁷ Their report recommended suspension and declared that Zimbabwe must withdraw its army and immediately suspend all illegal mining and sales.¹⁶⁸ At the November 2009 KP plenary meeting, Zimbabwe and other Participants agreed on a Joint Work Plan.¹⁶⁹ Under this plan, Zimbabwe agreed to a ban on their exports until monitors were in place and the government had demonstrated progress.¹⁷⁰ Progress was insufficient.

In 2010, a special monitor visited Zimbabwe and the Marange fields twice. At the plenary meeting that June, the monitor reported Zimbabwe was compliant, but the vote to adopt the report's recommendation ended in a stalemate.¹⁷¹ The group agreed to meet again the following month in Russia. Following that meeting, KP authorized two sales of Marange diamonds.¹⁷² These sales involved 900,000 carats of diamonds worth \$72 million and were met with disapproval from the United States, European Union, Canada and Australia.¹⁷³ No real progress occurred during the following year. Then, on June 23, 2011, Mr. Mathieu Yamba, the then-KP Chair announced that Zimbabwe could sell from two specific mines in Marange and that others would soon follow.¹⁷⁴ Representatives of every NGO present walked out of the meeting in protest.¹⁷⁵ The United States and other Western countries declared the decision invalid because it was not unanimous.¹⁷⁶ While this led to confusion, even from

167. Sebastien Berger & Peta Thornycroft, *Mugabe Escapes a Blood Diamond Ban*, DAILY TELEGRAPH (U.K.), Nov. 6, 2009, at 21.

168. Vircoulon, *supra* note 125, at 4.

169. KIMBERLEY PROCESS, JOINT WORK PLAN: ZIMBABWE 1 (Nov. 5, 2009), available at <http://www.state.gov/documents/organization/133851.pdf> [hereinafter JOINT WORK PLAN]; Celia W. Dugger, *Group Won't Suspend Zimbabwe on Mining Abuses*, N.Y. TIMES (Nov. 6, 2009), <http://www.nytimes.com/2009/11/07/world/africa/07zimbabwe.html>.

170. Vircoulon, *supra* note 125, at 4; *Zim Won't Export Marange Diamonds*, FIN. GAZETTE (Zimb.) (Nov. 13, 2009), <http://www.financialgazette.co.zw/top-stories/2081-zim-wont-export-marange-diamonds.html>.

171. Arthur Bright, *Zimbabwe Restarts Diamond Sales Amid 'Blood Diamond' Accusations*, CHRISTIAN SCI. MONITOR (Aug. 12, 2010), <http://www.csmonitor.com/World/terrorism-security/2010/0812/Zimbabwe-restarts-diamond-sales-amid-blood-diamond-accusations>.

172. *Id.*

173. *Id.*

174. Chair's Notice of 23 June 2011 on the Zimbabwe Issue, in 35 OTHER FACETS Aug. 2011, at 2, available at <http://www.pacweb.org/Documents/Other-Facets/OF35-eng.pdf>.

175. Statement by Charmian Gooch, Founding Dir., Global Witness (June 27, 2011), available at <http://www.globalwitness.org/library/global-witness-founding-director%E2%80%99s-statement-ngo-coalition-walk-out-kimberley-process>; Kersten, *supra* note 99.

176. Statement by Catherine Ashton, High Representative of the Union for Foreign Affairs & Sec. Pol'y (Nov. 1, 2011), available at <http://appablog.wordpress.com/2011/11>

Zimbabwe's finance minister, Tendai Biti,¹⁷⁷ more Zimbabwe diamonds entered the market. Finally, on November 3, 2011, the KP's ban on Marange diamonds was officially lifted – Marange diamond fields are now certified and part of the legitimate diamond trade.¹⁷⁸

B. Possible Violations

Zimbabwe's actions may have violated the KPCS in two distinct ways. The first involves its failure to comply with the procedural requirements of the Scheme. The second directly addresses the abuses committed to obtain these stones. This second argument can proceed in either of two ways – 1) by forcing Marange diamonds into the existing definition or 2) by relying on the underlying principles behind the KPCS.

C. Exporting to Non-Participant State

KPCS Participants must meet certain minimal requirements to remain in compliance and legally participate in the legitimate diamond trade. Zimbabwe violated many of these basic requirements.

Zimbabwe diamonds arrive in Mozambique daily.¹⁷⁹ Mozambique neither produces diamonds itself, nor is a member of the KPCS.¹⁸⁰ In Vila de Manica, just across the eastern Zimbabwe border, the illegal diamond trade flourishes with the complicity of both Zimbabwean and Mozambican officials.¹⁸¹ A Mozambican man living in Zimbabwe freely admitted to a reporter that he walks across the border nearly every day

/01/statement-by-the-spokesperson-of-high-representative-catherine-ashton-on-the-agree ment-reached-in-kimberley-process-regarding-marange-diamonds/; *Zimbabwe: Rampant Abuses in Marange Diamond Fields*, HUMAN RIGHTS WATCH (Aug. 30, 2011), <http://www.hrw.org/news/2011/08/30/zimbabwe-rampant-abuses-marange-diamond-fields>; Ecologist, *supra* note 135.

177. Celia W. Dugger, *Zimbabwe Diamond Exports Approved Over Objections*, N.Y. TIMES (June 24, 2011), <http://www.nytimes.com/2011/06/25/world/africa/25zimbabwe.html>.

178. *Zimbabwe: Official Lauds Diamond Trade Ruling*, *supra* note 20.

179. See Murphy, *supra* note 34, at 222; Cletus Mushanawani, *Zimbabwe: Mozambique's Diamond Capital*, HERALD (July 14, 2010), <http://allafrica.com/stories/201007140397.html>; Vircoulon, *supra* note 125.

180. Participants, KIMBERLEY PROCESS, <http://www.kimberleyprocess.com/web/kimberley-process/kp-participants> (last visited Apr. 7, 2012).

181. Alex Bell, *Zimbabwe: Army Leading Smuggling Operations Out of Chiadzwa*, SW RADIO AFR. (London) (July 26, 2010), <http://allafrica.com/stories/201007261469.html>; Sarah Childress, *Diamond Trade Finds Regulatory Loophole in Mozambique*, WALL ST. J. (Nov. 6, 2009), <http://online.wsj.com/article/SB125738837197329995.html>; Tamas S. Kiss, *Illicit Trade Zimbabwean Blood Diamond Trade Continues*, BUDAPEST REP. (Aug. 4, 2010), <http://www.budapestreport.com/2010/08/04/illicit-trade-zimbabwean-blood-diamond-trade-continues/>; Vircoulon, *supra* note 125, at C.

to sell diamonds to Lebanese buyers.¹⁸² Traders from Israel, Somalia, Nigeria, and Guinea reportedly make a great living in Manica, another border town in Mozambique.¹⁸³

The KPCS explicitly states that Participants cannot export to non-Participants.¹⁸⁴ The complications surrounding the KPCS definition of “conflict diamond” is irrelevant here because the KPCS bans exportation of *all* “rough diamonds,” which includes any “diamonds that are unworked or simply sawn, cleaved or bruted”¹⁸⁵ Furthermore, the Zimbabwe diamonds arrive in Mozambique carried in pockets without a valid KPCS certificate and clearly not in any type of “tamper-resistant containers.”¹⁸⁶ Zimbabwe thereby violated sections II(a) and IV(c) as well.¹⁸⁷

These facts are not in dispute; they are not even discussed. Undoubtedly, the issue of human rights violations is more important and more pressing.¹⁸⁸ Yet, these procedural violations are clear and far less controversial. It might have been easy for the KP to justify its ban on Marange diamonds in light of these violations. Of course, KP Chair Yamba declared Zimbabwe in compliance and the ban is now entirely lifted.¹⁸⁹ Furthermore, Zimbabwe argued that it complied with the Joint Work Plan and other *requirements* under the KPCS.¹⁹⁰ Any further *recommendations* by the KP are just that – unenforceable recommendations, which Zimbabwe is under no legal obligation to fulfill. However, the ban could be re-imposed and the United States

182. Childress, *supra* note 181.

183. *Id.*

184. KPCS, *supra* note 5, § III(c).

185. *Id.* § I.

186. *Id.* §§ II(a), IV(c).

187. *Id.*

188. Although KP investigators themselves have argued that this type of smuggling operation creates illicit trading routes, which undermines the security of legitimate international trading. See Wexler, *supra* note 27, at 1770-71 (citing Celia W. Dugger, *War Against Diamond Smuggling Is on the Line*, INT’L HERALD TRIB., Nov. 5, 2009, at 2 (quoting a confidential Kimberley Process report)).

189. See *Zimbabwe: Official Lauds Diamond Trade Ruling*, *supra* note 20.

190. Summary of the Report of the KP Review Visit to Zimbabwe, Kimberly Process (May 29 - June 1, 2007), available at http://www.kimberleyprocess.com/web/kimberley-process/annualreports?p_p_id=110_INSTANCE_7D811n2qTtI3&p_p_lifecycle=0&p_p_stt e=normal&p_p_mode=view&p_p_col_id=column2&p_p_col_count=2&_110_INSTANCE_7D811n2qTtI3_struts_action=%2Fdocument_library_display%2Fview_file_entry&_110_INSTANCE_7D811n2qTtI3_redirect=http%3A%2F%2Fwww.kimberleyprocess.com%2Fweb%2Fkimberley-process%2Fannualreports%3Fp_p_id%3D110_INSTANCE_7D811n2qTtI3%26p_p_lifecycle%3D0%26p_p_state%3Dnormal%26p_p_mode%3Dview%26p_p_col_id%3Dcolumn2%26p_p_col_count%3D2&_110_INSTANCE_7D811n2qTtI3_fileEntryId=17256.

took over the Chair in 2012.¹⁹¹ This presents a prime opportunity for the United States to act on its stated disgust over economically motivated human rights violations.

D. Human Rights Violations

While Zimbabwe is violating some technical KPCS requirements, the bigger concern is obviously the human rights abuses that facilitate the trade of Marange stones. Scholars and activists have presented two different arguments as to how these abusive acts violate the KPCS. The primary issue is whether Marange diamonds can be excluded from trade under the KPCS. The only such diamonds are "conflict diamonds." As stated above, the KPCS definition of conflict diamonds is "rough diamonds used by rebel movements or their allies to finance conflict aimed at undermining legitimate governments"¹⁹² Since no rebel groups use Marange diamonds to fund conflicts against state governments, Zimbabwe and now the KP insist that Marange diamonds *cannot be* conflict diamonds.¹⁹³

This result is profoundly unsettling. How can diamonds obtained through child labor, torture, and murder *not* be blood diamonds?

E. Marange Diamonds as KPCS Conflict Diamonds

Recognizing the difficulty in actually changing the definition of "conflict diamonds," some seek to fit the situation in Zimbabwe into a "typical" KPCS violation so the KP can exclude Marange diamonds from the market. They avoid the rebel concern all together and argue that while these diamonds may not be undermining a particular government, the fact that illicit smuggling leads to illegal trade channels threatens the security of international trading itself.¹⁹⁴ The response: these are still not conflict diamonds.

A more crafty and ambitious argument involves Zimbabwe's prolonged political instability. According to this line of reasoning, Zimbabwe's legitimate government is the coalition government formed in 2008, when Tsvangirai became prime minister.¹⁹⁵ Many reports indicate that the troops controlling Marange are loyal to Mugabe alone

191. Ford, *supra* note 6; Jeff Miller, *U.S. to Chair Kimberley Process in 2012*, RAPAPORT (Nov. 3, 2011), <http://www.diamonds.net/news/NewsItem.aspx?ArticleID=37698>.

192. KPCS, *supra* note 5, § I.

193. Wexler, *supra* note 27, at 1770.

194. See Celia W. Dugger, *Africa's Diamond Trade Under Scrutiny*, N.Y. TIMES (Nov. 3, 2009), <http://www.nytimes.com/2009/11/04/world/africa/04zimbabwe.html>; Dugger, *supra* note 188, at 2.

195. See Ecologist, *supra* note 135.

and want the coalition government to fail.¹⁹⁶ Since these troops run the torture camps and smuggle diamonds into Mozambique, some argue they qualify as “rebels” looking to overthrow the coalition government.¹⁹⁷

While this argument is appealing for those who want the KPCS to solve the problem of Marange diamonds, it is clearly a very far stretch. Rebels do not try to overthrow a government by ensuring that the president of nearly thirty-two years remains in power. This twists the definitions of “rebel” and “undermine” to an extent that would cause even most lawyers to shake their heads. Pretending that a definition covers more than it does only leads to confusion and further denial. This is not the way to prove that Marange diamonds should be banned.

F. KPCS Principles

The KPCS contains more than narrow definitions. The document and the process it developed explicitly acknowledge the “systematic and gross human rights violations that have been perpetrated” in conflicts fueled by conflict diamonds.¹⁹⁸ The aim of the KP “is to exclude conflict diamonds from international markets and to prevent diamond-fuelled wars;”¹⁹⁹ “[a]t its core, the KP is about stopping human rights abuse linked to diamonds.”²⁰⁰ At the KP meeting in June 2011, President of the World Diamond Council, Eli Izhakoff stated that the KP was “about humanity, not politics”²⁰¹ and urged all Participants to return to that core principle:

196. See Eddie Cross, *Does Zim Qualify for Kimberley Process?*, ZIM. INDEP. (Nov. 10, 2011), <http://www.theindependent.co.zw/opinion/33071-does-zim-qualify-for-kimberley-process.html>; Dugger, *supra* note 177 (noting that “civic groups and leaders in Mr. Biti’s party are deeply concerned that the military, still entrenched in the Marange diamond fields and loyal to Mr. Mugabe, will use diamond profits to finance a campaign of violence against the Movement for Democratic Change in elections that seem likely to be held next year.”); Bruce Loudon, *Robert Mugabe’s Bloody Regime Set in Stone*, AUSTRALIAN (Nov. 16, 2011), <http://www.theaustralian.com.au/news/world/robert-mugabes-bloody-regime-set-in-stone/story-e6frg6ux-1226195986532> (“Mugabe’s murderous army has become part of the exploration and selling process. The army is pivotal to keeping Mugabe, and his successor, in power.”); see also Smith, *supra* note 153.

197. See Cowell, *supra* note 16.

198. KPCS, *supra* note 5, pmb1.

199. GLOBAL WITNESS, RETURN OF THE BLOOD DIAMOND 5 (2010), available at <http://www.globalwitness.org/library/return-blood-diamond-deadly-race-control-zimbabwe-s-new-found-diamond-wealth>.

200. SOKWANELE, *supra* note 95, at 10.

201. *KP is About Humanity Not Politics WDC President Tells Meeting in Kinshasa*, MARKET DIRECT (June 20, 2011), available at <http://www.mdirect-business.com/content/kimberley-process-about-humanity-not-politics-wdc-president-tells-meeting-kinshasa>.

At its core, the Kimberley Process is about protecting the right of communities and individuals to derive properly deserved benefit from natural resources. . . . First and foremost, the Kimberley Process caters to the fundamental needs of millions of ordinary men, women and children living in developing areas, where diamonds are mined and processed.

. . . [W]hile we will not agree on everything, we . . . are firmly committed to a trade in diamonds that is not tainted by conflict . . .²⁰²

In the end, it should not matter what precise definition we use, the Marange diamonds are covered in blood and should not be in the market.

Unfortunately, while those who support the KP's authority to ban Marange diamonds convincingly argue that the principle at issue is the connection between diamonds and human rights abuses, the Preamble's principles each reference "conflict diamonds" as defined within the document.²⁰³ The human rights activists and NGOs who helped create this unique and impressive tool had to compromise and draw the lines around "conflict diamonds" closely enough to gain the support of diamond-producing nations and De Beers.²⁰⁴ We are now seeing the full cost of that compromise.

PART IV: ADDRESSING THE DILEMMA

Zimbabwe's Marange diamonds present a dilemma: they are associated with precisely the type of violent conduct that triggered the KPCS, yet they do not fit the well-established and politically defensible definition. To get around the dilemma, we must either change the definition or turn to a different mechanism that is not so limited.

A. *Change the Definition*

Diamonds other than conflict diamonds, as defined by the KPCS, cause serious problems.²⁰⁵ Zimbabwe proves that government-controlled diamonds can come with as much spilled blood as the rebel-controlled variety. Moreover, the conflicts these diamonds fuel and their associated human rights abuses are not the only harms connected to diamonds. Diamonds are regularly undeclared for tax evasion, stolen, used for money laundering, smuggled, and used to fund

202. *Id.*

203. KPCS, *supra* note 5, pmbl.

204. See *Zimbabwe: Official Lauds Diamond Trade Ruling*, *supra* note 20.

205. Passas & Jones, *supra* note 28, at 6.

terrorism²⁰⁶ and other crimes.²⁰⁷ Diamonds that are technically conflict diamonds make up only a very small portion of all illicit diamond trading; other illicit diamonds do not receive sufficient attention.²⁰⁸

With only minor alterations to its document, the KPCS could change this; substitute the word “illicit” for “conflict,” and neither Marange diamonds nor the massive diamond frauds in Brazil and Guyana, for example, could have the KP stamp of approval.²⁰⁹ Yet simple in theory does not mean simple in practice. Expecting one regulatory system to manage all diamond-related crimes in the world, especially one with so many additional challenges,²¹⁰ is unrealistic – not to mention the political resistance that would face such a proposal. But expecting it to regulate all blood-covered diamonds may not be. As other scholars and activists have argued, conflict diamonds should be defined as “all those diamonds that come from areas where diamond mining is based on the systematic violation of human rights.”²¹¹

Yet, some KP Participants argue that the system “was designed only to halt conflict diamonds and not the wider problem of illicit diamonds.”²¹² They are likely unwilling to accept even the narrower definition change that would condemn violent abuses to acquire diamonds, regardless of the perpetrator. And yet, virtually all of the internal African conflicts that led to the KPCS are over.²¹³ Today’s “rebel movements” are unlikely to aim only at overthrowing individual governments; large-scale terrorism has greater appeal. So, what do we do? Wait for some old-school rebels to grab some diamonds?

B. Change the Tool

Or do we develop a new tool for a new reality? Do we admit the KPCS has run its course, or acknowledge it was useful only in terms of its original limited scope? The activists and NGOs themselves are split. And if we do abandon the KPCS, where do we next turn our attention? Global Witness now claims that the diamond industry itself is the

206. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-06-978, CONFLICT DIAMONDS: AGENCY ACTIONS NEEDED TO ENHANCE IMPLEMENTATION OF THE CLEAN DIAMOND TRADE ACT 2 (2006) [hereinafter GAO Report], available at <http://www.gao.gov/assets/260/251699.pdf>.

207. Gooch, *supra* note 99, at 190-92; Passas & Jones, *supra* note 28, at 7.

208. Passas & Jones, *supra* note 28, at 6.

209. KILLING KIMBERLEY, *supra* note 123.

210. See *supra* notes 91-96.

211. LUNDAS - THE STONES OF DEATH: ANGOLA’S DEADLY DIAMONDS: HUMAN RIGHTS ABUSES IN THE LUNDA PROVINCES, 2004 18 (Rui Falcao de Campos & Rafael Marques, eds. 2005) [hereinafter STONES OF DEATH], available at <http://www.medico.de/media/lundas--the-stones-of-death-angolas-deadly-diamond.pdf>; Wexler, *supra* note 27, at 1771.

212. Gooch, *supra* note 99, at 203.

213. Hummel, *supra* note 41, at 1167.

greatest hope for addressing these human rights violations; multinational corporate compliance regulations must eliminate the current abusive practices. While this is undeniably accurate, there are also other legal actions that the United States, strengthened by its position as the new KP Chair, could utilize.

C. *Multinational Corporate Compliance*

Global Witness, one of the KPCS's founders, publicly declared the system ineffective.²¹⁴ Ms. Dunnebacke of Global Witness, stated that traders and dealers simply hide behind the KP, do not actually check the sources of their diamonds, and that the KP has simply failed to handle the situation at Marange.²¹⁵ Dunnebacke and Global Witness now believe the solution to the problems of the diamond trade lie within the industry itself: the focus must now be on requiring businesses and companies to conduct business less abusively.²¹⁶

This tactic fits with a relatively recent United Nations ("UN") trend to focus efforts on codifying expectations for international corporate social responsibility.²¹⁷ In 1999, the UN's Global Compact became the official initiative, actively encouraging corporations to volunteer to help develop, adopt and implement principles of corporate social responsibility.²¹⁸ The Global Compact's Ten Principles received universal consensus and address appropriate corporate behavior in the areas of human rights, labor, the environment, and anti-corruption.²¹⁹ Principles 1 and 2 discuss human rights: "Principle 1: Businesses should support and respect the protection of internationally proclaimed human rights; and Principle 2: make sure that they are not complicit in human rights abuses."

Additionally important, two reports focused further attention on developing comprehensive norms and positive obligations of corporations with regards to human rights: the 2005 *Report of the United Nations High Commissioner on Human Rights on the Responsibilities of Transnational Corporations and Related Business*

214. Eligon, *supra* note 22.

215. *Id.*

216. Message from Founding Director Charmian Gooch, Global Witness, Why We Are Leaving the Kimberley Process (Dec. 5, 2011), *available at* <http://www.globalwitness.org/library/why-we-are-leaving-kimberley-process-message-global-witness-founding-director-charmian-gooch>; Simon Allison, *Zimbabwe: Kimberley Process – Flawless it is Not*, ALLAFRICA (Dec. 6, 2011), <http://allafrica.com/stories/201112070600.html>; Ford, *supra* note 6.

217. *See, e.g.*, Wallis, *supra* note 26, at 410-11.

218. UNITED NATIONS GLOBAL COMPACT, <http://www.unglobalcompact.org/index.html> (last visited May 7, 2012).

219. *Id.*

*Enterprises with Regard to Human Rights*²²⁰ and the 2010 *Ruggie Report on Business and Human Rights*.²²¹ These reports strive to direct all corporations to use acceptable practices and also directly refer to international human rights instruments, thereby creating "a stronger and more widely accepted basis of human rights responsibilities generally, and a *jus cogens* basis regarding some human rights."²²² As such, multinational corporations such as De Beers and others in the diamond industry have both the duty to refrain from activities that could violate human rights and to actively promote such rights.²²³ As these norms develop further, and more corporations accept them, the force of international law will, in time, make such practices enforceable.

Yet they will only be enforceable to the extent that other UN declarations are enforceable or to the extent of voluntary compliance. Though Dunnebacke correctly states that diamond companies must monitor their product, and UN instruments exist to encourage this behavior, international regulation of multinational corporations still lacks a good compliance track record. Ironically, shortly after it was established, the KPCS was applauded as a new and different attempt at increasing international corporate responsibility for human rights.²²⁴ Unlike prior (and subsequent) UN forays into corporate responsibility, the KPCS incorporated multiple constituencies into the process early and actively.²²⁵ Further, the WDC's warrantee system designed to regulate the gems once they reach industry representatives is specifically intended to involve the corporate entities in such compliance.²²⁶ If traders and dealers currently hide behind the KPCS, they probably hide behind the warrantee system as well.²²⁷ And if they

220. U.N. High Comm'r on Human Rights, Subcomm. on Protection & Promotion of Human Rights, Report on the Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights, U.N. Doc E/CN.4/2005/91; ESCOR, 61st Sess. (Feb. 15, 2005), available at <http://www.ohchr.org/EN/Issues/Business/Pages/Reports.aspx>.

221. James Harrison, *2010 Ruggie Report on Business and Human Rights*, INT'L L. OBSERVER (Apr. 29, 2010), <http://internationallawobserver.eu/2010/04/29/2010-ruggie-report-on-business-and-human-rights/>.

222. Surya Deva, Comment, *UN's Human Rights Norms for Transnational Corporations and Other Business Enterprises: An Imperfect Step in the Right Direction?*, 10 ILSA J INT'L & COMP. L. 493, 498 (2004).

223. Wallis, *supra* note 26, at 413.

224. *Id.* at 389; Allison, *supra* note 216 (discussing the certification programs of the oil, petroleum, and other mineral industries); Ford, *supra* note 6 ("The KP was seen as the flagship in a new generation of hybrid regulatory efforts.").

225. Ford, *supra* note 6.

226. See WDC WEBSITE, *supra* note 110, at 11-12.

227. The warrantees were proving unsuccessful even in 2004. Press Release, Amnesty Int'l, Conflict Diamonds: Jewellers Keeping Consumers in the Dark (Oct. 18, 2004),

do that, what will prevent them from doing the same with a different, voluntary, and toothless mechanism?

Moreover, the degree of leverage NGOs had over the diamond industry when the KPCS formed has diminished. Neither the political will nor the industry fear that existed in 2000 exists today.²²⁸ The United States is no longer the primary diamond purchaser on the market as it was eleven years ago;²²⁹ the controversial sales of Marange diamonds in the summer of 2010 prove that India and China are more than willing to purchase any diamonds the United States boycotts.²³⁰

International corporate compliance and social responsibility is vital to the success and sustainability of our society and its resources – both human and non-human alike. It is a necessary tool for ending diamond related abuses. However, it is not sufficient.

D. United States Laws and Policies

It is time we look to other available tools to supplement, but not replace, the KPCS and international corporate compliance. In January 2012, the United States took over the rotating chair of the KP. This may prove the best chance for the KPCS and for addressing diamond related human rights abuses in general.²³¹ The United States initially condemned the violence in Zimbabwe,²³² disclaimed KP's authorization for the 2010 sales and advised consumers to boycott the gems. Unfortunately, its silence following lifting the ban casts doubt on its stance. Yet, the opportunity still exists.

Current U.S. legislation could stem the flow of bloody diamonds and punish those who trade them. For example, the Alien Tort Statute ("ATS"), originally passed in 1789, allows non-American citizens to sue "for a tort only, committed in violation of the law of nations or treaty of

available at <http://www.amnesty.org/es/library/asset/POL30/038/2004/es/9f6b2886-faa9-11dd-b6c4-73b1aa157d32/pol300382004en.pdf>.

228. Wallis, *supra* note 26, at 401.

229. *Id.* at 399-400. In 2005, the United States still "[a]ccount[ed] for over half of global diamond retail sales," though this number had already decreased. Fluet, *supra* note 38, at 113.

230. See Jason Moyo, *MDC Wants Marange Nationalized*, MAIL & GUARDIAN ONLINE (Nov. 25, 2011), <http://mg.co.za/article/2011-11-25-mdc-wants-marange-nationalised>.

231. Miller, *supra* note 191.

232. *Diamond Revenue Should Be Supported By New Legal Framework*, Zim Officials Say, ISRAELI DIAMOND INDUS. (Dec. 20, 2011), <http://www.israelidiamond.co.il/english/News.aspx?boneID=918&objID=10361>; Yoliswa Dube, *Year 2012 Expected to Present Better Opportunities for Zimbabweans*, CHRONICLE (Jan. 11, 2012), http://www.chronicle.co.zw/index.php?option=com_content&view=article&id=28735:year-2012-expected-to-present-better-opportunities-for-zimbabweans&catid=39:opinion-a-analysis&Itemid=132.

the United States.”²³³ Although debates regarding the ATS are still prevalent, this statute provides a cause of action in U.S. courts for a narrow set of claims asserting a violation of the law of nations.²³⁴ While this set of claims was originally extremely limited, it is expanding. Most relevant here, in *Filartiga v. Pena-Irala*, the Second Circuit concluded that the right to be free from torture was proscribed by the law of nations.²³⁵ The victims of the Diamond Base torture camps, therefore, could possibly bring a cause of action against their torturers under the ATS.²³⁶

Furthermore, the United States has experience enacting legislation to harshly sanction countries that participate in trade the United States disfavors. For example, the Iran and Libya Sanctions Act of 1996 (ILSA) authorized the President to penalize foreign companies, individuals and sometimes nations trading with Iran or Libya, because the United States deemed these nations sponsor terrorism.²³⁷ Additionally, the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 (Helms-Burton Act)²³⁸ sanctioned corporations who maintained specific trading relations with Cuba. The Act’s stated goal was to encourage a democratic Cuban government and was aimed at preventing other countries from trading with Cuba until it created such a government.²³⁹

Each of these Acts has critics and complications, but each, and the lessons they hopefully taught, could provide the stricter enforcement of clean diamond norms.²⁴⁰ The United States should not go out and sanction countries at will; yet in the current environment of relatively weak international enforcement, domestic nations with the power and

233. 28 U.S.C. § 1350 (2006); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712-13 (2004).

234. *Sosa*, 542 U.S. at 712-13.

235. *Filartiga v. Pena-Irala*, 630 F.2d 876, 884 (2d Cir. 1980).

236. There are additional requirements under the ATS, but going into such detail is beyond the scope of this paper. Furthermore, the Supreme Court recently heard oral arguments in *Shell Petroleum N.V. v. Kiobel*, 132 S. Ct. 472 (2011), *cert. denied*, 132 S. Ct. 248. On March 5, 2012, the Court ordered re-argument and additional briefs on the issue of whether the ATS allows U.S. courts to hear lawsuits for violations of international law committed on foreign soil. If the Court determines that such jurisdiction does not exist, this would obviously prevent the type of civil suit that could so benefit victims of human rights abuses at Marange. However, at the time of writing this article, the Court has not made such a ruling. Raising public awareness about the benefits the ATS could provide for enforcing human rights is now even more important.

237. Iran and Libya Sanctions Act of 1996, 50 U.S.C. § 1701 (2006) [hereinafter ILSA]. See Fluet, *supra* note 38, at 120.

238. Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996, 22 U.S.C. § 6021 (2006) [hereinafter Helms-Burton Act].

239. *Id.* § 6021(11); see also Fluet, *supra* note 38, at 121.

240. See Fluet, *supra* note 38, at 119-24.

legal ability to combat the generally disregarded horrific violence in Zimbabwe have the responsibility to take action. Given the United States' role in the KP, its continuing – though weakened – importance in the diamond market, and its relationships with members of the diamond industry, it is time to take a greater stand against the Marange atrocities.

PART V: ACTION STEPS TOWARD A SOLUTION

Inaction and implied inability are no longer acceptable. By adopting the following suggestions, important players in the international effort to regulate diamond-related atrocities could both eliminate the dilemma in Zimbabwe and direct international attention on actually putting an end to such atrocities.

First, the Kimberley Process, the World Diamond Council and the United States must each make public statements regarding their views on the relationship between diamonds and human rights. Quite simply, using systematic human rights abuses to mine or trade diamonds is unacceptable. Each of these three bodies must then take decisive steps to support this statement.

A. *The Kimberley Process*

At least two influential groups have publically declared that it is time to abandon the KPCS. As detailed above, both Global Witness and RapNet pulled out of the KP, citing Zimbabwe as final proof that the KP is unable to address human rights violations related to diamonds.²⁴¹ Though neither group suggests disassembling the organization, both believe that it is now incapable of handling today's true diamond conflicts.

However, good arguments also exist for giving the KPCS an overhaul and one final chance. Importantly, growing amounts of evidence support the contention that illicit diamond sales help finance global terrorism.²⁴² Leveraging and highlighting this evidence could trigger the political will needed to make the necessary reforms. The spokesman for the European Union's High Representative for Foreign Affairs and Security Policy wrote that the KP "may not be a perfect

241. Andersson, *supra* note 14; Rapaport, *supra* note 24.

242. "In early November 2001, the Washington Post broke the story that conflict diamonds helped finance Al Qaeda" Feldman, *supra* note 10, at 853; Fluet, *supra* note 38, at 103-04; Hummel, *supra* note 41, at 1158; Vetter, *supra* note 39, at 737; Ian Smillie, *Motherhood, Apple Pie & False Teeth: Corporate Social Responsibility in the Diamond Industry*, DIAMONDS AND HUMAN SECURITY PROJECT 4-5 (June 2003), available at <http://www.globalpolicy.org/secuirty/natres/diamonds/2003/0603-pac.pdf>; Maggi, *supra* note 114, at 536-37.

instrument, but it is the best we have, and therefore all parties, including civil society, should work to make it effective.”²⁴³ Achieving this will require a significant overhaul involving changes to both substantive and procedural aspects of the KPCS.

First, the KP must change the definition of conflict diamonds. The original definition no longer accurately describes the realities of today’s diamond conflict. As described above, the KP could change the definition in a number of different ways, reflecting varying degrees of how comprehensively it wants to address diamond-related crime. For now, the KPCS should continue to regulate only conflict diamonds. Based on today’s diamond conflicts, a conflict diamond should now be any diamond that comes “from areas where mining is based on the systematic violation of human rights.”²⁴⁴ If at some later date the KP decides it can address all illicit diamonds, it can add that provision then.

Second, the KP must regain credibility. To do so, it must be truly accountable for ensuring that it identifies all conflict diamonds, as newly defined. It must also acknowledge the need to allow Participant states’ governments some degree of protection.

The KP should adopt a more quasi-judicial structure. The KP investigative teams, which already act as fact-finders and submit reports to the KP, should be responsible for making specific findings of fact. In order for the KP to identify certain stones as conflict diamonds, it should be required to make a specific finding that systematic human rights violations are occurring with reference to specific mines. Only after such a finding should KPCS certification be denied. Whether or not the KP agrees with the investigation team’s finding will still require a consensus decision. This will clearly cause some of the same concerns and challenges that currently exist. However, by becoming more accountable for identifying systematic human rights violations in the diamond context, and making specific findings of this nature, any KP Participant who does not vote to ban diamonds from mines operating with systematic human rights abuses will become the focus of international pressure. Additionally, the KP should develop some form of appeals mechanism, through which the owner of the identified mine can object to the finding and be fairly heard.

243. Eligon, *supra* note 22.

244. STONES OF DEATH, *supra* note 211. Martin Rapaport’s definition of “blood diamonds” is also acceptable: “Blood diamonds are diamonds involved in murder, mutilation, rape or forced servitude.” Rapaport, *supra* note 24.

B. The World Diamond Council

At the end of January 2010, Martin Rapaport, Chairman of the Rapaport Group, resigned from the WDC. He explained his reasons in a letter to the WDC and in an article published immediately following his resignation. He specifically cites WDC's support of KP actions regarding Marange and points to the difference between his group's definition of blood diamonds and the KP's definition of conflict diamonds as the cause of the problem:

To understand how this could happen, we must define "blood diamonds" and compare our definition to the KP definition of "conflict diamonds."

Rapaport definition: "*Blood diamonds are diamonds involved in murder, mutilation, rape or forced servitude.*"

KP definition: "*Conflict diamonds means rough diamonds used by rebel movements or their allies to finance conflict aimed at undermining legitimate governments, as described in relevant United Nations Security Council (UNSC) resolutions insofar as they remain in effect, or in other similar UNSC resolutions which may be adopted in the future, and as understood and recognised in United Nations General Assembly (UNGA) Resolution 55/56, or in other similar UNGA resolutions which may be adopted in future . . .*"²⁴⁵

Rapaport recognized the fact that the KP definition of conflict diamonds does not address human rights violations and does not include all diamonds included under his definition blood diamonds – such as those from Marange.²⁴⁶ Later, following the KP announcement in November 2011 that Marange diamonds were certified, RapNet informed its 6,750 members that it had banned all trade of Marange diamonds.²⁴⁷ As stated above, RapNet is the world's largest diamond trading network and it will now publically suspend, expel, and name any company who violates the boycott of Marange diamonds.²⁴⁸

The rest of the WDC needs to follow Rapaport and RapNet's lead. The diamond industry, represented by WDC, must consider their consumers; the average person who purchases a diamond is not interested in legal technicalities. While not every customer considers

245. Rapaport, *supra* note 24.

246. *Id.*

247. Taurai Mangudhla, *Rapaport Tightens Screws on Zim Diamond Trade*, DAILY NEWS (N.Z.) (Dec. 30, 2011), <http://www.dailynews.co.zw/index.php/business/35business/6237-rapaport-tightens-screws-on-zim-diamond-trade.html>.

248. *Id.*

human rights when purchasing a diamond, those who do will identify with Rapaport's definition and not the KP's. Such conscientious customers will not support the idea that diamonds mined through forced labor, murder, and rape are "Conflict-Free." By banning all such diamonds from the legitimate trade, regardless of KP certification, the WDC could demonstrate its commitment to truly responsible business. As the green movement before it, customers will prove that responsible business practices that take a stand against human rights violations make good business sense.

To further this type of practice, the WDC must take an active role in implementing effective corporate compliance measures in all its members. The current system of WDC warrantees is insufficient. The RapNet and the Responsible Jewellery Council ("RJC"), an international non-profit organization with over 350 member companies, each have corporate compliance structures and more effective identification and certification procedures to ensure the ethical quality of their companies and products.²⁴⁹ By working with these organizations, and others like Global Witness who are committed to corporate compliance and ethical trade, the WDC could become a leader in the field, ensure that blood diamonds are truly excluded from the market, and increase profits for its members all at the same time.

C. The United States

The United States is currently in a position to take the lead in combating blood diamonds. As chair of the KP, the U.S. should propose an amendment to change the definition of conflict diamonds. This would show that the U.S. is not just paying "lip service" to the notion that people should not profit from inflicting serious human rights abuses. Additionally, the U.S. should take additional steps to follow and support RapNet's ban on Marange diamonds. While it is true that a U.S. boycott would no longer have the same impact it once would have, it would still have significant repercussions and serve as a powerful statement.

The U.S. must also take advantage of the existing laws that could influence those responsible for the atrocities in Zimbabwe. Recognizing the fact that it would be difficult, the U.S. should turn its attention to finding an appropriate way to bring a case under the Alien Tort Statute. As noted previously, the U.S. Supreme Court just recently

249. See RESPONSIBLE JEWELLERY COUNCIL, <http://www.responsiblejewellery.com/> (last visited Apr. 28, 2012).

heard oral arguments on a case involving the ATS.²⁵⁰ A suit brought against perpetrators of human rights violations in Zimbabwe, with public support from the U.S. government, would send the message that the U.S. firmly believes that such crimes are unacceptable, even in the name of profit, and that it is willing to hold people accountable for such actions.

Each of these proposed solutions presents significant difficulties of their own. Politics, policy, international relations and money will all pose obstacles to the effective implementation and enforcement of each of these suggestions. To deny this reality is naïve. And yet, to let them become paralyzing is unacceptable. It is just as unrealistic, and far more irresponsible, to wait around for a group of power-hungry rebels to steal some Marange diamonds.

PART VI: CONCLUSION

The "idealist's" understanding of symbolic value and the "realist's" insistence on effective practicalities are trapped within the conscientious International Human Rights lawyer. These competing perspectives crash together in Zimbabwe. We do not want to see powerful symbols of cooperation, such as the Kimberley Process, abandoned simply because they are not as practically effective as we had hoped. Yet, we need practical solutions. Global Witness pulled out of the KP not because its absence will change KP's behavior, but because of the symbolism of a founding member deserting a project it now calls ineffective. If more organizations follow suit, it may well prove a symbolic gesture with fatal consequences for the KPCS.

A comprehensive approach to ending diamond-fueled violence and destruction requires a multilateral approach.²⁵¹ Both the KP and the WDC should participate in that approach, but each is running out of time to prove their willingness to address the diamond conflicts of the 21st century. Both organizations must strengthen their policies with regard to diamonds mined through human rights abuses. The new U.S. Chair must push to amend the definition of conflict diamonds to that

250. See discussion of *Kiobel*, *supra* note 236. *Kiobel* involves a group of twelve Nigerians who brought suit under the ATS against Royal Dutch Petroleum Company seeking damages and other relief for the company's assistance and complicity in torture, extrajudicial executions, and other violations of international law committed by the Nigerian government. Originally, the main issue in the case was whether corporations were immune from tort liability for such violations. Given the recent order for re-argument, however, the primary issue will now focus on whether the ATS grants jurisdiction for U.S. courts to hear cases involving violations of international law that occurred outside of the territorial United States.

251. Fluet, *supra* note 38, at 124.

stated above: "all those gems that come from areas where mining is based on the systematic violation of human rights."²⁵²

The WDC should adopt RapNet's definition of blood diamonds and publically recognize that any diamond involved in rape, murder, or other human rights violations simply is not "Conflict-Free." Additionally, the U.S. should both use its existing law and develop new elements to increase the pressure on those who seek to benefit from illicit diamond trade. While the ATS currently stands on a threshold, waiting to see whether or not the U.S. Supreme Court strips it of its intended scope, public opinion can still exert real power. If, in the upcoming term, the Court determines that the ATS only provides jurisdiction for U.S. courts to hear cases involving tortious violations of international law occurring on American soil, then Congress must take active steps to pass new legislation that would allow for U.S. civil suits to condemn actions such as those in Marange.

The Kimberley Process Certification Scheme is far from perfect, but if we abandon every tool that does not provide all the solutions we hope for, the time and energy spent creating them may have been wasted. Giving up is not the answer; adapting and incorporating new mechanisms may be. The Kimberley Process and the World Diamond Council have one final opportunity to prove to the world that they are concerned with *all* violent human rights abuses perpetrated in the name of diamonds. If they cannot do this, then they should remain committed only to preventing rebel forces from using diamonds to fund civil war. And they should say as much. Lying to customers and the international community by claiming that the Kimberley Process ensures honestly conflict-free diamonds is unacceptable. The hypocrisy must end, one way or another. The conflict of diamonds is complicated, but it is a conflict we can overcome.

252. STONES OF DEATH, *supra* note 211.

THE TROUBLE WITH WESTPHALIA IN SPACE: THE STATE-CENTRIC LIABILITY REGIME

*Dan St. John**

ABSTRACT

What happens when a satellite owned by a private company in one state crashes into another state's satellite? International space law has an answer. The solution, however, reflects a bygone, state-centric era created by the Peace of Westphalia in 1648. A better system must meet demands of the emerging commercial space sector. The treaty framework governing state activities in outer space reflects Cold War fears. Consequently, the space liability regime favors diplomatic, cooperative dispute resolution between states. States, therefore, must sponsor private entities' claims. If the treaty process is ineffective, state responsibility and international liability fill the gaps left by the space liability regime. Today, space is increasingly crowded as commercial ventures launch into space. For them, a state-centric liability regime is ineffective. I conclude by suggesting that states back commercial ventures by subsidizing liability insurance and encourage the private sector to circumvent the treaty framework through contractual allocation of risk.

INTRODUCTION

Outer space has awed humanity for centuries. People, across the globe, turn their faces up to the night sky in wonder. Artists and musicians seek inspiration from it. Scientists, who until recently needed to look up for study, have found ways to break the chains of gravity and travel beyond our globe. With this achievement, humanity is reaching beyond the Earth's surface to place technology in space to enhance our quality of life through communicating nearly instantaneously throughout the global,¹ weather reporting,² remote

* J.D. Candidate, 2013, University of Denver Sturm College of Law; B.A., Economics and International Relations, 2008, University of Southern California. Many thanks to Lieutenant Colonel Dean Reinhart, USAF for helping me navigate the space treaties and their policy implications. Professor Annecoos Wiersema, Professor Eli Wald, Alissa Mundt, and Julie Nichols were invaluable in helping me string my thoughts together. My parents, Katie and Dan, were unwavering in their support and always quick with comments. To my friends, your jests enticed me to dig deeper into the field—for that I am grateful. And finally, dear footnote reader, I appreciate your interest in liability on the final frontier.

sensing³ of the Earth's surface to better manage natural resources,⁴ and applying advances from space research and development here on Earth.⁵ The horizon is bright for humanity if space is used in a thoughtful, efficient manner. For this to happen, law must govern outer space.

Before formal space law developed, prominent international law scholars, politicians, scientists, and some science fiction authors⁶ considered how law and space would interact. This diverse collection of thinkers helped set the stage for more formal legal talks and helped cement the spirit of cooperation through the foundational legal documents enumerating outer space law.⁷ These documents, although crafted with an eye on cooperation and a brighter future, are products of the Westphalian state system. In 1648, the Peace of Westphalia created the modern foundation of international law by building international relations around organized states with geographic boundaries. Consequently, solutions must come from the state-centric international legal regime despite the focus on cooperation. This cooperative spirit must continue and evolve to become a stabilizing force that tempers national interest. A space law liability regime that embodies this will likely be more effective than one where states jealously guard their sovereignty.

In 1989, Space Services, Inc. changed the *status quo* of space law when it becomes the first private company to launch a satellite into

1. I.H. PH. DIEDERIKS-VERSCHOOR & V. KOPAL, AN INTRODUCTION TO SPACE LAW 55 (3d ed. 2008).

2. *Id.* at 53-54.

3. "Remote sensing" is the practice of observing and imaging land from above. With the advent of satellite imaging, remote sensing can cover vastly larger areas than early aircraft-based reconnaissance. *Id.* at 70.

4. Sergio Marchisio, *Remote Sensing for Sustainable Development in International Law*, in OUTLOOK ON SPACE LAW OVER THE NEXT 30 YEARS 335, 335-37 (Gabriel Lafferranderie & Daphné Crowther eds., 1997); e.g., Press Release, NASA, NASA and USAID Pledge to Advance International Development with Science and Technology (Apr. 25, 2011), available at http://www.nasa.gov/home/hqnews/2011/apr/HQ_11-123_NASA_USAID.html.

5. See GLENN H. REYNOLDS & ROBERT P. MERGES, OUTER SPACE: PROBLEMS OF LAW AND POLICY 18-22 (1989).

6. E.g., NAT SCHACHNER, SPACE LAWYER (1953). This is the story of a young, hotshot space lawyer named Kerry Dale. After a dispute with his irascible boss, Dale rockets around the solar system using his knowledge of the "star code" and brilliant legal mind to best his former boss in business and woo the boss's beautiful daughter. In the end Dale, of course, gets the girl.

7. See Jennifer Frakes, Comment, *The Common Heritage of Mankind Principle and the Deep Seabed, Outer Space, and Antarctica: Will Developed and Developing Nations Reach a Compromise?*, 21 WIS. INT'L L.J. 409, 422 (2003) ("The Outer Space Treaty was based on politics and future visions of space exploration for all mankind . . .").

orbit.⁸ Due to technological advancements in rocketry and the retirement of the Space Shuttle, even more private space actors are expected to launch payloads into space.⁹ Cooperation is increasingly important¹⁰ because outer space is becoming more cluttered as states and commercial ventures undertake other space missions and launch more satellites and space stations.

Experts estimate that of the approximately "19,000 man-made objects in orbit," only 900 of those objects are satellites.¹¹ This junk, which includes dead satellites, paint flecks, wrenches, and other spacecraft detritus, is called "space debris" and poses a significant danger to any operation in space.¹² For example, a 0.2 millimeter in diameter paint chip caused quite a scare when it pitted the Space Shuttle Challenger's windshield.¹³ If space debris is left unchecked, scientists worry that low Earth orbit will become unusable.¹⁴ The "Kessler effect" posits that at a certain point, a cascade of collisions will envelop Earth and close off access to certain areas of space. Debris mitigation policies, which ideally require space objects to not jettison debris and be removed from orbit at end-of-life, are not uniformly adopted by space powers.¹⁵ The United Nations, however, made a large leap forward in 2008 when the General Assembly adopted debris mitigation guidelines with the intent to limit orbital hazards.¹⁶

With more actors in space, there will be more collisions, which will lead to more claims for liability.¹⁷ These claims will present a challenge because, although international space law has a framework for

8. Andre G. DeBusschere, *Liability for Damage Caused by Space Objects*, 3 J. INT'L L. & PRAC. 97, 104 (1994).

9. See DIEDERIKS-VERSCHOOR & KOPAL, *supra* note 1, at 106; NANDASIRI JASENTULIYANA, INTERNATIONAL SPACE LAW AND THE UNITED NATIONS 321, 325-26 (1999); Irene Klotz, *US Looks to Private Sector as Shuttle Program Ends*, REUTERS, July 5, 2011, <http://www.reuters.com/article/2011/07/05/uk-space-shuttle-commercial-idUSLNE76404L20110705>.

10. See DIEDERIKS-VERSCHOOR & KOPAL, *supra* note 1, at 23; JASENTULIYANA, *supra* note 9, at 216.

11. Robert P. Merges & Glenn H. Reynolds, *Rules of the Road for Space?: Satellite Collisions and the Inadequacy of Current Space Law*, 40 ENVTL. L. REP. NEWS & ANALYSIS 10009, 10010 (2010); Tariq Malik, *Space Junk Around Earth on the Rise, Experts Say*, SPACE.COM (Apr. 29, 2009), <http://www.space.com/news/090429-space-debris-safety.html>.

12. See DIEDERIKS-VERSCHOOR & KOPAL, *supra* note 1, at 127; BRUCE A. HURWITZ, STATE LIABILITY FOR OUTER SPACE ACTIVITIES 1-3 (1992); Malik, *supra* note 11.

13. Due to the incredibly high speeds of objects in orbit, even the tiniest of debris can cause significant damages. See DIEDERIKS-VERSCHOOR & KOPAL, *supra* note 1, at 127; JASENTULIYANA, *supra* note 9, at 321-22.

14. Donald J. Kessler & Burton G. Cour-Palais, *Collision Frequency of Artificial Satellites: The Creation of a Debris Belt*, 83 J. GEOPHYSICAL RES. 1985, 2637 (1978).

15. See FRANCIS LYALL & PAUL B. LARSEN, SPACE LAW: A TREATISE 308-10 (2009).

16. G.A. Res. 62/217, U.N. Doc. A/RES/62/217 (Feb. 1, 2008).

17. See DIEDERIKS-VERSCHOOR & KOPAL, *supra* note 1, at 121.

assigning liability, it is a state-centric regime that does not address private actors.¹⁸ General principles of international law, however, fill the gaps left in the space liability regime. While state responsibility and international liability do much to assuage liability concerns, they are still unwieldy for private actors. Going forward, states need to balance providing recovery to victims without stifling commercial space development.

Part I of this paper discusses the development of outer space law generally. The legal documents developed concurrently with leaps of technological advancements, meaning foundational documents were drafted with the future in mind. Coupled with the intent of tempering Cold War fears, early space law documents built a highly aspirational legal framework, which lead states to draft more workable laws guided by the space treaties. Part II focuses on the liability framework established by the Outer Space Treaty and the Liability Convention. In particular, this section clarifies important terms, discusses the claim process and the different liability regimes, explains how compensation is made, and how a state limits its liability. Part III explores traditional international law principles of state responsibility and international liability, which gaps in the space treaties. Part IV then discusses how Canada used the Liability Convention to make a claim for damages caused by the crash of the Soviet Union's Cosmos 954 satellite. This is the only case where Liability Convention has been used to solve a dispute. Although the procedures were not rigorously applied, the Convention did help resolve the dispute. In conclusion, the space liability regime must change to encourage private space development. The state-centric regime serves an important purpose, but it must relax in order to allow more commercial actors to develop.

I. DEVELOPMENT OF OUTER SPACE LAW

A. *Enter Space Law*

On October 4, 1957, a beach ball sized metal sphere called Sputnik blasted into orbit and opened the eyes of the world to a new frontier of scientific and technological exploration. The 1960s were a decade of rapid advances in space technology as the United States and Soviet Union launched larger manned rockets and planned more ambitious space missions.¹⁹ Because of the rapid scientific and technological strides, the law of outer space had to develop quickly.²⁰ In response, the United Nations established the Committee on the Peaceful Uses of

18. See *id.* at 107; HURWITZ, *supra* note 12, at 153; JASENTULIYANA, *supra* note 9, at 325-26; REYNOLDS & MERGES, *supra* note 5, at 301.

19. MANFRED LACHS, *THE LAW OF OUTER SPACE: AN EXPERIENCE IN CONTEMPORARY LAW-MAKING* 1-3 (1972).

20. See BIN CHENG, *STUDIES IN INTERNATIONAL SPACE LAW* 216-17 (1997).

Outer Space (COPUOS) in 1959 to address the unique legal issues that arise from space activities.²¹ COPUOS's main goals were to promote peaceful space activities, encourage cooperation, and establish a legal regime.²²

After eight years of debate, the Committee proposed the Outer Space Treaty,²³ which laid out a general framework for governing space activities.²⁴ The treaty came into force in October 1968 and, as of January 2006, 125 states have agreed to be bound by its terms.²⁵ In 1972, COPUOS added more details to the Outer Space Treaty's liability provisions through the Liability Convention.²⁶ As of January 2006, 108 states follow the Liability Convention's regime.²⁷ To give more force to these treaties,²⁸ in 1976 the Registration Convention set up a structure for states to register and track spacecraft.²⁹

In total, five treaties govern activities in outer space,³⁰ while five General Assembly non-binding resolutions³¹ further clarify principles of international law in outer space.³² Despite the relative youth of space law, several core concepts have crystallized into customary

21. International Co-operation in the Peaceful Uses of Outer Space, G.A. Res. 1472 (XIV), ¶ 1(a)(iii)(b), U.N. Doc. RES 1472(XIV) (Dec. 12, 1959); see DIEDERIKS-VERSCHOOR & KOPAL, *supra* note 1, at 3.

22. Question of the Peaceful Use of Outer Space, G.A. Res. 1348 (XIII), U.N. Doc. RES 1348(XIII) (Dec. 13, 1958); G.A. Res. 1472 (XIV), *supra* note 21. See also DIEDERIKS-VERSCHOOR & KOPAL, *supra* note 1, at 23; JASENTULIYANA, *supra* note 9, at 2-3.

23. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18 U.S.T. 205, 610 U.N.T.S. 205 [hereinafter Outer Space Treaty].

24. See DIEDERIKS-VERSCHOOR & KOPAL, *supra* note 1, at 3; REYNOLDS & MERGES, *supra* note 5, at 49. See CHENG, *supra* note 20, at 215-85, for a detailed account of the drafting of the Outer Space Treaty.

25. See DIEDERIKS-VERSCHOOR & KOPAL, *supra* note 1, at 23-24.

26. Convention on the International Liability for Damage Caused by Space Objects, Mar. 29, 1972, 24 U.S.T. 2389, 961 U.N.T.S. 187 [hereinafter Liability Convention]; REYNOLDS & MERGES, *supra* note 5, at 178.

27. See DIEDERIKS-VERSCHOOR & KOPAL, *supra* note 1, at 35.

28. DIEDERIKS-VERSCHOOR & KOPAL, *supra* note 1, at 44-45; REYNOLDS & MERGES, *supra* note 5, at 204-05.

29. Convention on Registration of Objects Launched into Outer Space, Sept. 15, 1976, 28 U.S.T. 695, 1023 U.N.T.S. 15 [hereinafter Registration Convention].

30. Treaties cover the following topics: general principles, astronaut rescue, liability, registration of space objects, and use of the Moon and other celestial bodies. Henry Hertzfeld, *The "Law of Outer Space" is at a Crossroads: Current and Future Issues in International Space Law*, 15 ILSA J. INT'L & COMP. L. 325, 328-29 (2009).

31. These resolutions discuss: basic legal principles, direct broadcasting by satellites, remote sensing, use of nuclear power sources, and how outer space benefits are to be used. See JASENTULIYANA, *supra* note 9, at 41-50.

32. See CHENG, *supra* note 20, at 150-62; Stacey L. Lowder, Comment, *A State's International Legal Role: From the Earth to the Moon*, 7 TULSA J. COMP. & INT'L L. 253, 254-57 (1999), for a thorough account of the development of space law from 1961 to the present.

international law through state practice.³³ Customary international law is state practice accepted as law.³⁴ It is a formative process where, over time, states give certain customs the force of law.³⁵ The customary international laws relating to space are that space is governed by international law;³⁶ national appropriation in space is forbidden;³⁷ space and its resources are to be used for the benefit of humanity;³⁸ states are responsible for their actions in space;³⁹ states are liable for damage;⁴⁰ and space objects have free transit over a state's "subjacent territory," meaning that a satellite may freely pass over a state's territory so long as the satellite is in orbit.⁴¹ These rules of customary law, therefore, are binding on all states.⁴²

The Outer Space Treaty was a success partly because it was drafted by blending science and jurisprudence.⁴³ Including scientists in the drafting process helped form a legal framework that incorporated technological necessities.⁴⁴ However, technological development progresses quickly and the treaty-making process is slow. Drafters of the space treaties, for example, could not have fathomed the drastic increase in commercial space activities.⁴⁵ States, therefore, must now increasingly rely these on informal principles, guided by the aspirational documents, to govern their activities.

33. See DIEDERIKS-VERSCHOOR & KOPAL, *supra* note 1, at 6, 11-12; LYALL & LARSON, *supra* note 15, at 71.

34. See DIEDERIKS-VERSCHOOR & KOPAL, *supra* note 1, at 10; 1 OPPENHEIM'S INTERNATIONAL LAW § 8, at 26 (R. Jennings & A. Watts eds., 9th ed. 1992) [hereinafter OPPENHEIM].

35. See DIEDERIKS-VERSCHOOR & KOPAL, *supra* note 1, at 11; OPPENHEIM, *supra* note 34, at 26.

36. See Outer Space Treaty, *supra* note 23, art. III.

37. See *id.* art. II.

38. See, e.g., *id.* art. I.

39. See *id.* art. VI.

40. See, e.g., *id.* art. VII; Liability Convention, *supra* note 26, arts. II, III; LYALL & LARSEN, *supra* note 15, at 71.

41. See LYALL & LARSEN, *supra* note 15, at 54. "Subjacent transit" means that, for example, satellites in orbit may freely pass over territory of a state without permission. Although seemingly necessary for effective space activities given the vast number of states a satellite in orbit transit, this legal principle is opposite of the analogy from air law. Aircraft need a state's permission to transit another sovereign's airspace. DIEDERIKS-VERSCHOOR & KOPAL, *supra* note 1, at 6; Joseph A. Bosco, *International Law Regarding Outer Space - An Overview*, 55 J. AIR L. & COM. 609, 620 (1990).

42. See DIEDERIKS-VERSCHOOR & KOPAL, *supra* note 1, at 10; V.S. Vershchetin & G.M. Danilenko, *Custom as a Source of International Law of Outer Space*, 13 J. SPACE L. 22, 23-24 (1985).

43. See Jay H. Ginsburg, *The High Frontier: Tort Claims and Liability for Damages Caused by Man-Made Space Objects*, 12 SUFFOLK TRANSNAT'L L.J. 515, 532 (1989).

44. See *id.* at 534.

45. See Frakes, *supra* note 7, at 422-23.

Space law, fundamentally, is a specialized body of law within international law.⁴⁶ Sources of space law are the same as other international law: treaties, customary international law, general principles of international law, and scholarly writing and judicial decisions.⁴⁷ However, "an automatic extension to outer space and celestial bodies of international law" would not work because international law does not address all the unique challenges posed by outer space.⁴⁸ In the 1960s and 1970s, states cobbled together a legal framework for space based on analogous principles from other specialized bodies of law, such as maritime and air law,⁴⁹ international law in general when possible,⁵⁰ and crafted new rules when not.⁵¹ For example, the concept that a state has exclusive sovereignty over its airspace⁵² was discarded in favor of allowing satellites free transit over a state's territory.⁵³

In contrast, other *lex specialis*, notably admiralty law, developed incrementally over several centuries as trade practices formed to resolve business disputes, which were eventually formalized into modern maritime law.⁵⁴ Air law developed much faster; however, its founding documents are more specialized.⁵⁵ Regardless, no great declaration of principles paved the way for either body of law. Space law, on the other hand, started afresh at the international level with broad declarations of principles.⁵⁶

B. Rules of the Road: Informal Law

Despite the number of treaties and resolutions governing outer space, space law is not as formal as other areas of international law.⁵⁷

46. See DIEDERIKS-VERSCHOOR & KOPAL, *supra* note 1, at 5; LYALL & LARSEN, *supra* note 15, at 2.

47. Statute of the International Court of Justice art. 38(1), June 26, 1945, 33 U.N.T.S. 993; see DIEDERIKS-VERSCHOOR & KOPAL, *supra* note 1, at 5-7; LYALL & LARSEN, *supra* note 15, at 31-32.

48. LACHS, *supra* note 19, at 15 (internal quotation marks omitted).

49. See REYNOLDS & MERGES, *supra* note 5, at 27-28.

50. See LACHS, *supra* note 19, at 15; Hertzfeld, *supra* note 30, at 327 (listing sources and inspirations for space law principles).

51. See LACHS, *supra* note 19, at 15 n.9.

52. See Convention on International Civil Aviation art. 1, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295 (declaring that states have exclusive sovereignty over their airspace).

53. See DIEDERIKS-VERSCHOOR & KOPAL, *supra* note 1, at 6; LYALL & LARSEN, *supra* note 15, at 54; Bosco, *supra* note 41, at 620.

54. Admiralty law grew out of technical necessities reflected by early trade law. In Britain, the complexities of admiralty law eventually led to the creation of specialized maritime tribunals. This process took centuries. Ginsburg, *supra* note 43, at 518-19.

55. See *id.* at 520-24.

56. See DIEDERIKS-VERSCHOOR & KOPAL, *supra* note 1, at 5; JASENTULIYANA, *supra* note 9, at 1.

57. Hertzfeld, *supra* note 30, at 331.

In place of international law, many space activities are governed by codes of conduct and best practice guidelines drafted by "national agencies and professional experts."⁵⁸ Because of the law's informality, disputes are resolved diplomatically or, for licenses or contract disputes, in national courts.⁵⁹ States, however, generally abide by international principles regarding space.⁶⁰ This informalism can be traced to the same issues that influenced early space treaties: a rapidly changing technological field and a focus on idealism in the law.

The excitement of the Space Race was tempered by the lurking fear that space was to be the next battlefield for the Cold War.⁶¹ The driving issues of the 1960s and 1970s framed the debate about space law, which is reflected in the foundational documents.⁶² Nuclear weapons were on the forefront of drafters' minds.⁶³ Conflict in the final frontier was not out of the question. Therefore, space law documents are written with highly aspirational goals⁶⁴ such as space being the "province of mankind" and that space resources are most efficiently used when used cooperatively.⁶⁵ International cooperation is a principle found in all space treaties and statements of principles.⁶⁶ All of the space treaties were drafted within COPUOS using the consensus method. Because the treaties were not opened for signature until all the drafting states reached consensus, this encouraged compliance with the rules once the treaties entered into force.⁶⁷ Despite all states not being satisfied on every issue, space law as a whole is stronger because there are no reservations detracting from the consistency of the law.

58. Gerardine Meishan Goh, *Softly, Softly Catchee Monkey: Informalism and the Quiet Development of International Space Law*, 87 NEB. L. REV. 725, 726 (2009); see also JASENTULIYAYA, *supra* note 9, at 5-14.

59. This explains why there is so little litigation on the finer points of "space law." See Hertzfeld, *supra* note 30, at 331.

60. See Goh, *supra* note 58, at 729-30.

61. See REYNOLDS & MERGES, *supra* note 5, at 195; Hertzfeld, *supra* note 30, at 327.

62. See REYNOLDS & MERGES, *supra* note 5, at 71; Hertzfeld, *supra* note 30, at 327.

63. See REYNOLDS & MERGES, *supra* note 5, at 71; Hertzfeld, *supra* note 30, at 327-28.

64. See Goh, *supra* note 58, at 731-32; Myres S. McDougal & Leon S. Lipson, *Perspectives for a Law of Outer Space*, 52 AM. J. INT'L L. 407, 429-30 (1958).

65. See DIEDERIKS-VERSCHOOR & KOPAL, *supra* note 1, at 23; JASENTULIYANA, *supra* note 9, at 1; Hertzfeld, *supra* note 30, at 327-28. See also, e.g., Outer Space Treaty, *supra* note 23, arts. I, II, IX ("States . . . shall conduct all their activities . . . with due regard to the corresponding interest of all other States Parties to the Treaty.").

66. See DIEDERIKS-VERSCHOOR & KOPAL, *supra* note 1, at 23; Hertzfeld, *supra* note 30, at 327-28; Chukeat Noichim, *International Cooperation for Sustainable Space Development*, 31 J. SPACE L. 315, 324 (2005).

67. See JASENTULIYANA, *supra* note 9, at 215; Ginsburg, *supra* note 43, at 534.

II. CREATING LIABILITY IN OUTER SPACE

A. *Developing Outer Space Liability*

The United Nations Committee on the Peaceful Uses of Outer Space began exploring the problem of liability for space activities in 1958.⁶⁸ The negotiations wavered between the Soviet position that a space liability treaty would be superfluous, given liability rules existing in international law, and the desire for states without space operations to see a treaty that guaranteed prompt, equitable compensation.⁶⁹ To give COPUOS guidance on crafting a liability regime, the General Assembly passed a resolution declaring that states "bear international responsibility" for space activities and are liable for damage caused by their space actives.⁷⁰ The General Assembly's guidance, made immediate by the first controlled landing on the Moon by the Soviet Union's Luna-9, spurred the Soviet Union and United States into agreeing to codify basic space law principles in the Outer Space Treaty.⁷¹

Drafters also disagreed about what would qualify as "damage" for liability purposes. The dispute centered on (1) the types of protected interests, (2) the type of conduct giving rise to liability, (3) whether a different principle should govern in space and on Earth, (4) the extent of the launching state's liability, and (5) whether joint and several liability was appropriate.⁷² The Outer Space Treaty briefly addressed several of these issues,⁷³ but not in a comprehensive manner.⁷⁴

B. *Liability Convention: Providing Further Clarification*

When the Liability Convention entered into force in 1972,⁷⁵ it expanded and clarified the Outer Space Treaty's liability regime.⁷⁶ The

68. DIEDERIKS-VERSCHOOR & KOPAL, *supra* note 1, at 3; REYNOLDS & MERGES, *supra* note 5, at 49; Ginsburg, *supra* note 43, at 537. See generally CHENG, *supra* note 20, at 215-85 (discussing the negotiations and provisions of the 1967 Space Treaty and the 1968 Astronauts Agreement).

69. CHENG, *supra* note 20, at 289.

70. G.A. Res. 1962 (XVIII) ¶¶ 5, 8, U.N. Doc. A/RES/1962(XVIII) (Dec. 13, 1963).

71. See CHENG, *supra* note 20, at 291.

72. See Carl Q. Christol, *The Legal Common Heritage of Mankind: Capturing an Illusive Concept and Applying it to World Needs*, in 18 COLLOQUIUM ON L. OF OUTER SPACE 42, 52-53 (1976).

73. Outer Space Treaty, *supra* note 23, arts. VI, VII (establishing state responsibility for the actions of state and non-governmental entities and establishing international liability for damage in outer space, airspace, and on the surface).

74. See MORRIS D. FORKOSCH, OUTER SPACE AND LEGAL LIABILITY 49, 54 (1982).

75. Liability Convention, *supra* note 26, at 188.

76. See HURWITZ, *supra* note 12, at 10; JASENTULIYANA, *supra* note 9, at 324.

treaties generally work together.⁷⁷ When there is a conflict, however, the rules of treaty interpretation suggest that the Liability Convention supplants conflicting provisions in the Outer Space Treaty.⁷⁸ The impetus for drafting the Convention was primarily a concern for damage caused by space objects to individuals and property on Earth.⁷⁹ This focus, while understandably important, left the question of liability for damage in space unclear.⁸⁰

Understanding the liability regime for space must first start with understanding important terms used in space law. The Liability Convention establishes a claims process, which lays out a state may recover damages. Claims differ based on whether the incident happened in space or on Earth's surface. If liability attaches, the injured state is entitled to compensations. Launching states, however, can limit their liability or exonerate themselves completely if certain criteria are met.

1. Important Terminology

Before moving to what constitutes a claim under the Liability Convention, it is important to define certain terms used throughout. Space law has several important concepts on which the rest of the body of law is built.

Liability in space law is predicated on harm inflicted by a "space object."⁸¹ However, the Liability Convention inconveniently does a poor job laying out what exactly is a "space object."⁸² Under the Convention, a "space object includes component parts of a space object as well as its launch vehicle and parts thereof."⁸³ These "component parts" include anything normally regarded as components of a spacecraft; for example, cowlings from rockets, fuel tanks, an astronaut's glove, dropped

77. See DIEDERIKS-VERSCHOOR & KOPAL, *supra* note 1, at 147. *But see* HURWITZ, *supra* note 12, at 10 (noting that this is not true if all states involved are not party to both treaties).

78. This assumes that claims are brought between states party to both treaties. Vienna Convention on the Law of Treaties, art. 30(3), May 23, 1969, 1155 U.N.T.S. 331; Stanton Eigenbrodt, *Out to Launch: Private Remedies for Outer Space Claims*, 55 J. AIR L. & COM. 185, 193 (1989).

79. DeBusschere, *supra* note 8, at 100; Christopher D. Williams, *Space: The Cluttered Frontier*, 60 J. AIR L. & COM. 1139, 1157 (1995).

80. See HURWITZ, *supra* note 12, at 11; Williams, *supra* note 79, at 1157. *Cf.* REYNOLDS & MERGES, *supra* note 5, at 178 (explaining that the Liability Convention provides for liability where space objects are damaged elsewhere than on the surface of the earth).

81. Liability Convention, *supra* note 26, arts. II, III; HOWARD A. BAKER, SPACE DEBRIS: LEGAL AND POLICY IMPLICATIONS 62 (1989); DIEDERIKS-VERSCHOOR & KOPAL, *supra* note 1, at 37.

82. See CHENG, *supra* note 20, at 324-26.

83. Liability Convention, *supra* note 26, art. I(d) (internal quotation marks omitted).

wrenches, paint chips, and lost bolts.⁸⁴ Natural objects, such as meteorites, are not included in this definition.⁸⁵

It is unclear where the line is drawn between a launch vehicle space object and something else.⁸⁶ Must a space object be intended for space, or can it merely facilitate a launch? Are spacecraft built in orbit space objects? The Liability Convention leaves these questions unanswered.⁸⁷ Regardless of the definition, states cannot abandon a space object.⁸⁸ Article VIII of the Outer Space Treaty says that states "shall retain jurisdiction and control over such objects."⁸⁹

Who can make a claim is a vestige of the Westphalian system and is defined by the treaties. In most disputes, there will be two parties: the "claimant" state and the "launching" state. Each is defined relatively specifically in space law. Taking the claimant state first, there can be three possible states: (1) the state, or its natural person, suffering damage (natural state); (2) the state in which the damage occurred (territorial state); and (3) the state whose permanent residence suffered harm (state of permanent residence).⁹⁰ Under the second and third possibilities, a state makes a claim on behalf of an individual whose state did not choose to assert its rights⁹¹—befitting a victim-oriented regime.⁹² Although the Liability Convention seems to put claimant states in the hierarchy listed, a lower-ordered state is not prohibited from making a claim.⁹³ But, if no state chooses to advance an individual's claim, that individual has no recourse in international law.⁹⁴ However, to mitigate the negative effects of the state-centric system, the injured party may pursue a claim in municipal courts.⁹⁵

84. See DIEDERIKS-VERSCHOOR & KOPAL, *supra* note 1, at 9; HURWITZ, *supra* note 12, at 24-25; LYALL & LARSEN, *supra* note 15, at 86; Merges & Reynolds, *supra* note 11, at 10010.

85. BAKER, *supra* note 81, at 62; DIEDERIKS-VERSCHOOR & KOPAL, *supra* note 1, at 37.

86. See CHENG, *supra* note 20, at 325.

87. See *id.*; HURWITZ, *supra* note 12, at 23.

88. JASENTULIYANA, *supra* note 9, at 204-05; LYALL & LARSEN, *supra* note 15, at 67.

89. Outer Space Treaty, *supra* note 23, art. VIII.

90. Liability Convention, *supra* note 26, art. VIII. See also CHENG, *supra* note 20, at 307; LYALL & LARSEN, *supra* note 15, at 111. Consider this hypothetical: a Swiss national, legally residing in Colombia, is injured at a Kazakh spaceport by an American company's rocket. Three states may assert a claim for this individual: Switzerland, as his national state; Kazakhstan, as the state having territorial jurisdiction over the location of the injury; and Colombia, as his state of legal permanent residence.

91. Liability Convention, *supra* note 26, art. VIII; HURWITZ, *supra* note 12, at 49-50.

92. CHENG, *supra* note 20, at 307.

93. *Id.*

94. HURWITZ, *supra* note 12, at 50. See also *Barcelona Traction, Light & Power Co. (Belg. v. Spain)*, 1970 I.C.J. 3, ¶ 70 (Feb. 5); *Nottebohm Case (Liech. v. Guat.)*, 1955 I.C.J. 4, 13 (Apr. 6); MARK WESTON JANIS & JOHN E. NOYES, *INTERNATIONAL LAW CASES AND*

The launching state is more straightforward because the definitions in the Outer Space Treaty⁹⁶ and the Liability Convention⁹⁷ have been interpreted to mean the same thing.⁹⁸ There are four possible launching states: (1) the state that launches the space object; (2) the state that procures the launching; (3) the state from whose territory the launch happens; and (4) the state from whose facilities the launch happens.⁹⁹ These definitions work if a state successfully inserts a space object into outer space. If the launch fails, however, the state remains responsible.¹⁰⁰ Drafters had seen many failed launches, which is the most dangerous part of the process, and it would be unreasonable for a failed launch to vitiate liability. A technicality would not excuse liability for any damage.¹⁰¹

Because there can be multiple states responsible for damages, they are jointly and severally liable to the victim.¹⁰² "Joint and several" liability means that victims may pursue a claim against, and recover from any one culpable state, regardless of the culpability of other states.¹⁰³ Drafters contemplated two situations giving rise to joint and several liability:¹⁰⁴ (1) when damage is caused to a third party as a result of a collision between other states' space objects¹⁰⁵ and (2) when damage is caused by a space object with more than one launching state.¹⁰⁶ In these cases, the state paying damages may seek indemnification from the other jointly responsible state—although it is unclear how the liability is apportioned.¹⁰⁷

COMMENTARY 373 (4th ed. 2011) (explaining that individuals generally cannot assert claims under international law; that is the purview of states).

95. See Liability Convention, *supra* note 26, art. XI; HURWITZ, *supra* note 12, at 52.

96. Outer Space Treaty, *supra* note 23, art. VII.

97. Liability Convention, *supra* note 26, art. I(c).

98. See CHENG, *supra* note 20, at 309-10; LYALL & LARSEN, *supra* note 15, at 86.

99. See CHENG, *supra* note 20, at 309-10; DIEDERIKS-VERSCHOOR & KOPAL, *supra* note 1, at 35-36; LYALL & LARSEN, *supra* note 15, at 86.

100. Liability Convention, *supra* note 26, art. I(b); HURWITZ, *supra* note 12, at 20-21.

101. HURWITZ, *supra* note 12, at 20-21.

102. Liability Convention, *supra* note 26, arts. IV, V. See also CHENG, *supra* note 12, at 329; DIEDERIKS-VERSCHOOR & KOPAL, *supra* note 1, at 38; HURWITZ, *supra* note 12, at 37.

103. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 10 (2000). See also DIEDERIKS-VERSCHOOR & KOPAL, *supra* note 1, at 36; HURWITZ, *supra* note 12, at 37.

104. See CHENG, *supra* note 20, at 328-31; JASENTULIYANA, *supra* note 9, at 36.

105. Comm. on the Peaceful Uses of Outer Space, Legal Subcomm., 9th Sess., 149th mtg. at 83, U.N. Doc. A/AC.105/C.2/SR/132-51 (July 29, 1980). This was addressed by the Liability Convention, *supra* note 26, art. IV.

106. Comm. on the Peaceful Uses of Outer Space, Legal Subcomm. Rep. on its 9th Sess., June 8 – July 3, 1970, at 8, U.N. Doc. A/AC.105/85 (July 3, 1970). This was addressed by the Liability Convention, *supra* note 25, art. V.

107. See Liability Convention, *supra* note 26, art. V; HURWITZ, *supra* note 12, at 38.

2. Making a Claim

The Liability Convention is a tool for resolving international disputes.¹⁰⁸ Consequently, as an international tool based on the Westphalian system, only states may assert claims.¹⁰⁹ Unique to space law,¹¹⁰ however, is that a state is responsible for "national activities in outer space, regardless of whether . . . those activities are conducted by government or private entities."¹¹¹ Therefore, an injured private entity must petition its government to make a claim on its behalf.¹¹²

The space treaties encourage diplomatic solutions to disputes.¹¹³ The Outer Space Treaty calls on states to "undertake appropriate international consultations" before conducting activities that could potentially impact other states.¹¹⁴ Parties can also use dispute resolution mechanisms provided in other international organizations; for example, a dispute about spectrum allocation for space communication would be best resolved by the International Telecommunication Union.¹¹⁵ However, if there is no diplomatic solution within one year of the filing of a claim, then either state may request that a Claims Commission be formed.¹¹⁶ The process for initiating a claim¹¹⁷ and forming the Claims Commission¹¹⁸ is laid out in the Liability Convention, but the Commission operates like an arbitration tribunal.¹¹⁹ It renders an award based on international law that also takes "principles of justice and equity" into account.¹²⁰

108. The Liability Convention does not "apply to damage caused by a space object of a launching state to: (a) nationals of that state; [or] (b) foreign nationals" participating in the operation of that space object. Liability Convention, *supra* note 26, art. VII; *see also* CHENG, *supra* note 20, at 308.

109. *See* Liability Convention, *supra* note 26, art. VIII (describing how a state may make a claim); Eigenbrodt, *supra* note 78, at 196.

110. States traditionally bear no responsibility for the actions of nationals. *See* LYALL & LARSEN, *supra* note 15, at 66.

111. Williams, *supra* note 79, at 1153. *See* Outer Space Treaty, *supra* note 23, art. VI; IAN BROWNLIE, SYSTEM OF THE LAW OF NATIONS: STATE RESPONSIBILITY (PART I) 165-66 (1983); DIEDERIKS-VERSCHOOR & KOPAL, *supra* note 1, at 36.

112. *See* DIEDERIKS-VERSCHOOR & KOPAL, *supra* note 1, at 36, 107-08; JASENTULIYANA, *supra* note 9, at 325-26.

113. *See* DIEDERIKS-VERSCHOOR & KOPAL, *supra* note 1, at 40; JASENTULIYANA, *supra* note 9, at 220; LYALL & LARSEN, *supra* note 15, at 112.

114. *See* Outer Space Treaty, *supra* note 23, art. IX; JASENTULIYANA, *supra* note 9, at 218.

115. *See* JASENTULIYANA, *supra* note 9, at 216-17.

116. *See* Liability Convention, *supra* note 26, art. XIV; LYALL & LARSEN, *supra* note 15, at 112.

117. *See* Liability Convention, *supra* note 26, arts. VIII-X.

118. *See id.* arts. XV-XX.

119. *See id.* art. XII; LYALL & LARSEN, *supra* note 15, at 112; Eigenbrodt, *supra* note 78, at 198-99.

120. Liability Convention, *supra* note 26, art. XII. *See also* LYALL & LARSEN, *supra* note 15, at 113.

However, awards are “recommendatory” unless the parties agree to be bound by them.¹²¹

If a party needs more certainty than the Liability Convention’s claims process can provide, the treaty structure allows injured parties to assert claims in other venues.¹²² Injured parties do not need to exhaust municipal remedies before asserting a claim under the Liability Convention, although they may not simultaneously pursue a claim in multiple venues.¹²³ This is consistent with the Liability Convention’s victim-oriented approach.¹²⁴

3. Location Matters: The Different Liability Schemes

The extent to which a state is responsible for damage depends on where the damage occurred. If the damage was done on the Earth’s surface or in airspace, a state is held absolutely liable for damage.¹²⁵ If damage is done in outer space, including on celestial bodies, the state is liable under a fault-based regime.¹²⁶

i. Earth-based Damage

If a space object causes damage “on the surface of the earth or to aircraft in flight,” the launching state is absolutely liable for damage.¹²⁷ Article II of the Liability Convention addresses the drafters’ concern for damage done on Earth’s surface—the standard is clear and responsibility is relatively easy to determine.¹²⁸ Additionally, the absolute liability standard reflects the ultra-hazardous nature of space activities.¹²⁹ This doctrine of “dangerous things” properly puts the burden of ensuring safety on the launching state because of the complex nature of launches, the difficulty third parties have avoiding a launched

121. See Liability Convention, *supra* note 26, art. XIX(2); DIEDERIKS-VERSCHOOR & KOPAL, *supra* note 1, at 40-41.

122. For example, the injured party can use dispute resolution mechanisms provided in other treaties, arbitration, or domestic courts. See Liability Convention, *supra* note 26, arts. IX, XI; JASENTULIYANA, *supra* note 9, at 216-17; HURWITZ, *supra* note 12, at 75.

123. See Liability Convention, *supra* note 26, art. XI(1); HURWITZ, *supra* note 12, at 52.

124. See HURWITZ, *supra* note 12, at 10, 84 n.19, 207; Bosco, *supra* note 41, at 617.

125. Liability Convention, *supra* note 26, art. II.

126. *Id.* art. III.

127. *Id.* art. II.

128. See DeBusschere, *supra* note 8, at 100; Williams, *supra* note 79, at 1157. Cf. REYNOLDS & MERGES, *supra* note 5, at 49 (explaining that negotiators did not know what to expect from space activities; therefore, planning a legal regime to govern unexpected events could lead to incomplete law).

129. See DIEDERIKS-VERSCHOOR & KOPAL, *supra* note 1, at 37; JASENTULIYANA, *supra* note 9, at 35 n.40; LYALL & LARSEN, *supra* note 15, at 108; Ginsburg, *supra* note 43, at 516.

space object, and because the launching state can best control the circumstances surrounding launch.¹³⁰

ii. Space-based Damage

If damage, however, occurs "elsewhere than on the surface of the earth to a space object," the launching state is liable only if the damage is the state's fault.¹³¹ Fault-based liability places the burden on states to avoid collisions in orbit.¹³² This assumes states have a mutual interest in protecting their space assets as well as the technological capability to take preventative measures.¹³³ Some satellites, however, cannot perform collision avoidance maneuvers and others are too small to easily track.¹³⁴ Unlike the doctrine of "dangerous things," the risks are potentially easier to control in space. Although some space objects can neither be tracked nor moved, states are more likely to be able to avoid damage.¹³⁵ To establish liability through space law, a claimant must show (1) that the space object belongs to the responsible state and (2) the damage was "caused by" that space object.¹³⁶

4. Fault and Causation

First, the space object must be attributable to a particular launching state, which requires that the space object be identified.¹³⁷ But the Liability Convention does not provide a method to identify the state responsible for the errant space object.¹³⁸ The Registration Convention, however, is part of the legal structure that facilitates the finding of fault by requiring states to register their space objects so that the objects can be identified later, should a collision occur.¹³⁹ However, neither the Outer Space Treaty nor the Liability Convention base liability on whether a space objects listed in the registry.¹⁴⁰ Assuming the space object causing the damage is identified and the launching

130. See DIEDERIKS-VERSCHOOR & KOPAL, *supra* note 1, at 37; HURWITZ, *supra* note 12, at 28, 30; LYALL & LARSEN, *supra* note 15, at 108.

131. Liability Convention, *supra* note 26, art. III.

132. See HURWITZ, *supra* note 12, at 34.

133. *Id.*

134. See LYALL & LARSEN, *supra* note 15, at 297.

135. See HURWITZ, *supra* note 12, at 34.

136. See JASENTULIYANA, *supra* note 9, at 202.

137. See Outer Space Treaty, *supra* note 23, art. VIII (stating that space objects remain under the jurisdiction and control of the launching state).

138. JASENTULIYANA, *supra* note 9, at 326.

139. See Registration Convention, *supra* note 29, art. IV; DIEDERIKS-VERSCHOOR & KOPAL, *supra* note 1, at 44-45; Ginsburg, *supra* note 43, at 544.

140. DIEDERIKS-VERSCHOOR & KOPAL, *supra* note 1, at 46; JASENTULIYANA, *supra* note 9, at 326-27.

state is at fault, it is then responsible for the damage. If there is no fault, liability does not attach.¹⁴¹

Proposals to include a broad definition of damage, however, were rebuffed.¹⁴² Some scholars argue it is improper to read liability for indirect damages into the treaties because indirect damages are not tied directly to the event creating liability.¹⁴³

However, identifying the launching state of a space object is extremely difficult.¹⁴⁴ First, these international space registries are neither up to date nor consolidated.¹⁴⁵ States often fail to register older space objects or smaller component parts.¹⁴⁶ Second, some space objects are extremely small and cannot be tracked.¹⁴⁷ Debris or trash, for example, is often far too small to track. Yet, as with the Space Shuttle Challenger's windshield, tiny debris can cause significant damage, especially to astronauts on spacewalks.¹⁴⁸ If the party responsible for damage cannot be identified, liability cannot be assigned.¹⁴⁹

After the responsible state has been identified, the state must then be found liable for causing the damage. The problem with the space law liability regime is that there is no standard of care against which a state's conduct can be measured.¹⁵⁰ This is a fundamental flaw in the Liability Convention¹⁵¹ because fault cannot be measured without the yardstick of standard of care.¹⁵² Several theories, however, have been put forward.¹⁵³

One proposal suggests that fault should be based on a state's objective intent because liability for a breach merely restates

141. See HURWITZ, *supra* note 12, at 36; DeBusschere, *supra* note 7, at 102-03.

142. Aldo Armando Cocca, *From Full Compensation to Total Responsibility*, 27 COLLOQUIUM ON L. OF OUTER SPACE 157, 158 (1984).

143. See, e.g., Edward R. Finch, Jr., *Outer Space Liability: Past, Present, and Future*, 14 INT'L LAW. 123, 126 (1980).

144. Williams, *supra* note 79, at 1158.

145. See LYALL & LARSEN, *supra* note 15, at 89.

146. See JASENTULIYANA, *supra* note 9, at 327.

147. See Merges & Reynolds, *supra* note 11, at 10010.

148. BAKER, *supra* note 81, at 11.

149. See HURWITZ, *supra* note 12, at 36.

150. See BAKER, *supra* note 81, at 84; JASENTULIYANA, *supra* note 9, at 323; Williams, *supra* note 79, at 1159-60.

151. See BAKER, *supra* note 81, at 84; Williams, *supra* note 79, at 1159-60.

152. See Robert F. Stamps, *Orbital Debris: An International Agreement is Needed*, 32 COLLOQUIUM ON L. OF OUTER SPACE 152, 154 (1990) ("In order to establish whether a State is at fault for a collision . . . there must first be an accepted standard of care for traffic in outer space, and a breach of that standard of care.").

153. For example, Nandasiri Jasentuliyana, the Director of the United Nation's Office for Outer Space Affairs and President of the International Institute of Space Law, has called for an expert panel to develop appropriate standards for space activities. See JASENTULIYANA, *supra* note 9, at 208.

international law.¹⁵⁴ If fault attached at an objective breach of international law, a state would be free to act however it wanted to, unless there is an international law prohibiting the act.¹⁵⁵ The "reasonableness" of a state's action, on the other hand, is predicated on the foreseeability of the damage.¹⁵⁶ Given the difficulty of tracking satellites and the environmental uncertainties in space, it is difficult to foresee all circumstances when a space object can be damaged.¹⁵⁷ As it stands now, adjudicators will have to find analogies in other areas of international law and municipal law to determine the appropriate standard of care.¹⁵⁸

Another argument, however, centers on causation. In order for fault to attach, there must be a causal connection between a state's action and the damage suffered.¹⁵⁹ Scholars argue the "caused by" language in the Liability Convention merely requires a connection between the accident and the damage.¹⁶⁰ This conforms with the liability structure laid out by the German American Mixed Claims Commission after World War I. Under international law "it matters not how many links there may be in the chain of causation . . . provided there is no break in the chain" and the loss can be traced "link by link" to the wrongful action.¹⁶¹ Allowing causation to flow through a series of related links from the initial proximate cause is befitting a victim-oriented recovery regime.¹⁶²

Another model comes from the Permanent Court of Arbitration. In 2011, the Court created Optional Rules for Disputes Relating to Outer Space Activities, which parties may use to resolve outer space disputes.¹⁶³ Article 27 establishes that each party has the burden of

154. See BROWNLIE, *supra* note 111, at 38-40.

155. See S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 44 (Sept. 7); see also Ginsburg, *supra* note 43, at 537.

156. See CARL Q. CHRISTOL, MODERN INTERNATIONAL LAW OF OUTER SPACE 96 (1982).

157. Cf. S.E. Doyle, *Reentering Space Objects: Facts and Fiction*, 6 J. SPACE L. 107, 110 (1978) (describing the inherent difficulties in predicting a dead satellite's trajectory).

158. See FORKOSCH, *supra* note 74, at 81; JASENTULIYANA, *supra* note 9, at 208.

159. Carl Q. Christol, *International Liability for Damage Caused by Space Objects*, 74 AM. J. INT'L L. 346, 361 (1980).

160. CHRISTOL, *supra* note 156, at 97.

161. Administrative Decision No. II (U.S. v. Ger.), 7 R.I.A.A. 23, 29-30 (Ger.-U.S. Mixed Claims Comm'n 1923), available at http://untreaty.un.org/cod/riaa/cases/vol_VII/23-32.pdf.

162. See Christol, *supra* note 159, at 351.

163. PCA *Adopts New Rules of Procedure*, PERMANENT CT. OF ARB. (Dec. 6, 2011), http://www.pca-cpa.org/shownews.asp?nws_id=323&pag_id=1261&ac=view.

proving their own claims.¹⁶⁴ This requirement grants tribunals “broad discretion” to determine claims “in light of justice and equity.”¹⁶⁵

5. Compensation

Space law operates under the principle of full, restorative compensation.¹⁶⁶ Article XII of the Liability Convention declares that compensation will be determined according to international law and principles of justice and equity.¹⁶⁷ The reparation will restore the damaged person, entity, or state “to the condition which would have existed if the damage had not occurred.”¹⁶⁸ This article reiterates¹⁶⁹ the rule of customary international law articulated in the *Chorzow Factory* case.¹⁷⁰

The nature and extent of recoverable damages, however, has not been precisely determined. Direct damage is recoverable.¹⁷¹ However, indirect damage—lost profit or mental suffering—is not expressly mentioned in the Convention.¹⁷² Some argue that indirect damages can be recovered through proximate causation.¹⁷³ International tribunals and agreements have allowed indirect damages, so long as the damage can be attributed to the state’s wrongful act.¹⁷⁴ Others, however, note that it is best to use a direct damage model because the connection between the wrongful act and the indirect damage is often too tenuous.¹⁷⁵ Additionally, the Liability Convention provides no clear guidance and a staggering amount of indirect damage could potentially be attributed to a state.¹⁷⁶ For example, in 2005, Canada expressed

164. Permanent Court of Arbitration, *OPTIONAL RULES FOR ARBITRATION OF DISPUTES RELATING TO OUTER SPACE ACTIVITIES*, art. 27, available at http://www.pca-cpa.org/showfile.asp?fil_id=1774.

165. Christol, *supra* note 159, at 361.

166. See Ginsburg, *supra* note 43, at 540-41.

167. Liability Convention, *supra* note 26, art. XII.

168. *Id.*

169. See DIEDERIKS-VERSCHOOR & KOPAL, *supra* note 1, at 38-39; Eigenbrodt, *supra* note 78, at 194-95.

170. Chorzow Factory Case (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17, at 47 (Sept. 13) (“[R]eparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.”).

171. See DIEDERIKS-VERSCHOOR & KOPAL, *supra* note 1, at 38-9; HURWITZ, *supra* note 12, at 13-14.

172. See HURWITZ, *supra* note 12, at 12-14; REYNOLDS & MERGES, *supra* note 5, at 188.

173. See CHENG, *supra* note 20, at 323. This includes “loss of profits, interruption of business activities, reasonable costs for repairs or medical expenses, loss of services of a third party, or other damages.” See Ginsburg, *supra* note 43, at 539-40.

174. See, e.g., Trail Smelter Arbitration (U.S. v. Can.), 3 R.I.A.A. 1905 (Trail Smelter Arb. Trib., 1938 & 1941). See also HURWITZ, *supra* note 12, at 16-18.

175. See HURWITZ, *supra* note 12, at 16.

176. DIEDERIKS-VERSCHOOR & KOPAL, *supra* note 1, at 38-39; Eigenbrodt, *supra* note 78, at 195 (explaining that, while indirect damages are recoverable in the United States,

concern that a Titan IV rocket booster launched from Cape Canaveral would fall near an oil platform in Newfoundland. Evacuating the platform would have been an arduous process, costing \$250 million. If the spent booster did not hit the platform, the Liability Convention would not apply. If, however, the booster hit the platform, it is unclear whether Canada could claim lost profits. The uncertainty of what constitutes damages under the space liability regime counsels parties seeking more certainty to resort to municipal law.¹⁷⁷

6. Limiting Liability and Exoneration

The Liability Convention generally does not allow parties to exonerate themselves from properly attributed absolute liability.¹⁷⁸ Although this situation has yet to arise, the Liability Convention allows a state to reduce its liability when the injured state acted recklessly and contributed to the damage.¹⁷⁹ In order to exonerate itself from absolute liability, the launching state must show that the damage "resulted either wholly or partially from gross negligence or from an act or omission done with the intent to cause damage on the part of the claimant State."¹⁸⁰ This blurs the line between absolute and fault-based liability by allowing the launching state to reduce its liability because of the claimant's negligence.¹⁸¹ However, this exemption is tempered by Article VI(2), which forbids exoneration if the launching state acted contrary to international law.¹⁸² These rare situations where a state can limit its liability again reflect the Liability Convention's victim-oriented recovery scheme.¹⁸³

III. SPACE LAW LIABILITY V. INTERNATIONAL LAW LIABILITY

Space law, unlike space objects, does not operate in a vacuum. The space treaties are not universally accepted and the nuances of liability claims have not become customary international law binding on all states. Nor do they address every dispute that may arise in outer space. The space treaties, however, added to an already established

the Soviet Union measured damages based on "societal costs such as hospitalization, schools, and State pensions rather than personal loss.").

177. See Eigenbrodt, *supra* note 78, at 196; Ginsburg, *supra* note 43, at 540.

178. Liability Convention, *supra* note 26, art. VI. See DIEDERIKS-VERSCHOOR & KOPAL, *supra* note 1, at 38; LYALL & LARSEN, *supra* note 32, at 110.

179. Liability Convention, *supra* note 26, art. VI; DIEDERIKS-VERSCHOOR & KOPAL, *supra* note 1, at 38; FORKOSCH, *supra* note 74, at 81; HURWITZ, *supra* note 11, at 40.

180. Liability Convention, *supra* note 26, art. VI(1); DIEDERIKS-VERSCHOOR & KOPAL, *supra* note 1, at 38.

181. HURWITZ, *supra* note 12, at 41.

182. Liability Convention, *supra* note 26, art. VI(2) (mentioning specifically the United Nations Charter and the Outer Space Treaty as sources of international law). See DIEDERIKS-VERSCHOOR & KOPAL, *supra* note 1, at 38.

183. See HURWITZ, *supra* note 12, at 40; Bosco, *supra* note 41, at 617.

framework for solving international disputes. In this sense, the space treaties are built on top of the more established, yet less precise, Westphalian state system.

This section outlines the general international law on state responsibility and international liability, which fill the gaps left by the space liability regime. It then discusses the major difference between the general international law and space law liability regimes. Finally, the section tries to answer the question of which regime states should use.

A. *Liability Under International Law*

There are two different concepts governing restitution for injury to other states: state responsibility and international liability. Both deal with compensating the victim for harm, but they are triggered in different ways. Unfortunately, the concepts of responsibility and liability have often been confused and switched.¹⁸⁴ When the International Law Commission (ILC) debated state responsibility, they discussed “[i]nternational liability for injurious consequences arising out of acts not prohibited by international law.”¹⁸⁵ This, as Brownlie points out, was inappropriate because state responsibility deals only with wrongful acts.¹⁸⁶ The ILC, however, did not resolve this confusion until 2001.¹⁸⁷ Consequently, the space treaties seemingly use “liability” and “responsibility” interchangeably.¹⁸⁸ This confusion is exacerbated because French and Spanish, two official languages of the United Nations, use the same word to describe both concepts.¹⁸⁹

The simplest way to distinguish these concepts is to note that state responsibility arises due to a breach of an international obligation. International liability, on the other hand, arises when one state harms another; no breach of a duty is necessary. State responsibility is tied to a wrongful act of state; liability is triggered by harm.

184. See Frans G. von der Dunk, *Liability Versus Responsibility in Space Law: Misconception or Misconstruction?*, in 34 COLLOQUIUM ON THE L. OF OUTER SPACE 363, 363 (1991).

185. BROWNIE, *supra* note 111, at 49 (internal quotation marks omitted).

186. See *id.* at 49-50.

187. See JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY 75-76 (2002).

188. See BROWNIE, *supra* note 111, at 50; HURWITZ, *supra* note 12, at 148-49; von der Dunk, *supra* note 184, at 363.

189. See HURWITZ, *supra* note 12, at 148; von der Dunk, *supra* note 184, at 363. French and Spanish, both official United Nations languages, use “responsabilité” and “responsabilidad,” respectively, to capture the idea of state responsibility and international liability.

1. State Responsibility

State responsibility is a law of obligations.¹⁹⁰ It holds states responsible for "internationally wrongful acts" done against another state or its citizens.¹⁹¹ This allows an injured state to protect its citizens from abuses by other states.¹⁹² In order for state responsibility to arise, the responsible state must commit an internationally wrongful act that is properly attributable to the breaching state.¹⁹³ An internationally wrongful act is either an act or omission attributable to a state under international law or a breach of a state's international obligation.¹⁹⁴

An act is attributable to a state only if the act was committed by the state or has the state's authorization.¹⁹⁵ Private acts are almost never attributable to states.¹⁹⁶

The breach of an international duty, properly attributed to a state, triggers the secondary obligation to make reparations for injury caused by the breach.¹⁹⁷ Reparation follows the *Chorzow* principle,¹⁹⁸ which seeks to wipe away the harm caused by the responsible state.¹⁹⁹ Reparation can, theoretically, be made in three ways: first, as state can undo the wrong that caused the injury;²⁰⁰ if that is not possible, monetary compensation is an acceptable substitute;²⁰¹ finally, if the harm is non-monetary, satisfying the injured party by way of apology or official recognition will count as reparation.²⁰²

190. See CRAWFORD, *supra* note 187, at 77; Sompong Sucharitkul, *State Responsibility and International Liability Under International Law*, 18 LOY. L.A. INT'L & COMP. L.J. 821, 828 (1996); von der Dunk, *supra* note 184, at 363.

191. See BROWNIE, *supra* note 111, at 23; von der Dunk, *supra* note 184, at 363.

192. See Sucharitkul, *supra* note 190, at 823.

193. See BROWNIE, *supra* note 111, at 36; CRAWFORD, *supra* note 187, at 81; von der Dunk, *supra* note 184, at 363.

194. See United States Diplomatic and Consular Staff in Tehran, Judgment (U.S. v. Iran), 1980 I.C.J. Rep. 3, ¶¶ 61-68 (May 24) (holding that states can incur responsibility for an individual's acts if the state fails to exercise "due care" in preventing private acts that breach an international obligation); BROWNIE, *supra* 111, at 30; CRAWFORD, *supra* note 187, at 81; von der Dunk, *supra* note 184, at 363-64.

195. See United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. Rep. 3, ¶ 80; BROWNIE, *supra* note 111, at 36; CRAWFORD, *supra* note 187, at 94, 100; von der Dunk, *supra* note 184, at 364.

196. BROWNIE, *supra* note 111, at 165; von der Dunk, *supra* note 184, at 364.

197. CRAWFORD, *supra* note 187, at 201; Sucharitkul, *supra* note 190, at 825.

198. CRAWFORD, *supra* note 187, at 201-02; von der Dunk, *supra* note 184, at 364.

199. Factory at Chorzow (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17, at 29 (Sept. 13).

200. BROWNIE, *supra* note 111, at 210-12; von der Dunk, *supra* note 184, at 364.

201. BROWNIE, *supra* note 111, at 222-24; von der Dunk, *supra* note 184, at 364.

202. BROWNIE, *supra* note 111, at 208-09; von der Dunk, *supra* note 184, at 364.

2. International Liability

International liability arises when a state injures an entity beyond its jurisdiction through an act that is not internationally wrongful.²⁰³ This rule is an offshoot of state responsibility,²⁰⁴ which forbids states from actively harming their neighbors and requires states to prevent harm in neighboring territories.²⁰⁵ States are required to exercise “due care” to prevent such harm.²⁰⁶ This standard, however, is poorly defined and rings hollow because it is not adequately defined.²⁰⁷ The ILC, when debating international liability, did not address the standard of care and tied liability to harm; therefore, if harm occurs, the duty has been violated.²⁰⁸ Therefore, a state can be liable for acts that are, subjectively, not its fault.²⁰⁹

If a state is held liable for damage, it must pay compensation for that damage.²¹⁰ This differs from state responsibility’s “reparation” because compensation merely requires that the liability be removed by repairing the damage—there is no requirement to put the individual in the same place he would be had the harm not occurred and no punitive damages.²¹¹ Holding a wrongdoer responsible for harm inflicted, however, is ultimately a good thing because it deters states from acting in a way that could harm another state.

B. Distinctions Between Space and Standard Liability

International law provides a general scheme for recovering for an international wrong. The space liability regime was built on top of this structure. Both, however, are products of a state-centric regime. The Soviet Union, for example, thought the international legal structure in place was sufficient to govern space activities. Drafters, however, decided a specific regime would better serve the needs of states in space. State responsibility and international liability, however, still linger in the background to fill gaps left by the space treaties.

203. See CRAWFORD, *supra* note 187, at 75-76; Sucharitkul, *supra* note 190, at 828.

204. See HURWITZ, *supra* note 12, at 149; Special Rapporteur, *Preliminary Report on the International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law*, ¶¶ 19-21, U.N. Doc. A/CN.4/344 (1980).

205. See, e.g., Trail Smelter Arbitration (U.S. v. Can.), 3 R.I.A.A. 1938, 1963-65 (Trail Smelter Arb. Trib. 1938 & 1941); Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4, 22 (Apr. 9).

206. HURWITZ, *supra* note 12, at 147; von der Dunk, *supra* note 184, at 365.

207. See BROWNLIE, *supra* note 111, at 49-50.

208. See HURWITZ, *supra* note 12, at 151; von der Dunk, *supra* note 184, at 365.

209. See von der Dunk, *supra* note 184, at 365.

210. *Id.* at 364.

211. N.L.J.T. Horbach, *The Confusion About State Responsibility and International Liability*, 4 LEIDEN J. INT'L L. 47, 51-53 (1991); von der Dunk, *supra* note 184, at 364.

Adapting to the needs of space, the liability regime crafted by the Outer Space Treaty and the Liability Convention is different in two important ways.²¹²

First, under international space law, states are responsible for the actions of their nationals.²¹³ The standard state-centric international law regime does not usually hold states responsible for their nationals.²¹⁴ This unique requirement, however, is logical when considering the nature of what space law is trying to regulate. Space activities are inherently dangerous.²¹⁵ Because of this, and the state-centric nature of international law, states regulate private national actors.²¹⁶ Additionally, this liability scheme should be considered in the light of the times when it was drafted. When scholars began addressing space liability in the late 1950s, private space actors were not on the drafters' minds.²¹⁷

Second, a state need not exhaust all domestic remedies before asserting a claim under the Liability Convention.²¹⁸ Traditional international law, on the contrary, requires that a party exhaust all domestic remedies before resorting to an international tribunal.²¹⁹ In space law, a claimant state can elect to pursue claims in the launching state's municipal courts.²²⁰ However, the claimant cannot seek "double damages" by trying to recover damages for the same harm in different tribunals.²²¹ This suggests that, although a claimant may try to recover in multiple venues, it could not pursue parallel claims.²²²

C. Which Regime Governs Space Claims?

States potentially have four avenues to pursue a claim for damages in space: (1) the Liability Convention, (2) the Outer Space Treaty, (3)

212. LYALL & LARSEN, *supra* note 15, at 111.

213. Outer Space Treaty, *supra* note 23, art. VI; DIEDERIKS-VERSCHOOR & KOPAL, *supra* note 1, at 36; Williams, *supra* note 79, at 1153.

214. BROWNLIE, *supra* note 111, at 165; LYALL & LARSEN, *supra* note 15, at 66.

215. DIEDERIKS-VERSCHOOR & KOPAL, *supra* note 1, at 37; JASENTULIYANA, *supra* note 9, at 35 n.40; LYALL & LARSEN, *supra* note 15, at 108; Ginsburg, *supra* note 43, at 516.

216. *E.g.*, Commercial Space Launch Act, 51 U.S.C. § 50901(a)(7) (2010); *see* JASENTULIYANA, *supra* note 9, at 404-05; LYALL & LARSEN, *supra* note 15, at 104-05; *see also* Ginsburg, *supra* note 43, at 528-32 (discussing the development of U.S. space law and the processes for holding private actors responsible).

217. *See* REYNOLDS & MERGES, *supra* note 5, at 49-50; DeBusschere, *supra* note 8, at 103.

218. Liability Convention, *supra* note 26, art. XI(1); HURWITZ, *supra* note 12, at 52.

219. LYALL & LARSEN, *supra* note 15, at 111.

220. Liability Convention, *supra* note 26, art. XI(2); *see* LYALL & LARSEN, *supra* note 15, at 111.

221. *See* LYALL & LARSEN, *supra* note 15, at 111.

222. *See id.*

standard recovery proceedings under international law, and (4) municipal courts.²²³ Which regime, therefore, governs?

There is no requirement that states resolve disputes through the space treaties.²²⁴ Some scholars argue that because the Outer Space Treaty and the Liability Convention are *lex specialis* developed to deal exclusively with space liability claims, those treaties should provide the only remedy for claims for damage by space objects.²²⁵ The International Law Commission's Articles on State Responsibility suggest a specialized regime of international law controls as to the exclusion of general international law.²²⁶ This rationale makes sense, given the space liability regime addresses unique situations in space.

This argument, however, disregards the cooperative nature of space law. The space treaties do not preclude parties from using other venues²²⁷ and, in fact, encourage diplomatic solutions to disputes.²²⁸ Only after diplomacy fails does the Claim Commission process begin.²²⁹ Because only states may bring a claim under the space liability regime,²³⁰ having other avenues for relief recognizes the weaknesses in the Westphalian system and promotes the victim-oriented nature of space liability by allowing a non-state victim to recover even if the state elects not to make a Liability Convention claim.²³¹ Therefore, it is best to permit victims to use any of the four recovery avenues.

IV. SPACE LIABILITY IN PRACTICE

De-orbiting space debris is no longer a rare occurrence. Fortunately, given the vastness of the oceans, most detritus falls harmlessly into the seas.²³² In 1979, the United States had a close call when Skylab fell remarkably close to Esperance, a small town eastern Australia.²³³ Anticipating damages and in accordance with treaty requirements, NASA prepared to respond to damage claims; however, it

223. See *id.* at 66-67.

224. HURWITZ, *supra* note 12, at 75; cf. DIEDERIKS-VERSCHOOR & KOPAL, *supra* note 1, at 147.

225. See CRAWFORD, *supra* note 187, at 306-08; Eigenbrodt, *supra* note 78, at 201.

226. See CRAWFORD, *supra* note 187, at 306.

227. See Liability Convention, *supra* note 26, arts. IX, XI; JASENTULIYANA, *supra* note 9, at 216-17; HURWITZ, *supra* note 12, at 75; LYALL & LARSEN, *supra* note 15, at 111.

228. See Liability Convention, *supra* note 26, art. XIV ("If no settlement of a claim is arrived at through diplomatic negotiations as provided in Article IX . . ."); DIEDERIKS-VERSCHOOR & KOPAL, *supra* note 1, at 40; JASENTULIYANA, *supra* note 9, at 220; LYALL & LARSEN, *supra* note 15, at 112.

229. See Liability Convention, *supra* note 26, art. XIV.

230. See *id.* art. VIII (describing how a *state* may make a claim); Eigenbrodt, *supra* note 78, at 196.

231. See HURWITZ, *supra* note 12, at 10, 207; Bosco, *supra* note 41, at 617.

232. See LYALL & LARSEN, *supra* note 15, at 117.

233. *Id.*

received none.²³⁴ The closest "liability" was a light-hearted A\$400 fine for littering issued by a small Australian town.²³⁵ However, as the skies become more crowded, debris will become more of a danger and the Liability Convention will no doubt be put to the test.²³⁶

A. *Liability Convention Claim: Cosmos 954*

The Liability Convention has been used, officially, only once. On January 23, 1978, the Soviet Union's Cosmos 954 satellite fell from orbit and crashed into a remote area of northwestern Canada.²³⁷ The satellite's nuclear power source used 65 kilograms of radioactive material, which survived reentry and scattered over the crash area. Canada conducted a massive clean-up operation that swept 124,000 square kilometers for radioactive material.²³⁸ Although the Soviet Union offered to assist the clean-up, Canada refused assistance and later submitted a claim to recover clean-up and recovery costs using the Liability Convention and general international law.²³⁹ Couching the demand in Article II terms, Canada invoked the Soviet Union's responsibility as the launching state to compensate harm incurred.²⁴⁰

The process began diplomatically, as the Liability Convention intends.²⁴¹ The two states fought over the amount of compensation and mitigating circumstances, but eventually reached an agreement in 1981.²⁴² The Soviet Union paid Canada C\$3,000,000 as a "full and final settlement."²⁴³ This agreement, however, did not acknowledge Soviet liability.²⁴⁴

Staunch advocates of a separate, clear space liability regime would not be happy with this result. The Liability Convention provides the

234. *Id.*

235. The United States government, incidentally, never paid the fine. Ian O'Neill, *Celebrating July 13, "Skylab-Esperance Day"*, DISCOVERY NEWS, July 14, 2009, <http://news.discovery.com/space/celebrating-july-13-skylab-esperance-day.html>.

236. See DIEDERIKS-VERSCHOOR & KOPAL, *supra* note 1, at 141; Merges & Reynolds, *supra* note 11, at 10010.

237. Eigenbrodt, *supra* note 78, at 200.

238. Ginsburg, *supra* note 43, at 546-47.

239. See Canada's Claim Against the Union of Soviet Socialist Republics for Damage Caused by Soviet Cosmos 954, Annex A, ¶¶ 14-20, Jan. 23, 1979, 18 I.L.M. 899 [hereinafter Canada Claim]; Ginsburg, *supra* note 43, at 547.

240. See Canada Claim, *supra* note 239, Annex A, ¶ 14; Ginsburg, *supra* note 43, at 548.

241. See Canada Claim, *supra* note 239, Annex A, ¶¶ 4-12; Ginsburg, *supra* note 43, at 548.

242. See DIEDERIKS-VERSCHOOR & KOPAL, *supra* note 1, at 42; Ginsburg, *supra* note 43, at 548.

243. Protocol on Settlement of Canada's Claim for Damages Caused by "Cosmos 954", Can.-U.S.S.R., art. 2 Apr. 2, 1981, 20 I.L.M. 689 [hereinafter Cosmos Protocol]. See Ginsburg, *supra* note 43, at 548-49.

244. See Cosmos Protocol, *supra* note 243, art. 1; Eigenbrodt, *supra* note 78, at 200.

framework for initiating the claims process, but the parties did not follow the Convention's one-year claims initiation process.²⁴⁵ Because the Claims Commission was not activated, there were no mechanisms that facilitated recovery; Canada had to actively pursue relief, which some argue is contrary to the purpose of having a liability separate regime.²⁴⁶ However, international space law does not provide a clear process for prosecuting a space liability claims. The treaties merely provide guidance on how claims should be made and what a state is potentially responsible for. International cooperation, emphasized by the Article IX requirement that claims be submitted through diplomatic channels, was upheld.²⁴⁷ In the end, this dispute was solved; the Soviet Union compensated Canada for the harm incurred.²⁴⁸ Even though the process was not exact, the Liability Convention served its purpose by facilitating negotiations that led to a solution.²⁴⁹

CONCLUSION: THE RISE OF THE PRIVATE SPACE ACTOR

Space science constantly advances; ideas unimagined in 1967 are now feasible, which create unanticipated issues not addressed by the treaties. This will challenge the Westphalian underpinnings of international space law. For example, there are no treaty provisions specifically addressing commercial ventures.²⁵⁰ Space tourism is just over the horizon²⁵¹ and, now that the Space Shuttle is retired, NASA will rely on other states and the private sector for launch capabilities.²⁵² Questions of liability, insurance, and regulation are just a few issues that need to be resolved.²⁵³ Problems like debris removal in orbit demonstrate the lack of enforceable legal obligations.²⁵⁴

The current space liability regime was based on a state-centric model and designed for a world where outer space was dominated by the United States and the Soviet Union.²⁵⁵ The treaties made states

245. See DIEDERIKS-VERSCHOOR & KOPAL, *supra* note 1, at 42; Eigenbrodt, *supra* note 78, 201-02.

246. See FORKOSCH, *supra* note 74, at 12-13 (decrying the Liability Convention for promoting a "self-help" regime).

247. See Liability Convention, *supra* note 26, art. IX; DIEDERIKS-VERSCHOOR & KOPAL, *supra* note 1, at 42.

248. See Cosmos Protocol, *supra* note 243, art. I-II; DIEDERIKS-VERSCHOOR & KOPAL, *supra* note 1, at 42.

249. See Eigenbrodt, *supra* note 78, at 202.

250. Hertzfeld, *supra* note 30, at 330.

251. Tiffany Gabbay, *Richard Branson Wants to Take You into Outer Space*, BUSINESS INSIDER (July 5, 2011), http://articles.businessinsider.com/2011-07-05/lifestyle/30023363_1_space-travel-zero-gravity-spaceport.

252. See DIEDERIKS-VERSCHOOR & KOPAL, *supra* note 1, at 121; Klotz, *supra* note 9.

253. See DIEDERIKS-VERSCHOOR & KOPAL, *supra* note 1, at 121-22; Hertzfeld, *supra* note 30, at 330.

254. See Goh, *supra* note 58, at 737; Merges & Reynolds, *supra* note 11, at 10010.

255. See Debusschere, *supra* note 8, at 103.

responsible for damage because states had deep enough coffers to pay the extraordinary costs for a space-related disaster.²⁵⁶ Today, however, outer space is increasingly crowded with other states and many private actors.²⁵⁷ States are still jointly and severally liable for satellite networks owned and operated by multinational corporations.²⁵⁸ The state-centric regime is increasingly unworkable for private entities. While more accessible for companies, general international law principles do not provide the accessibility commercial ventures need.

Because of this, states are beginning to actively support commercial space ventures. Many states require private companies to secure insurance to protect both the company and the state from liability.²⁵⁹ The United States' Commercial Space Launch Act, for example, requires commercial ventures to obtain liability insurance.²⁶⁰ If the statutorily mandated insurance coverage is unavailable, the "maximum liability insurance available on the world market at a reasonable cost" is sufficient.²⁶¹ Liability insurance for space activities, however, is always expensive and sometimes cannot be obtained.²⁶² And because of the Westphalian structure, it is states that are ultimately liable for damage under the space treaties. Consequently, national space policies must balance protecting the state from liability with unnecessarily chilling domestic commercial space ventures.²⁶³

Government, however, may underestimate the ingenuity of business. Perhaps "lawyers' fascination with liability issues" overly emphasizes the importance of an international legal regime.²⁶⁴ Commercial ventures, such as Richard Branson's Virgin Galactic and Elon Musk's SpaceX, see a future in space. Already, companies are finding ways to resolve disputes extra-judicially by contracting around liability issues.²⁶⁵ Companies insert cross-waivers of liability, whereby each party agrees to bear its own risk.²⁶⁶ When something goes awry,

256. See Christol, *supra* note 159, at 348.

257. See JASENTULIYANA, *supra* note 9, at 321; Merges & Reynolds, *supra* note 11, at 10010.

258. See DIEDERIKS-VERSCHOOR & KOPAL, *supra* note 1, at 107; Debusschere, *supra* note 8, at 104-05.

259. See DIEDERIKS-VERSCHOOR & KOPAL, *supra* note 1, at 113-14; JASENTULIYANA, *supra* note 9, at 404-05. The following states require some form of insurance in their municipal space codes: Australia, Russia, South Africa, Sweden, United Kingdom, and the United States. See LYALL & LARSEN, *supra* note 15, at 114-16.

260. 51 U.S.C. § 50914 (2012).

261. *Id.* § 50914(a)(3). The statutory minimums are \$500,000,000 for third parties' damage and loss claims and \$100,000,000 for damage or loss to the Government.

262. See LYALL & LARSEN, *supra* note 15, at 114.

263. See *id.* at 115.

264. REYNOLDS & MERGES, *supra* note 5, at 187.

265. LYALL & LARSEN, *supra* note 15, at 33.

266. DIEDERIKS-VERSCHOOR & KOPAL, *supra* note 1, at 115.

the contract pulls the dispute into municipal court.²⁶⁷ This, at least, gives parties some certainty about the law governing the dispute. Business will not let an imperfect treaty structure hinder space development.

States cannot completely withdraw from liability disputes in space, given the state-centric structure of international law and the huge sums of money potentially involved in damage. However, states should continue to foster commercial development by requiring companies to have substantial liability insurance. In exchange for that protection, the state would back the company in the international arena. This protects the state from the brunt of liability while allowing companies to resolve disputes through international channels.

267. See, e.g., *Martin Marietta Corp. v. Int'l Telecomm. Satellite Org.*, 978 F.2d 140, 141 (4th Cir. 1992).



UNIVERSITY OF
DENVER

Sturm College of Law
*Denver Journal of International
Law & Policy*

ALUMNI SUBSCRIPTION FORM

Name _____ Graduation Year _____

SHIPPING ADDRESS

Address _____ City _____

State _____ Zip _____ Country _____

BILLING ADDRESS (if applicable)

Name _____

Address _____ City _____

State _____ Zip _____ Country _____

RATE INFORMATION

Alumni Rate: \$30.00 (no additional postage is charged).

You will receive the *Journal* on a quarterly basis. Additionally, \$5.00 will be donated to the Loan Repayment Assistance Program Fund (LRAP). Established in 2003, LRAP assists alumni who work in public interest law with student loan repayments. *Journal* alumni have already benefited from this important program and LRAP will encourage many future *Journal* members to employ their talents in the public arena.

Current Volume: 40
Current Year: 2012

Number of Issues: Three to five editions are published quarterly each year, beginning in October.

INSTRUCTIONS

Mail this form and payment by check to:

Denver Journal of International Law & Policy
ATTN: Daniel Warhola
University of Denver, Sturm College of Law
2255 East Evans Avenue, Room 449
Denver, Colorado 80208 USA

Please make checks payable to the Denver Journal of International Law and Policy. We will gladly accept new subscribers in the middle of a publication cycle. Please pay the full subscription price and we will mail any back issues to you.

QUESTIONS?

If you have any questions, please do not hesitate to contact Daniel Warhola, via phone (303.871.6166), fax (303.871.6411), or email (dwarhola12@law.du.edu).

Thank you for your support!

The Denver Journal of International Law and Policy

welcomes the submission of articles of timely interest to the international legal community. Manuscripts should be in duplicate, double-spaced, and should contain footnotes. Style and grammar should correspond to *The Chicago Manual of Style* (15th ed. 2003). Footnotes should comply with the eighteenth edition of The Harvard Law Review Association, *A Uniform System of Citation* (18th ed. 2005). Please include an abstract of not more than 150 words and a statement of academic and professional affiliations. Manuscripts should be submitted in Microsoft Word 97 for Windows. Submitted manuscripts will not be returned unless requested.

Manuscripts may be submitted to:

Managing Editor
Denver Journal of International Law and Policy
University of Denver College of Law
2255 East Evans Avenue, Suite 449
Denver, CO 80208 USA
Telephone (303) 871-6166

DJILP Alumni Subscriptions

The DJILP offers you a special Alumni subscription rate which will bring our in-depth and thought provoking articles to your mailbox at an unbeatable price. At the same time, your new subscription will help support an important DU program that encourages students to use their skills where they can make the most difference – the public sector.

You continue to be integral to the Journal's success, and we offer you a unique opportunity with this special rate. We have crunched the numbers and determined it costs \$25.00 to print and mail four issues annually to each subscriber. We partnered with the Alumni Development Office to include a \$5.00 donation to the Loan Repayment Assistance Program Fund (LRAP) with each new subscription. Established in 2003, this endowed fund provides support assisting with loan repayments for Sturm College of Law graduates who enter public interest positions. Journal alumni have already benefited from this important program, and LRAP will encourage many future Journal members to employ their talents in the public arena.

To take advantage of this superb deal, please include a note to this effect when mailing your subscription payment to DJILP.

(Please see attached Alumni Subscription form)

Managing Editor
Denver Journal of International Law and Policy
University of Denver College of Law
2255 East Evans Avenue, Suite 449
Denver, CO 80208 USA
Telephone (303) 871-6166

SUBSCRIPTION ORDER FORM

VOLUME 40 SUBSCRIPTION RATE: \$40.00 DOMESTIC
\$45.00 FOREIGN
\$30.00 ALUMNI*

Name _____

Organization _____

Address _____

City _____ State _____ Zip _____

Please bill _____ Check enclosed for _____

MAIL TO: Business Editor
Denver Journal of International Law and Policy
University of Denver College of Law
2255 East Evans Avenue, Suite 449
Denver, CO 80208 USA

* See Alumni Subscription form in the back of this issue

DJILP Subscription Information

Thank you for your interest in the Denver Journal of International Law & Policy.

Below is our contact information and current rates. Please feel free to contact us with any additional questions.

Mailing and Payment Address:

Denver Journal of International Law & Policy
University of Denver, Sturm College of Law
2255 East Evans Avenue, Room 449
Denver, Colorado 80208
USA

Primary Contact Person:

Daniel Warhola

Business Editor

Phone: (303) 871-6166

Website: <http://law.du.edu/index.php/DJILP>

E-mail: dwarhola13@law.du.edu

Pricing Information:

Domestic Rate: (Mailings to Addresses within the United States)

\$40.00 USD (*Note: No additional postage is charged.)

Foreign Rate: (Mailings to Addresses outside the United States)

\$45.00 USD (*Note: No additional postage is charged.)

Alumni Rate: (Mailings to Address within the United States) \$30.00 USD, of which \$5.00 is donated to the Loan Repayment Assistance Program Fund (LRAP), which provides loan repayment assistance to Sturm College of Law graduates who enter public interest positions. (*Note: No additional postage is charged.)

Advanced Payment Required:

We will gladly accept new subscribers in the middle of a publication cycle. Please pay the full subscription price, and we will mail any back issues as necessary.

Acceptable Form of Payment:

Please send payment by check to the above address.

Current Volume: 40

Current Year: 2010-2011

Number of Issues Published per year: Between 3 and 5 on a quarterly basis beginning in October.

The Denver Journal of International Law and Policy

is online with Hein Online, LEXIS®, and WESTLAW®; and is indexed and abstracted in Current Index to Legal Periodicals, Environmental Abstracts, ICEL References, Index to Federal Legal Periodicals, Index to Legal Periodicals, LegalTrac, and Shepard's Law Review Citations.

Cite as: DENV. J. INT'L L. & POL'Y

The *Journal* welcomes inquiries concerning its tax deductible donor program.



In the world of international law, there's a new game in town.

The View From Above: International Law at 5,280 Feet is an online publication working with 50 students and over a dozen professional contributors to bring a more timely sensibility to the discussion of international law and policy. Join our online community of students, professors, and practitioners at:

www.TheViewFromAbove.org

