

Denver Journal of International Law & Policy

Volume 28
Number 4 *Fall*

Article 8

May 2020

Full Issue

Denver Journal International Law & Policy

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Recommended Citation

International Law & Policy, Denver Journal (2020) "Full Issue," *Denver Journal of International Law & Policy*: Vol. 28 : No. 4 , Article 8.

Available at: <https://digitalcommons.du.edu/djilp/vol28/iss4/8>

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**DENVER JOURNAL OF INTERNATIONAL
LAW AND POLICY**

VOLUME 28

1999-2000



Denver Journal

of International Law and Policy

VOLUME 28

NUMBER 4

FALL-2000

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ENFORCEMENT OF HUMAN RIGHTS ON MULTI-NATIONAL CORPORATIONS: GLOBAL CLIMATE, STRATEGIES AND TRENDS FOR COMPLIANCE

JENNESS DUKE*

I. INTRODUCTION

Engaging in a human rights discussion concerning multi-national corporation (MNC) enforcement is multi-dimensional. Economic, political, social and profit issues, among others, dangle precariously from the web of an increasingly global community that debates the issue of human rights enforcement. Examination of the cacophony of compliance mechanisms must be viewed in the shadow of these rapidly changing issues.

II. OVERVIEW OF THE CLIMATE OF THE HUMAN RIGHTS DEBATE

A. *International Political Climate*

When human rights issues and economics combine the debate therein becomes highly political.¹ The increase of U.S. corporate expansion extraterritorially gives rise to a heated debate worldwide on the role corporations' play in the international human rights arena. The political dichotomy between interests of developing countries and those with market economies makes it very difficult to determine the very foundation of the human rights debate.² Within the UN General Assembly, competing views arise between developing countries who value "respect for cultural and religious diversity around the world, respect for sovereignty and an end to the politicization of human rights issues," and those of developed countries who argue for fundamental standards of human rights and stress the hierarchy of individual liberty over eco-

* J.D. 2001, University of Denver College of Law.

1. GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 13 (Hurst Hannum ed., 1999) [hereinafter GUIDE].

2. *Human Rights Issues Dominate the Agenda*, General Assembly 52, 35 U.N. CHRON. 56 (Mar. 22, 1998)

conomic and social rights.³

B. *Climate Change With Emergence of Developing Nations*

1. Enticement of Low Wage Markets

While the tide of political sentiment continues to question the very essence of human rights, developing countries swim with powerful strokes into the international economic market.⁴ Developing countries entice MNC's with low wages and an increasingly more skilled and productive workforce.⁵ Certain sectors of the U.S. labor market suffer from the competition developing countries provide.⁶ The steel and textiles industries are examples of "labor-intensive" segments that have been weakened by the increased globalization of the labor market.⁷

Many MNC's who take advantage of such high profit, low wage labor markets do not abide by the international labor standards of the International Labor Organization (ILO).⁸ The ILO was created in 1919 in an attempt to remove injustice in global labor markets.⁹ The framers felt the injustices were enough to "imperil" world safety.¹⁰ Many argue the North American Free Trade Agreement (NAFTA) has only added to the failure of the ILO's effectiveness.¹¹

Instances of slavery, child labor, and unpaid prison labor are among the most visible injustices in developing countries.¹² Children in India and Pakistan are commonly found working to help support their low-income families.¹³ Without work making items such as rugs, children may be relegated to work in even worse situations.¹⁴

Local opposition in India to Enron, a U.S. corporation, has led to farmer grievances of unfair seizure of land and diversion of water for corporate needs.¹⁵ Fishermen also protest in fear that power generation

3. See GUIDE, *supra* note 1, at 14.

4. THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: FIFTY YEARS AND BEYOND 289 (Yael Danieli et al. eds., 1999) [hereinafter FIFTY YEARS AND BEYOND].

5. BRIAN McDONALD, THE WORLD TRADING SYSTEM: THE URUGUAY ROUND AND BEYOND 12 (1998).

6. *Id.* at 13.

7. *Id.*

8. See FIFTY YEARS AND BEYOND, *supra* note 4, at 289.

9. See GUIDE, *supra* note 1, at 85.

10. ILO CONST. preamble (1961).

11. See FIFTY YEARS AND BEYOND, *supra* note 4, at 289.

12. See McDONALD, *supra* note 5, at 281.

13. *Id.*

14. *Id.* at 282.

15. U.S. Corporation Complicit in Abuses in India: Report Charges U.S. and Indian Governments Also Overlook Human Rights Violations (visited Jan 25, 1999) <<http://www.hrw.org>>.

from the US plant will increase seawater temperature and kill fish vital to their survival.¹⁶

Such abuses seem repugnant to many in developed countries, most of whom, like the U.S., do not recall similar abuses in the early U.S. industrial age.¹⁷ It is unfair to place the entire burden of human rights management on developing countries.¹⁸ Most of the developing countries cannot provide the kind of human rights protection afforded by developed nations.¹⁹ Developing countries are caught between the need for economic stability, development and fulfillment of international laws and treaties signed by the government.²⁰ When governments enter into business, it is difficult to say that they should also be the "watch dog" of their own human rights practice.²¹

2. Call to the Global Market vs. Human Rights

The emergence of developing countries into the global market evokes issues of formulation of appropriate human rights standards, determination of governance over such standards, and conflicts between the competing interests of economic development and human rights.²² In the developed countries where MNC's are incorporated, officials are ensnared between the call to foreign investment, global capitalization, and the promotion of the human rights they espouse.²³

To further blur the line between business and human rights, the UN adopted a resolution in March, 1999, proclaiming that the "right to development" is a human right.²⁴ The resolution called the gap between developed and undeveloped countries unacceptably wide.²⁵

Despite the lack of an organized framework of human rights standards among nations, the UN endorses and encourages developing countries to enter the international market.²⁶ "Industrial nations must relax trade barriers and open their markets to the developing

16. *Id.*

17. See MCDONALD, *supra* note 5, at 281.

18. *Id.* at 280.

19. *Id.*

20. See *U.S. Corporation Complicit in Abuses in India*, *supra* note 15.

21. THOMAS L. FRIEDMAN, *Foreign Affairs The New Human Rights*, N.Y. TIMES, July 30, 1999.

22. See GUIDE, *supra* note 1, at 14.

23. *Corporations and Humans Rights*, HUMAN RIGHTS WATCH (visited Mar. 28, 2000) <http://www.hrw.org/hrw/about/initiatives/corp.html>.

24. *Human Rights & Unilateral Coercive Measures*, U.N GAOR 3d Comm., 53rd Sess. At 1, G.A. Doc. A/RES/53/141.

25. *Id.*

26. UNCTAD: *Urges Market Access For Poor Countries*, UNCTAD PRESS RELEASE, UN WIRE, (Sept. 21, 1999).

world . . ."²⁷ The UN goes further and calls on the international community to move at a faster pace to incorporate developing countries into the global market.²⁸ Finally, the UN calls on developed countries to "encourage trade," and "sustain market access" to developing countries.²⁹

C. *Climate Change With The Emergence Of Technological Advances*

1. Race to the Bottom

Technological advancements are having both positive and negative effects on the global climate surrounding human rights violations by MNC's. The development of new technology creates a phenomenon called a "race to the bottom."³⁰ This phenomenon suggests that in the MNC's rush to keep in step with competitors' new technological advances by seeking low wage and low welfare environments, they often do so at the expense of human rights.³¹ New electronics and information technology fuel the race by forcing corporations to constantly upgrade their facilities.³²

2. Improved Access to Global Community

Technology has also fueled advancements in human rights activism.³³ Non-governmental organizations (NGO's) and other activists have seized upon the internet to "mobilize widespread awareness campaigns."³⁴ Use of the internet afforded an opportunity for previously silent NGOs to stop the Organization of Economic Cooperation and Development (OECD) negotiations for the Multilateral Agreement on Investment, called corporations into account for human rights violations, and garnered support for incorporation of communities on the fringe.³⁵ Some argue that while access to such a large segment of the general populous is a human rights advantage, others contend that such publicity widens the already hostile gap between corporations and human rights advocates.³⁶

The enhanced communication network not only gives a louder voice

27. *Id.*

28. *Id.*

29. *Id.*

30. See MCDONALD, *supra* note 5, at 13.

31. *Id.*

32. *Id.*

33. See FIFTY YEARS AND BEYOND, *supra* note 4, at 260.

34. *Id.*

35. *Globalization With A Human Face*, HUMAN DEVELOPMENT REPORT 1, 1999, at 5.

36. See FIFTY YEARS AND BEYOND *supra* note 4, at 260.

to human rights advocates, it also creates improvements in health and education.³⁷ The wall of size, location, wealth and knowledge is crumbling with the falling cost of Internet access.³⁸ Small businesses and poor countries are now able to enter the global economic market more easily.³⁹

D. Evolution Of The International Social Climate

1. Battle Over Responsibility

The social climate among the international community is convoluted. There is a constant push and shove among the players for economic control and social responsibility. Some countries try to divert criticism concerning human rights abuses by charging individuals with a responsibility to respect governmental authority.⁴⁰ Westerners however, decry that individuals have the right to protest perceived unjust acts committed by their government without fear of retribution.⁴¹

Some argue that when governments fail, the burden shifts to corporations to uphold human rights standards.⁴² Current human rights trends suggest that not only should corporations monitor human rights abuses, but they should also teach their employees "moral competence" and "moral values."⁴³ Some human rights educators narrow the responsibility for human rights violations down to the smallest scale, calling for individual responsibility.⁴⁴ Educators are on the verge of merging their ideals to create a new set of values to be applied to the entire human race.⁴⁵

2. Continuing Abuses

Yet as the push and shove continues, human rights abuses by MNC's and the governments that protect them, continue. In Sao Paulo, Brazil, 500,000 children live without homes and work on the streets.⁴⁶ Women in Bangladesh may work a total of eighty-seven hours per week

37. See *Globalization With A Human Face*, *supra* note 35, at 5.

38. *Id.*

39. *Id.*

40. See FIFTY YEARS AND BEYOND, *supra* note 4, at 407.

41. *Id.*

42. See *Corporations and Humans Rights*, *supra* note 28.

43. See FIFTY YEARS AND BEYOND, *supra* note 4, at 262.

44. *Id.*

45. *Id.*

46. *Id.* at 289.

in the garment industry, but receive wages for only fifty-six hours.⁴⁷ NGOs report numerous abuses around the globe, including those in Nigeria where Human Rights Watch (HRW) reports that Nigerian police force uses extremely brutal measures to quiet protests against oil companies.⁴⁸ Attacks on young people by security guards protecting a Chevron drilling rig have also been cited.⁴⁹ HRW charged that U.S. owned Enron Power Company with complicity in Indian government abuses against protesters of the plant.⁵⁰ The ILO reports that nearly 180 million child workers are located in Asia, and recently has severed ties with Burma as a result of continuing child labor abuses.⁵¹

3. Search for a Global Human Rights Scheme

One difficulty surrounding the social structure of the human rights debate is the same as for the political debate: the determination of the foundation of the human rights discussion. Many westerners seem to focus on issues of individual liberty, whereas internationally, for the sake of survival, workers focus on labor issues.⁵²

The social struggle currently is in the search for a global scheme in industry that works for the profit of the corporation and for the dignity of people.⁵³ One tactic is to call upon a globalization plan with "ethics, equity, inclusion, human security, sustainability and development."⁵⁴ Determining exactly how to accomplish this is the paramount task.

E. *International Economic Climate Change*

1. State of Confusion: Disparate Distribution of Wealth

The economic climate of today's global market is in a constant state of flux. While the market continues to become more accessible to MNC's and developing countries, the distribution of wealth remains uneven.⁵⁵ In addition, the search for market accessibility and profits by

47. See *Globalization With A Human Face*, *supra* note 35, at 7.

48. *Oil Companies Complicit in Nigerian Abuses*, HUMAN RIGHTS WATCH WORLD REPORT, (visited Oct. 6, 1999) <<http://www.hrw.org/press/1999/feb/nig0223.htm>>.

49. *Id.*

50. See *U.S. Corporation Complicit in Abuses in India*, *supra* note 15.

51. *World Children Top Conference Agenda*, BBC NEWS ONLINE, (visited Sept. 8, 1999) <http://news.bbc.co.uk/1/hi/english/world/newsid_441000/441339.stm>.

52. See FRIEDMAN, *supra* note 21.

53. See *Globalization With A Human Face*, *supra* note 35, at 7.

54. *Id.*

55. Eric Beaucheshe, *Wealth Gap a Recipe for Financial Crisis: UN*, SOUTHAM NEWS, (visited Sept. 20, 1999) <<http://www.nationalpost.com/news>>.

MNC's leaves human rights issues in the wake.⁵⁶

Per capita income continues to drop in more than fifty-five countries; and in 80 countries the average per capita income is lower than it was ten years ago.⁵⁷ According to the UN's Human Development Report for 1999, globalization of the world economy has done little to effect the poor where "the richest fifth of humanity [is] enjoying more than 85 percent of total gross domestic product and the poorest fifth only one percent."⁵⁸ In Chile, for example, ten percent of the richest control forty-five percent of national wealth, which has risen eleven percentage points since globalization began.⁵⁹ The income gap continues to widen. The gap doubled in thirty years from 30 to 1 in 1960 to 60 to 1 in 1990.⁶⁰ The gap currently stands at 74 to 1.⁶¹

The disparity not only occurs in developing nations. Among industrialized nations, the U.S. has one of the three worst poverty levels sharing its poor ranking with Ireland and the U.K.⁶² In the U.S., twenty-five percent of children live in poverty.⁶³

2. Negative Impacts by Multi-National Corporations

MNCs have had certain negative effects on the global market. When MNCs rush to low wage markets, where trade unions, child labor and slavery exist, the market suffers from elevated competition.⁶⁴ The "mega corporation" poses the opposite risk. The current trend toward huge corporate mergers results in the centralization of power that threatens to degrade global competition.⁶⁵

3. Emergence of New Players

New political players are contributing to an ever-changing global economic climate. The World Trade Organization (WTO) governs with increasing power over member states, MNC's emerge with more economic power in the global market than many national governments and the scope of NGOs expands with the increase use of global internet technology.⁶⁶ The full of effect of these new players has yet to be fully

56. See *Globalization With A Human Face*, *supra* note 35, at 2.

57. *Id.*

58. *Human Development Report: Globalization Leaving Poor Behind*, UN WIRE (July 12, 1999).

59. *Id.*

60. *Id.*

61. *Human Development Report: Globalization Leaving Poor Behind*, *supra* note 58.

62. *Id.*

63. See FIFTY YEARS AND BEYOND, *supra* note 4, at 288.

64. See MCDONALD, *supra* note 5, at 279.

65. See *Globalization With A Human Face*, *supra* note 35, at 3.

66. *Id.* at 1.

realized.

The international community focuses on the fast pace of corporate economic growth, and strives to keep up by creating economic policies and standards, but fails to exert effort toward protecting human rights.⁶⁷ The need for economic controls is essential, however, because when the market is out of control, profit motives may outweigh corporate efforts to protect human rights.⁶⁸ Stabilization of the global economy depends on the development of human rights governance mechanisms, as well as effective economic controls on MNC's.⁶⁹

III. HUMAN RIGHTS COMPLIANCE STRATEGIES

A. *Compliance Via Self-Governance*

1. Protecting Corporate Image

Absent any clear governmental regulation and given the confusion that surrounds the human rights debate, NGO's have become even more important in effecting human rights change. By focusing on exposing human rights abuses by MNC's, NGOs drive corporate entities to regulate themselves.

While many MNC's do not actively participate in human rights abuses, they nevertheless, may stand idle while governments protect corporate interests at the expense of human safety and dignity.⁷⁰ Some corporations deflect responsibility for these abuses by charging the governments where they trade and invest, with the duty to care for their citizens.⁷¹

Corporations are only able to deflect such criticism to a certain extent; once investigated by NGO's corporate image may be affected if corporations fail to address abuses surrounding their companies.⁷² Currently, corporate image is the key to human rights compliance by MNC's. Corporations that market items such as footwear and clothing rely heavily on corporate image and have been the first industry players to react to human rights abuse accusations.⁷³

NGO's can also be effective in exposing abuses, and effecting

67. *Id.* at 2.

68. *Id.*

69. *Id.* at 8.

70. Arvind Ganesan, *Business and Human Rights—The Bottom Line*, HUMAN RIGHTS WATCH, (visited Oct. 6, 1999) <<http://www.hrw.org/hrw/advocacy/corporations/index602.htm>>.

71. *Id.*

72. *Id.*

73. *Id.*

change in corporations that do not depend heavily on the price of good corporate image.⁷⁴ Shell oil established a human rights policy after activists arranged protest over abuses by the oil company in the Niger Delta.⁷⁵ While the era of good corporate image via a positive human rights record grows, some corporations still contend that they are not responsible for specific human rights abuses because they improve human rights overall simply by investing and conducting business in developing countries.⁷⁶ Still amidst such arguments, many corporations understand the advantage of marketing a good human rights record.⁷⁷

MNC's understand that NGO pressure is only going to increase as global technology is used to reach a larger audience.⁷⁸ Many corporations are even beginning to push a collective human rights policy, arguing that if all corporations are held to a single voluntary standard of human rights responsibility, no MNC will be unfairly penalized.⁷⁹ A collective policy may preserve global competition and help focus the international community on the needs of human rights.⁸⁰ While profit will always be the primary consideration, especially when a corporation is in the business of self-governance, a collective policy will help remove one hurdle to disadvantaged competition.

2. Voluntary Codes of Conduct

Another positive aspect of the self-governance trend is that at least in the garment and shoe industries, a small pocket of leadership has developed.⁸¹ These corporate leaders meet periodically with NGOs to discuss current human rights policies and methods of implementation.⁸²

Nike has been one of the most criticized MNC's, but one that has also attempted to change its corporate image.⁸³ Nike chairperson Philip Knight presented Nike's philosophy at a meeting with President Clinton and the Fair Labor Coalition:

For the past twenty-five years, Nike has provided good jobs, improved labor practices and raised standards of living wherever we operate, including here in the U.S. What we've come to realize is that we need to do a better job of publicly describing actions we've taken to promote

74. See GUIDE, *supra* note 1, at 13.

75. See Ganesan, *supra* note 70.

76. *Id.*

77. *Id.*

78. See FIFTY YEARS AND BEYOND, *supra* note 4, at 1.

79. See *id.*

80. See *Globalization With A Human Face*, *supra* note 35, at 7.

81. See *Corporations and Humans Rights*, *supra* note 28.

82. *Id.*

83. *Id.*

fair labor practices in newly emerging market societies, including the development of a code of conduct, internal monitoring and external audits.⁸⁴

Dissenters criticize these types of corporate image statements and other highly publicized development strategies, arguing that they do little to effect the state of human rights.⁸⁵ Such programs appeal politically and socially, changing the public perception of MNC's, however they may do little substantively.⁸⁶

Many human rights educators have issued a call to corporations to do more than invent a glossy human rights package, but rather to begin to teach their employees what it means to be a responsible global citizen.⁸⁷ MNC's need to teach their employees what it means to live in this new global society.⁸⁸

Some skeptics argue that self-governance is not an effective solution.⁸⁹ These activists argue that human rights are issues applicable to individuals, governments, corporations and intergovernmental organizations, and that it will take a collective effort to have a sustained impact on human rights.⁹⁰ They further contend that human rights goals are far too important to be left to MNC's to voluntarily decide to abide by "self-generated" independent standards.⁹¹

B. Compliance Via Governmental Human Rights Regulation

1. U.S. Efforts

Very little external governmental regulation of MNC's exists with respect to human rights abuses. While the U.S. government has spearheaded discussions on corporate responsibility, it has been reluctant to follow through with the ideas expressed.⁹² In 1995, the U.S. introduced "Model Business Principles" for companies involved in foreign operation; these rules however, were never implemented.⁹³

Other U.S. efforts at government regulation have also failed. In July of 1996, the government hosted a "Fashion Industry Forum," urg-

84. *Id.*

85. *See* FIFTY YEARS AND BEYOND, *supra* note 4, at 261.

86. *Id.*

87. *Id.*

88. *Id.*

89. *See* Globalization With A Human Face, *supra* note 35, at 12.

90. *Id.*

91. *Id.*

92. *See* Corporations and Humans Rights, *supra* note 28.

93. *Id.*

ing U.S. corporations to mark "no sweat" on garments to distinguish themselves as corporations that do not use sweatshops.⁹⁴ Once again, there was no follow-through and the project faded.⁹⁵

One possible reason that the U.S. government is sluggish in its regulation of MNC's is that officials are occupied tackling human rights violations occurring domestically. The U.S. General Accounting Office cited numerous violations in "wage, child labor, health, and security in the workplace."⁹⁶ Most of these types of sweatshop violations occur in businesses that supply products to high profile corporations.⁹⁷ Such manufacturers as GAP, Esprit and Liz Claiborne head the list of approximately 1,000 companies accepting goods from more than 22,000 sweatshops located in the U.S.⁹⁸

2. Utilization of an International Criminal Court

Many discussions have revolved around the creation and utilization of an International Criminal Court (ICC) to hold human rights abusers accountable. Currently, such a system is only used in an ad hoc tribunal form for crimes against humanity.⁹⁹ Many suggest that this court could be used to prosecute corporations that violate human rights standards. Activists argue that even under the current court structure, corporations should be held accountable for crimes against humanity-including incidents such as the poisoning of civilians as in the Bhopal incident, which is strikingly close to genocide.¹⁰⁰

3. Utilization of Existing Treaties

One suggested method of regulation would be to include MNC's as parties to existing treaties, arguing that they should be bound as "citizens" of the signatory parties.¹⁰¹ While this may seem far-reaching such inclusion would be similar to how the ILO binds trade unions and other industry associations as "social partners" with their nation of origin.¹⁰² These "partners" assist in drafting standards, but are also required to comply with those standards upon ratification.¹⁰³

94. *Id.*

95. *Id.*

96. *See* FIFTY YEARS AND BEYOND, *supra* note 4, at 289.

97. *Id.*

98. *Id.*

99. *See id.*, at 407.

100. *Id.*

101. *Id.* at 408.

102. *Id.* at 407.

103. *Id.*

4. State and Local Governance

Some state and local legislation has occurred to monitor human rights violations.¹⁰⁴ Following the U.S.'s introduction of the "Model Business Principles," the U.S. Department of Labor issued a report of MNC's human rights record regarding child labor.¹⁰⁵ In response to the report, cities and states around the country began issuing purchasing ordinances. Both Massachusetts and the city of Berkeley, California have passed laws prohibiting public entities from purchasing goods from Burma.¹⁰⁶

5. Utilization of Loan Guarantees

The U.S. does have some ability to directly control MNC's. Prior to granting loan guarantees to corporations for foreign investment, the U.S. completes a mandatory political and human rights assessment.¹⁰⁷ In theory, the assessment should hinder human rights violators from profiting in the global market. However, the process seems underutilized and ineffective when corporations such as U.S. owned Enron secures \$300 million worth of loan guarantees amidst reports of abuses in India.¹⁰⁸

Because of U.S. government loan guarantees, lobbying efforts on behalf of corporate interests in foreign countries and using public funds for corporate development projects, activists argue the U.S. must accept some liability for corporate human rights violations.¹⁰⁹ It is also argued that international lending institutions such as the WTO or IMF should provide some human rights regulation.¹¹⁰

6. Collective Effort Among All Global Members

Global governance must start with all international players dedicated to establishing a common set of standards and core values. The issue must be managed externally, as it is arguably too important to leave any member of the global community to self-govern alone.¹¹¹ The UN Charter and the Universal Declaration of Human Rights establishes some commonly accepted human rights, which may be a good foundation to begin developing a collective external set of global human

104. See *Corporations and Humans Rights*, *supra* note 28.

105. *Id.*

106. *Id.*

107. See *U.S. Corporation Complicit in Abuses in India*, *supra* note 15.

108. *Id.*

109. See *id.*

110. *Id.*

111. See *Globalization With A Human Face*, *supra* note 35, at 8.

rights standards.¹¹²

There has been very little proposed legislation from within the U.S. or from international organs.¹¹³ What little debate that has been generated from key international economic organizations, has been highly criticized for its narrow focus and lack of inclusion of non-market communities and developing countries.¹¹⁴ Institutions such as the IMF and WTO, as well as the World Bank and the OECD, are largely comprised of wealthy nations with large powerful voices; little room is left for the adequate representation of weaker countries or other international associations.¹¹⁵ Critics argue that regulation that may result from these groups would have little sustainable global impact.¹¹⁶

7. Corporate Response to Regulation

Corporations bristle at the suggestion of U.S. government regulation, in fear that any unilateral regulation will severely affect competition in the global market.¹¹⁷ When the U.S. government proposed refusing loan guarantees to MNC's involved in the Three Gorges Dam in China, U.S. based Caterpillar launched a high profile campaign in protest.¹¹⁸ Minus a few feeble attempts at regulation, most corporate response results from consumer concern. Consumer pressure sparked two grocery store chains in Great Britain to create labor codes for the third world workers who supplied their store brand products.¹¹⁹ Image troubles have forced some major name corporate players, like Michael Jordan, Nike, and Kathie Lee Gifford into accepting social responsibility for labor standards held by the overseas plants that manufacture their products.¹²⁰

Still other corporations have a mixed response or no response to human rights accusations.¹²¹ Corporations such as Pepsi-Cola pulled out of Burma as a result of human rights abuse exposure, while an oil company, UNOCAL, remained amid the protests.¹²² The Zenith Corporation offered no apology for acknowledged sex discrimination of female

112. See *U.S. Corporation Complicit in Abuses in India*, *supra* note 15.

113. See *Globalization With A Human Face*, *supra* note 35.

114. *Id.*

115. *Id.*

116. See *id.*

116. *Id.*

117. See *Corporations and Humans Rights*, *supra* note 28.

118. *Id.*

119. See *id.*

120. *Id.*

121. *Id.*

122. *Id.*

workers in Mexico.¹²³ Even after the hanging death of the human rights advocate Ken Saro-Wiwa, Royal Dutch/Shell increased financial investment in Nigeria.¹²⁴ Such mixed reaction serves only to strengthen the call for external regulation of MNC's.

C. Compliance Via Non-Governmental Organization Pressure

1. Effective Public Campaigns

MNC's have received more change producing pressure from NGO's than from any other source.¹²⁵ When NGO's are effective at mobilizing the public to boycott human rights abusing companies, MNC's begin to react.¹²⁶ NGO's can also push consumers to purchase products from companies that are socially responsible. The "Dolphin Safe" labels on tuna cans have been extremely effective and may become the NGO strategy of the future.¹²⁷

NGO's have been extremely effective at exposing MNC's human rights failures, prompting some corporations (such as Heineken) to withdraw from countries (such as Burma) that tout very poor human rights records.¹²⁸ As NGO's become increasingly more effective, they demand solid results from MNC's after reporting abuses, calling for "transparency" of corporate policies and independent monitoring of human rights standards.¹²⁹

Human Rights Watch (HRW) is one example of a cutting edge NGO that seeks to "expose human rights violations and hold abusers accountable."¹³⁰ HRW maintains a sleek website and issues multiple press releases concerning human rights abuses by governments and "those who hold power."¹³¹ Groups such as HRW are growing increasingly more sophisticated, employing a full-time staff, board of directors, enlisting the support of major donors and even offering fellowships and internship programs.¹³²

123. *Id.*

124. *Id.*

125. See FIFTY YEARS AND BEYOND, *supra* note 4, at 409.

126. *Id.*

127. *Id.*

128. See *Corporations and Humans Rights*, *supra* note 28.

129. See *Oil Companies Complicit in Nigerian Abuses*, *supra* note 48.

130. HUMAN RIGHTS WATCH WEBSITE, (visited Oct. 6, 1999) <<http://www.hrw.org/about/about.html>>.

131. See generally *id.*

132. *Id.*

2. Endorsment of NGO's by UN

As the credibility of NGO's increase, they gather more support from major inter-governmental organizations (IGOs) including the UN.¹³³ In 1996, a UN resolution permitted NGO's to apply for "consultative status" with ECOSOC. In March of 1999, the UN adopted the "Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms."¹³⁴ Among the articles to the declaration, the UN included a right to "form, join and participate in non-governmental or inter-governmental organizations, associations or groups. . ."¹³⁵ Many now argue that NGO's and other corporate associations together may serve as an effective means of independently monitoring "human safe" or "not produced by child labor" labeling campaigns.¹³⁶

Campaigns by NGOs have even had some international effect, compelling governments to entertain the possibility of new human rights legislation.¹³⁷ When Canadian Prime Minister Jean Chretien refused to meet with a child labor activist while on a trip to India in 1996, negative press coverage pushed Chretien to publicly announce the possibility of sanctions against makers of goods using child labor imported into Canada.¹³⁸

Human rights issues now demand time from more than twenty-seven for the UN's fifty-three meetings per year, and much of the current discussions could be the direct result of increased public concern over human rights abuses.¹³⁹ Increased public concern could very well be traced back to the increase of human rights information provided to the public by NGO's.¹⁴⁰ While the UN cannot in effect create legislation, increased demands on member nations to "set specific target dates for eliminating child labor and ensuring full enforcement of laws and legislation. . ." as well as other recommendations towards human rights may indirectly change the nature of human rights enforcement.¹⁴¹

It is clear that the wave of peer pressure that NGO's exert to increase human rights responsibility will not decrease until government entities establish effective regulatory controls and even then, the need

133. *In Fiftieth Anniversary Year, Assembly Reviews Progress on Human Rights Declaration; General Assembly*, 36 UN CHRON. 54, 53 (Mar. 22, 1999) [hereinafter *Fiftieth Anniversary Year*].

134. *Id.*

135. *Id.*

136. See FIFTY YEARS AND BEYOND, *supra* note 4, at 409.

137. See *Corporations and Humans Rights*, *supra* note 28.

138. *Id.*

139. See *Fiftieth Anniversary Year*, *supra* note 133.

140. See GUIDE, *supra* note 1, at 29.

141. See *Fiftieth Anniversary Year* *supra* note 133.

for the NGO's independent monitoring may still be required to police implementation and enforcement.

D. Compliance Via Intergovernmental Organization Regulation

1. United Nations Efforts

The UN is the most recognized IGO, and yet, it too has surprisingly little regulatory control of MNC's and human rights violations.¹⁴² The UN Centre on Transnational Corporations has issued recommendations to MNC's to "abstain from involvement in and subversion of domestic politics in host nations; practice nondiscrimination; and respect host government priorities on employment, the environment and socioeconomic policy."¹⁴³ These recommendations are weak, as there is no binding effect or enforcement capability if violated.¹⁴⁴

Rather than focusing on a regulatory approach to MNC compliance with human rights, the UN is beginning a cooperative program to encourage MNC's to voluntarily join together to increase human rights protection in the new global market.¹⁴⁵ Close to twenty MNC's have joined the dialog and submitted the \$50,000 entry fee to become part of the United Nations Development Program (UNDP).¹⁴⁶ The foundation of the program is to close the gap between developing and developed countries in the global market.¹⁴⁷ Promoters hope to see increased employment in undeveloped countries, thus bringing new wealth into these countries and improving human rights.¹⁴⁸ Any company engaging in UNDP will, according to UN officials, have to meet a minimum human rights standard in return for the use of a newly developed logo and an improved human rights reputation.¹⁴⁹

UNDP has been highly criticized by corporate and human rights watch dog groups.¹⁵⁰ While the program's guidelines state "the corporation's past or current operations [must not be] ethically, socially or politically controversial," dissent has arisen over the inclusion of several corporations with shady human rights records.¹⁵¹ MNC's such as Dow

142. WILLIAM H. MEYER, HUMAN RIGHTS AND INTERNATIONAL POLITICAL ECONOMY IN THIRD WORLD NATIONS: MULTINATIONAL CORPORATIONS, FOREIGN AID, AND REPRESSION, 84 (1998).

143. *Id.*

144. *Id.*

145. Naomi Klein, *The UN Is Losing Sight of Its Goals*, THE TORONTO STARR, (Mar. 26, 1999) <<http://www.corpwatch.org/trac/undp/star2.html>>.

146. UNDP: *Agency Assailed For Soliciting Money From Companies*, UN WIRE, Mar. 12, 1999.

147. See *Fiftieth Anniversary Year*, *supra* note 133.

148. See UNDP: *Agency Assailed For Soliciting Money From Companies*, *supra* note 146.

149. Nicole Winfield, *UN Agency Defends Business Ties*, ASSOCIATED PRESS, Mar. 18, 1999.

150. Joan Oleck, *Will the UN Sell a Seal of Approval*, BUS. WK., Mar. 19, 1999.

151. UNDP: *Agency Assailed For Soliciting Money From Companies*, *supra* note 146.

Chemical, makers of Agent Orange, and Royal Dutch/Shell, potentially to be investigated by the UN human rights envoy, top the list of controversial partners.¹⁵² Activists argue that MNC's are simply buying the UN logo and a clean human rights record with no showing of an improved human rights record.¹⁵³ Still amidst the heated protest the Transactional Resource and Action Center says the partnership that the UNDP provides will show corporations that they can participate in a market that provides access to all global players, protects human rights and makes a profit.¹⁵⁴ Supporters hold that when corporations have tarnished human rights records, it is better to partnership with them to improve their record rather than ostracize them from any meaningful dialog and opportunity to make a sustainable impact on improving human rights.¹⁵⁵

2. *World Trade Organization Efforts*

The trend among the international community is to call on other IGO's as well to take a stand concerning MNC's impact on human rights. The WTO is responsible for managing MNC's regarding economic and trade policies.¹⁵⁶ It has power over national governments, MNC's, and a huge network of NGOs.¹⁵⁷ The amount of power held by such an organization has many calling the WTO to increase responsibility and monitoring of human rights violations incurred by its member nations.¹⁵⁸ The WTO could be effective in establishing human rights standards. Unlike most other IGO's and national governments, tools such as peer pressure and trade sanctions exist for enforcement of human rights standards.¹⁵⁹

In a draft ministerial declaration written for proposal at the November 1999 Ministerial in Seattle, the WTO pledged to promote, among other issues, raising the living standard and sustainable development.¹⁶⁰ The declaration called for more transparency within the WTO and to help global trade be more effective in relieving poverty

152. *Id.*

153. Farhan Haq, *Report Faults UNDP Partnership with Corporations*, INTER-PRESS SERVICE, Mar. 2, 1999.

154. *Agency Assailed For Soliciting Money From Companies*, CORP. WATCH (visited 10/6/99) <<http://www.corpwatch.org/trac/undp/unfoundation.html>>.

155. James Ridgeway, *Mondo Washington: UN-Environmental U.S. Designee Gets Funds From Eco Plunderers*, VILLAGE VOICE, Mar. 24-30, 1999.

156. *See Globalization With A Human Face*, *supra* note 35 at 9, 12.

157. *Id.*

158. *See Human Development Report: Globalization Leaving Poor Behind*, *supra* note 58.

159. *See* MCDONALD, *supra* note 5, at 281.

160. Text: Draft Ministerial Declaration, Draft preparation for World Trade Organization Ministerial, Seattle Washington 1 (Oct. 7, 1999).

around the globe.¹⁶¹ The WTO has also suggested conducting research on the link between the ILO's core labor standards and the WTO.¹⁶² Many developed countries want the WTO to study the effect that the Uruguay Round of GATT had on core labor standards via the relaxation of trade barriers.¹⁶³ Some developing countries resist such discussions as enforceable core labor standards that would decrease the competitive advantage they enjoy by offering low labor market costs and imposition of standards that their developing status would not be able to support.¹⁶⁴

During the 1996 Singapore ministerial, the WTO issued a compromise to continue to promote the core labor standards, but stated that it would not use the standards to detract from the competitive advantage enjoyed by developing countries. Exactly how such a compromise can be reached is uncertain.¹⁶⁵ Finally, the WTO did admit that it is the appropriate authoritative body to monitor core labor standards.¹⁶⁶ The WTO has not opposed simply researching trade liberalization's negative effect on human rights, but maintains that the true focus should be on "how to foster economic growth to promote core labor standards in countries at early stages of economic and social growth."¹⁶⁷

The WTO also proposes to hold yearly symposiums to discuss the link between trade and labor standards. Discussions would involve NGO's with special interest in trade and human rights.¹⁶⁸ Such efforts by the WTO were not realized soon enough to satisfy NGO's and representatives of developing nations who succeeded in shutting down the Seattle Ministerial in November of 1999.¹⁶⁹ NGO's protested vehemently for more WTO responsibility and transparency in areas of human and environmental rights and developing countries argued against under-representation in WTO activities.¹⁷⁰

3. World Bank, IMF and Other IGO Efforts

The World Bank has also been mentioned in the human rights arena and has been called upon to join with the UN to determine how investment inequities between developed and developing countries can

161. *Id.* at 3.

162. *Briefing Paper on: International Core Labour Standards and the WTO*, QUAKER U.N OFFICE, Geneva, 1999 [hereinafter *Briefing Paper*].

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* at 2.

167. *Id.*

168. *Id.*

169. Evelyn Iritani, *Poor Nations Defy, Derail WTO 'Club'*, L.A. TIMES, Dec. 5, 1999 at A.

170. *See id.*

be effectively managed for proper access.¹⁷¹ It is suggested that this joint task force would report to ECOSOC and the World Bank Development Committee.¹⁷²

The International Monetary Fund (IMF) has recently emphasized the imposition of "structural and institutional reforms as opposed to focusing on balance-of-payments adjustments."¹⁷³ The IMF has proposed forgiving the debts of many developing countries in an attempt to stimulate their economy and access to the global market.¹⁷⁴ This is the result of the evolving focus of IMF. Upon its inception in 1945, the fund was designed simply to monitor exchange rates; gradually its function began to encompass the encouragement of trade and currently it has acquired the role of actually issuing credit.¹⁷⁵

Many argue that forgiving debt will not have the desired effect of encouraging trade and indirectly resulting in market access, a better economy and improved human rights.¹⁷⁶ The debts of approximately forty-two countries could be forgiven, but some say these countries could use the boost in their "credit rating" to purchase arms to further control their citizenry.¹⁷⁷ Further arguments hold that debt relief will be a patronizing insult to the dignity of developing countries.¹⁷⁸ With the backlash on the IMF's current debt relief plan it is uncertain as to whether the IMF will research any more proactive measures to address global market or human rights issues.¹⁷⁹

The OECD has proposed raising the standards of conduct for MNC's.¹⁸⁰ The OECD hopes that by requiring greater transparency and increasing corporate responsibility to shareholders they can attract more foreign access to the global market.¹⁸¹ The OECD would like these standards to be come a part of the WTO and IMF application process.¹⁸²

The Overseas Development Council (ODC) is working on establishing better conflict resolution mechanisms that are needed in a volatile

171. See *Globalization With A Human Face*, *supra* note 35, at 12.

172. *Id.*

173. Martin Feldstien, *Refocussing The IMF*, FOREIGN AFF., Apr. - May 1998.

174. Susan Warner, *Relief From Debt May Be in Sight for World's Poorest Countries*, PHILA. INQUIRER, June 18, 1999, at A03.

175. See Feldstien, *supra* note 173.

176. *Debt Relief: G-8 Plan Will Not Solve Crisis, Critics Say*, U.N WIRE, June 18, 1999.

177. *Id.*

178. Rosemary Righter, *A Debt Bonfire is No Panacea: Pennies From Heaven?*, TIMES (London), June 18, 1999, at Opinion Section.

179. See Feldstien, *supra* note 173.

180. *CORPORATIONS: OECD Urging 'Code of Conduct' For Developing Nations*, U.N WIRE, May 5, 1999.

181. *Id.*

182. See *Debt Relief: G-8 Plan Will Not Solve Crisis, Critics Say*, *supra* note 176.

economic market.¹⁸³ Because free market economies are volatile and developing countries are inexperienced, the need for conflict management is imperative to prevent social upheaval and violations of human rights.¹⁸⁴ A book written by Harvard Professor Dani Rodrik on global development and developing countries, compared South Korea and Indonesia. According to Rodrik, Indonesia provided no method for people to express their views and riots broke out. In Korea, the government negotiated with uncooperative union leaders to provide solutions prior to social upheaval.¹⁸⁵

Each of these IGO's illuminates a piece of the puzzle, trying to encourage MNC investment in foreign markets, opening the market to developing countries, but attempting to maintain core human rights and labor standards. None of the roles these IGO's define for themselves or programs they promote seem to adequately address solutions to MNC's violations of human rights or provide effective enforcement tools to compel corporations to comply.

E. Compliance Via International Trade And Treaty Law

1. Efforts in the Arena of Trade and Customary International Law

International trade law is one method of indirect regulation that may have some substantial effect in deterring human rights violations.¹⁸⁶ Concepts of fair trade restrict corporations from profiting from human rights violations; under such law, equal treatment must be given to every nation's product.¹⁸⁷ Producers who violate human rights to lower merchandise prices and increase profits may be found guilty of dumping, and the U.S. may impose punitive anti-dumping tariff measures to reduce any competitive advantage the offending MNC may have gained by human rights violations.¹⁸⁸ While anti-dumping measures may not directly regulate human rights violators, they decrease the advantage that such violations give the MNC's that engage in such practices.¹⁸⁹

International law whether customary or treaty law, has had little effect on human rights violators. State human rights violations, alleged

183. Nancy Alexander, *Notes From Overseas Development Council (ODC) Forum: Making Globalization Work*, INTERNATIONAL TRADE CENTER, March 18, 1999.

184. *Id.*

185. See Alexander, *supra* note 183.

186. See *Corporations and Humans Rights*, *supra* note 28, at 6.

187. See FIFTY YEARS AND BEYOND, *supra* note 4, at 408.

188. *Id.*

189. *Id.*

in protection of corporate interests in India, were violations of both customary international law and multilateral treaties.¹⁹⁰ International law almost exclusively considers nations as those primarily responsible for the management of human rights.¹⁹¹ National governments then hold all individuals within their borders responsible for managing human rights according to treaties and customary international law.¹⁹² Little governance is exerted however, toward corporate actors incorporated within the borders of a nation that has signed on to a human rights treaty, but who are conducting business outside of that nation's borders.¹⁹³ There is no international law either by treaty or custom that is binding authority on all international actors including individual corporate entities.¹⁹⁴

The main concern is that the countries where MNC's operate, many times have very low human rights standards to comply with; these standards may be significantly less than those of the MNC's country of incorporation.¹⁹⁵ And even if the country where the MNC conducts business is a signatory to human rights treaties, they may not enforce those obligations adequately on the individual actors within their state.¹⁹⁶ For example, while many countries have signed the Convention Against Torture, it is not widely recognized as a crime in their national penal codes, thus is rarely enforced.¹⁹⁷

2. Efforts in the Arena of Treaty and Customary International Law

In theory, the simplest method of forcing MNC's to comply with human rights treaties and customary international law, is to incorporate them into the existing human rights treaties as individuals of the state parties; thus holding corporate entities responsible for the management of human rights violations, regardless of any foreign business location.¹⁹⁸ While this sounds appealing, the only existing treaty to hold individuals responsible is the UN Convention on the Prevention and Punishment of the Crime of Genocide.¹⁹⁹ It has been argued that there would be increased support for the ICC if corporate actors could be

190. See *U.S. Corporation Complicit in Abuses in India: Report Charges U.S. and Indian Governments Also Overlook Human Rights Violations*, *supra* note 15.

191. See MEYER, *supra* note 142, at 83.

192. See *Globalization With A Human Face*, *supra* note 35 at 9.

193. *Id.*

194. See GUIDE, *supra* note 1, at 6.

195. See FIFTY YEARS AND BEYOND, *supra* note 4.

196. See GUIDE, *supra* note 1, at 3.

197. See FIFTY YEARS AND BEYOND, *supra* note 4, at 260.

198. JOHN M. ROGERS, INTERNATIONAL LAW AND UNITED STATES LAW (1999).

199. See GUIDE, *supra* note 1, at 11.

brought before the court on "crimes against humanity" as expressed in the Genocide Convention.²⁰⁰ Even if the ICC is not the most effective means of holding corporate actors responsible, others argue that under the Genocide Convention, national courts should have extended "trans-boundary" jurisdiction to hold Convention violators responsible.²⁰¹

Out of the Treaty of Versailles came the International Labour Organization (ILO), and a set of five core labor standards, "the right to organize, bargain collectively, freedom of association, freedom from forced labor, child labor, and discrimination."²⁰² While these labor standards have been in force for many years, they are sometimes disregarded in order for foreign nations to attract MNC's by offering the lowest wage and production costs.²⁰³ In addition, many of the ILO's conventions have not received widespread ratification. The U.S. has not ratified the Forced Labor Convention, Freedom of Association Convention, or the Right to Organize and Collective Bargaining Convention; other developed countries have refused ratification as well.²⁰⁴

Treaties promoting social and political rights, such as the International Covenant on Civil and Political Rights, have received sparse mention in the human rights debate.²⁰⁵ Few NGO's lobby for the regulation of MNC's concerning these rights because they continue to struggle to enforce basic human rights.²⁰⁶ It is possible to make an argument that anti-dumping laws could apply to social and political rights as they do to core human rights violations to tie them to trade law, but there is little evidence that such an argument would stand.²⁰⁷

NAFTA has been heralded as a plight against enforcement of human rights violations against corporations. Relaxing North American trade barriers has made it convenient for U.S. corporations to slip the bounds of human rights regulation for the lower wage markets in Mexico.

200. See FIFTY YEARS AND BEYOND, *supra* note 4, at 408.

201. See GUIDE, *supra* note 1, at 11.

202. See Briefing Paper, *supra* note 162.

203. See FIFTY YEARS AND BEYOND, *supra* note 4, at 289.

204. See McDONALD, *supra* note 5 at 281.

205. See *Oil Companies Complicit in Nigerian Abuses*, *supra* note 48.

206. *Id.* at 2.

207. See FIFTY YEARS AND BEYOND, *supra* note 4, at 409.

IV. GLOBAL RESPONSE AND ENFORCEMENT TRENDS

A. *Foreign Response Generally to Human Rights Issues*

1. Easier Said Than Done

Foreign governments struggle with human rights issues. They are clearly caught between the need to enter the global market to improve their economy and an attempt to retain the human rights standards they espouse.²⁰⁸ Countries such as Germany while initially discussing banning rugs made by child labor in Asia instead opted to mix their support of the rug manufacturers with the support of education programs for children in Asia.²⁰⁹ Governments tend to flip-flop on their position, holding tight to human rights obligations at one point, yet releasing the hold for obvious political and economic reasons at the next point.²¹⁰

2. Cultural Relativism

Cultural relativism plays an important role in the eyes of developing countries. Human rights in general should be weighed so as not to offend the "cultural, economic and social backgrounds of the concerned country."²¹¹ Some resistance toward globalization comes from the view that the cultural identity and traditions of indigenous people will be threatened amid the rush toward western consumerism.²¹² MNC's who conduct business in developing countries, seem to understand little about the developing country's distinct traditions, and then wonder why local fishermen complain that increased water temperatures will kill their fish harvests.²¹³ The opposite argument is made that indigenous people are underrepresented in the global market and that heed should be taken to their human, property and cultural rights when MNC's move into their country.²¹⁴

208. See *Corporations and Humans Rights*, *supra* note 28, at 2.

209. *Id.*

210. *Id.*

211. *Fiftieth Anniversary Year*, *supra* note 133, at 2.

212. See *FIFTY YEARS AND BEYOND*, *supra* note 4, at 261.

213. See *U.S. Corporation Complicit in Abuses in India: Report Charges U.S. and Indian Governments Also Overlook Human Rights Violations*, *supra* note 15, at 1.

214. *INDIGENOUS PEOPLES: UN Slow To Act On Rights Statement*, UN WIRE, Aug. 13, 1999.

B. *The Future of Human Rights*

1. Focus Shift

The future of human rights protections seems to include a shift in the focus of human rights responsibility from state actors to the increasingly more powerful corporate actors.²¹⁵ As the power of the state over the corporate sector erodes, corporate entities will have to either incorporate into the existing system or create new binding standards on human rights performance.²¹⁶ Corporations should be held to a minimum standard of human rights education of employees to emphasize global ownership of the human rights ethic.²¹⁷

2. Increase of NGO and IGO Pressure

NGOs will intensify the current level of public assault on corporate violators to encourage more corporate transparency concerning human rights compliance and create more effective corporate development programs.²¹⁸ Public encouragement will continue to work toward a global market policy that regards people to be as important as profits.²¹⁹

Trade law may be utilized more effectively to control exports and imports of goods manufactured by human rights violators and anti-dumping laws could be broadened to include areas of social human rights abuses.²²⁰ Implementation of a multilateral code of conduct for MNC's could be established and enforced against MNC's to balance the loss of any competitive edge and remove the voluntary nature of current norms.²²¹ Increased pressure on economic IGO's may prod organizations such as the WTO and the IMF to use the enormous power they hold to manage and enforce common core labor standards and basic human rights.²²² Multi-lateral agreements and treaties could incorporate MNC's and individuals so that all actors in the international community may be held accountable for abuses.²²³ Use of IGO organs, such as the ICC, could be used to pierce the corporate veil and hold individuals responsible for violations in the name of their corporations also holds

215. See FIFTY YEARS AND BEYOND, *supra* note 4, at 407.

216. *Id.* at 407.

217. *Id.* at 261.

218. *Id.* at 409.

219. See *Globalization With A Human Face*, *supra* note 35, at 2.

220. See *id.* at 10.

221. *Id.* at 11.

222. See *Human Development Report: Globalization Leaving Poor Behind*, *supra* note 55, at 2.

223. See *Globalization With A Human Face*, *supra* note 35, at 9.

potential.²²⁴

The foregoing trends illustrate that progress must be made in an industry that lacks any binding regulation, toward a balanced system of human rights norms, that may be effectively enforced unilaterally toward all corporate actors in the global market.

V. CONCLUSION

Corporate compliance will not be accomplished by use of voluntary standards of conduct; some independent body must police any standards or regulations. Education alone will not bring into effect the desired change, as placed on a scale, profit will always outweigh the social mores that human rights espouse. Incorporation into current human rights treaties alone will not be an effective enforcement tool as human rights treaties are commonly disregarded even by the governments of the signatory countries. Enforcement may come from a mixture of corporate involvement in the creation of standards, education and treaty incorporation, however corporate actors will only respond when, for profit reasons, they are left with no other choice.

Utilization of trade law and external regulation by the WTO seems the most effective means for the creation of true sustainable human rights enforcement. The WTO wields power that no independent state holds. Membership in the WTO is coveted and regulations would garner instant enforcement value. The issues surrounding developing countries may improve as the WTO opens the ministerial doors to the voices of those emerging in the global market. Trade law penalties for abusers will neutralize any economic benefit realized from human rights infringement. No single compliance mechanism will be completely effective, however where profit is the primary end for which corporations aspire, any substantive effort to enforce human rights must focus on affecting profit.

224. See *Oil Companies Complicit in Nigerian Abuses*, *supra* note 48.

ECONOMIC FREEDOM AND PRIVATIZATION – FROM EGYPT AND MESOPOTAMIA TO EASTERN EUROPE

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“Fundamentally, there are only two ways of co-coordinating the economic activities of millions. One is central direction involving the use of coercion [and] . . . [t]he other is voluntary co-operation of individuals”¹

INTRODUCTION

On the tenth anniversary of the sudden collapse of the Berlin Wall, the seemingly immovable symbol of the Cold War, a great debate exists among the people of Eastern Europe² about whether the end of communism was a mistake.³ Disillusion surrounds the issue of what good is the freedom to travel when you cannot afford to travel, or what good is the freedom of speech if no one listens.⁴ Capitalism has been the most common scapegoat for the countries making the bumpy transition from communism to a free market economy. But, is it really capitalism, or are there other reasons for this widespread dissatisfaction?⁵ Although the global community generally advocates for privatization and a free market economy, the reality of the process of privatization

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1. MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 13 (1962) (Milton Friedman, a leading economist and free-market advocate, notes that totalitarian and free-market systems are the only two fundamental ways to run an economy).

2. See *THE WORLD ALMANAC AND BOOK OF FACTS 2000* 710 (1999) [hereinafter *ALMANAC 2000*]. The Eastern European countries include Albania, Bulgaria, Czech Republic, Hungary, Poland, Romania, Slovakia and the former Soviet Republics of Belarus, Estonia, Latvia, Lithuania, Moldova, Russia and Ukraine. See *id.* The former Soviet Republics of Armenia, Azerbaijan, Georgia, Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan are now considered part of the continent of Asia. See *id.* at 516-17. The former Eastern European country of the German Democratic Republic (“East Germany”), as a result of the German reunification of 1990, is now the Federal Republic of Germany (“Germany”) and is considered part of Western Europe. See *id.* at 800. The former Republics of Yugoslavia, which are considered Southeastern Europe, comprise Bosnia Herzegovina, Croatia, Macedonia, Slovenia and Yugoslavia. See *id.* at 876.

3. See Kevin Cullen, *Unity Eludes Germany 10 Years After Wall's Fall*, *DENVER POST*, Nov. 7, 1999, at A1.

4. See *id.*

5. See *id.* (discussing a general dissatisfaction with the new capitalism).

might not bring the economic prosperity initially expected.⁶ Privatization, historically, has contributed to the socio-economic and political prosperity of a nation, although not without a few failures.⁷ With a historical perspective in mind, this article will examine the problems with privatization, specifically in the Russian Federation and Czech Republic, where the privatization efforts have gone in opposite directions.

Part one provides historical background in the development of today's economies, the natural need for a free-market economy and the economic impact on society. Part two discusses the process of privatization in the Russian Federation and Czech Republic. Part three analyzes the three most common political, social, and economic problems of failed transitions to privatization. The article concludes with a general view of today's global economy.

I. BACKGROUND AND HISTORY

A. *Humans and Economics: Early Economic Development*

"Trade, in the simple form of barter, is as old as man."⁸ Humans, historically, have never been satisfied with what they can produce for themselves, because they have always been driven by *want* rather than *need*.⁹ Once humans possess what they need, they want to acquire what others possess, either by force or by exchange, and if they happen to possess what others might need, they trade.¹⁰ Once local needs are satisfied, people frequently go beyond local markets and look for clients elsewhere.¹¹ Today, archaeologists have discovered ruins that provide evidence of ancient international exchange, proving the human nature of freely owning and trading, called the free-market.¹² Similar to today, these historical trade efforts did not occur entirely free of obstacles, such as excessive government control. Nevertheless, the commitment

6. See Mark Baker, *Privatization in the Developing World: Panacea for the Economic Ills of the Third World or Prescription Overused?*, 18 N.Y.L. SCH. J. INT'L & COMP. L. 233, 237 (1999).

7. See Yuliya Mitrofskaya, *Privatization as an International Phenomenon: Kazakhstan*, 14 AM. U. INT'L L. REV. 1399, 1400 (1999).

8. SIR LEONARD WOOLLEY, *THE BEGINNINGS OF CIVILIZATION* 321 (1965) [hereinafter *CIVILIZATION*] (discussing the rise of human civilizations all over the world).

9. *See id.*

10. *See id.*

11. *See id.*

12. *See id.* (noting that "in the Chalcolithic Age, we find in the house ruins of the early al'Ubaid period at Ur beads made of amazonite which must have been imported from the Nilghiri hills of southern India; presumably they had . . . passed from hand to hand").

to trade continued.¹³

With the introduction of metal and metallurgical science, trade became a greater necessity because only a few could manufacture the things that everyone needed.¹⁴ The manufacturer, however, had to rely on raw materials, which often had to be imported, to keep up with the constant demand.¹⁵ There was not one solution to this growing need for trade, therefore different civilizations approached it in different ways.¹⁶ Unlike today, these differences were not due to ideologies, because the philosophical outlook was still lacking, instead these were a result of different “economic character[s] and resources” available in certain parts of the world.¹⁷ For instance, the ancient civilizations of Egypt and Mesopotamia employed opposite methodologies toward their respective economic systems.¹⁸ The Egyptian and Mesopotamian civilizations are two of the oldest civilizations known in the world,¹⁹ and, therefore, the study of their economic systems reflects that the continuous tug-of-war between a state-controlled economy and a free-market system is nothing new. The study also helps prove an understanding of the failed state-controlled economies and, consequently, the trend toward the free-market system.²⁰

1. Egypt

Egypt, under Pharaohs, had an economic system that in the modern world is called “nationalization,” closely resembling the state-controlled communist-style economic system of today.²¹ Under this system, Pharaohs controlled all commerce in Egypt, and the concept of free-trading merchants practically did not exist.²² Merchants worked for the government and could not individually enjoy the wealth they helped create.²³ Despite the evidence of Egyptian commerce, there is no

13. WILLIAM L. LANGER, AN ENCYCLOPEDIA OF WORLD HISTORY 21-27 (1952) [hereinafter WORLD HISTORY] (noting that besides physical obstacles, such as lack of communications equipment and difficulty in traveling, the most common of all obstacles was the excessive power of governments, or gods in some cases. In Egypt, for instance, Pharaoh controlled everything, while on the other hand, Mesopotamia was the least controlled economy, nevertheless triad gods Enlil, Anu, and Ea were in charge of Sumer and Akkad, god Marduk controlled the Babylonians, and Ashurbanipal ruled Assyria).

14. See CIVILIZATION, *supra* note 8, at 321.

15. See *id.*

16. See *id.* at 321-22.

17. *Id.* at 322.

18. See *id.*

19. See WORLD HISTORY, *supra* note 13, at 23, 25.

20. See Mitrofanskaya, *supra* note 7, at 1401-2.

21. See CIVILIZATION, *supra* note 8, at 322.

22. See *id.*

23. See *id.*

mention of word "merchant" in Egyptian texts, nor is there any knowledge of laws regulating trade because Pharaoh's nationalization functioned as "a law unto himself."²⁴ Pharaohs became "deified in life and in death, and exercised despotic authority, ruling through an elaborate, carefully trained bureaucracy."²⁵ Pharaohs forced the architects to erect pyramids and palaces, sculptors to portray gods, intellectuals to promote literature, scientists to invent and discover, and traders to trade.²⁶ The system continued with "forced" success, but eventually collapsed.²⁷

In theory, the entire country was Pharaoh's personal property.²⁸ The well-being of the country depended upon the goodwill of the gods, who essentially represented the government.²⁹ With the exception of petty trade in the villages, Pharaohs monopolized labor, natural resources, domestic and foreign trade.³⁰ Profits from all trades went straight to the Pharaohs, which led to the dissatisfaction of craftsmen, construction workers, and merchants.³¹ Consequently, trade weakened and eventually no merchants remained to carry out Pharaohs' business.³²

2. Mesopotamia

In Mesopotamia, individual merchants freely conducted business within the limitations of laws, and were subject to taxation; in a system that today, we call capitalism.³³ The Mesopotamians depended almost entirely on foreign trade.³⁴ Although rich in agricultural land, they produced no timber, stone, gold, copper or any of the other metals that became a necessity.³⁵ Hence, the Mesopotamians imported most of the raw materials they needed and traded heavily.³⁶ A merchant in Mesopotamia could even do business on credit. For example, he could sell his product in exchange for a tablet with value expressed in copper

24. *Id.*

25. WORLD HISTORY, *supra* note 13, at 21.

26. *See id.*

27. *See* CIVILIZATION, *supra* note 8, at 322. The Egyptian system was similar to the systems in Joseph Stalin's Soviet Union and Mao Ze-Tung's China, where farmers, scientists, athletes were all forced to perform under the banner of patriotism, but without any financial incentive.

28. *See id.*

29. *See id.* at 324.

30. *See id.*

31. *See id.* at 324-25.

32. *See id.* at 329.

33. *See id.* at 322.

34. *See id.* at 329.

35. *See id.*

36. *See id.*

or silver to be collected later; the system was called "letters of credit."³⁷ The Mesopotamian system of economics benefited everyone and became an example for others to follow.³⁸

The free market system of Mesopotamia provided its traders, merchants, and craftsmen with ample opportunities to do business not only in Mesopotamia, but also beyond the local market.³⁹ For instance, buyers paid on demand of merchant's tablets, comparable to modern day paper currency.⁴⁰ The system provided opportunities, freedom, and prosperity to the entire civilization where creation of wealth was not monopolized by the government. Overall, commerce in Mesopotamia flourished, their influence in establishing commerce and banking systems was unmatched, they used standard weights and measures, they were the first to codify civil law and to write contracts, and maintained a military far superior to that of the Egyptians.⁴¹

B. The Beginning of the Modern Economic Era

The Egyptians and the Mesopotamians left their impression on the world, with newly growing societies left to follow their models. Consequently, a new medium of exchange and fresh economic theories inevitability increased commercial world trade.⁴² Several different commodities functioned successfully as mediums of exchange; even cattle provided an instrument of trade.⁴³ Salt acted as an instrument of commerce in Abyssinia, shells in India, dried cod in Newfoundland, tobacco in Virginia, sugar in the West Indies, leather in some countries, and "nails instead of money" in Scotland.⁴⁴

Eventually, metal became a medium of exchange, which resulted in modern era coins⁴⁵ when William the Conqueror introduced the custom of paying in money.⁴⁶ The early coins were valued according to their weight, but eventually these coins were assigned denominations.⁴⁷ Today, money has become the universal instrument of commerce, and has had a tremendous impact on the world as noted by Adam Smith.⁴⁸

37. *Id.* at 340.

38. *See id.*

39. *See id.* at 341.

40. *See id.*

41. *See* WORLD HISTORY, *supra* note 13, at 25.

42. ADAM SMITH, THE WEALTH OF NATIONS 20 (Alfred A. Knopf, Inc. 1991) (1776) [hereinafter WEALTH].

43. *See id.*

44. *Id.* at 20-21.

45. *See id.* at 21.

46. *See id.* at 23.

47. *See id.*

48. *See id.* at 24.

Adam Smith, the father of modern day economics, first described economics' influence on society.⁴⁹ Adam Smith's book, *The Wealth of Nations*, although written in 1776, contains economic theories still observed today.⁵⁰ Adam Smith described the three ways the "increase and riches of commercial and manufacturing towns contributed to the improvement and cultivation of the countries,"⁵¹ and moreover, that a free-market represents a natural need and a system that countries ultimately want to have.

The three ways described by Smith are: first, a free-market economy gives constant encouragement to further cultivate and improve the country; second, the wealth acquired by the citizens is frequently used to buy and sell land, which would otherwise be left uncultivated; and, third, increasing trade and commerce introduces order, peace, and good government by having people focus on economic well-being rather than conflicts and wars.⁵² Adam Smith's theory became the symbol of prosperity and well-being around the world, in the form of privatization and free-market economics. An increasing number of countries continued to adopt, theoretically, the Mesopotamian economic system rather than the Egyptian system. Today, despite the challenges in transition, some countries fared well, while others went astray.⁵³

II. TODAY'S WORLD: AN UPDATE

A. Privatization

Privatization has become a global phenomenon, as more and more countries experiment with what is called a "free-market economy."⁵⁴ The term "privatization" differs in interpretation from scholar to scholar, and from country to country. For instance, some scholars describe privatization as an action designed to "broaden the scope of private sector activity."⁵⁵ In general, privatization is defined as "a

49. *See id.* at xiii.

50. *See id.* at xix.

51. *Id.* at 362.

52. *See id.* at 362-63.

53. *See* Rumu Sarkar, *The Legal Implications of Financial Sector Reform in Emerging Capital Markets*, 13 AM. U. INT'L L. REV. 705, 707-08 (1998). Many developing countries of Africa, Asia, and Latin America, such as Tanzania, India and Brazil are moving away from the protectionist economies of the past, and Eastern Europe is racing toward privatization as well. *See id.* Some countries such as Poland, Czech Republic, Hungary, Chile and South Africa have done well, while others, such as Russia, Ukraine and Tanzania are still struggling with their reforms. *See id.*

54. *See* Mitrofanskaya, *supra* note 7, 1401-02.

55. CHRISTOPHER ADAM ET AL., *ADJUSTING PRIVATIZATION: CASE STUDIES FROM DEVELOPING COUNTRIES* 6 (1992).

conversion of businesses from governmental ownership to private,"⁵⁶ and as an act of "transferring (by the means of buying and selling) the legal title of state property, which was in the possession of state enterprises for restricted purposes of producing certain goods under owner-state control, to individual or associated owners."⁵⁷ However, the most common definition is "the transfer from the public to the private sector of ownership and/or control of productive assets."⁵⁸

Privatization not only promotes economic stability, but also democracy and social stability, by reducing the power of centralized government and granting it to the ordinary people.⁵⁹ As a result, it satisfies a fundamental demand of human nature, that is the owner of something is more likely to take good care of it.⁶⁰ Privatization also encourages competition, which results in better products and customer service, whereas state-run economies tend to be inefficient and bureaucratic.⁶¹ Today, failed state-run economies, improved systems of communication, increasing tax burdens, and basic human nature to strive for success provide some reasons leading to the trend of decentralizing world economies, such as those in Eastern Europe.⁶²

B. *Eastern Europe*

The transition of the communist Eastern European countries from state-run economies to free-market economies have provided some of the biggest news stories in the recent history. Yet in essence, it is simply a struggle between the ancient Egyptian and Mesopotamian economic systems.⁶³ "The widespread nature of privatization efforts in Eastern Europe has become a common topic in legal literature, although critical analysis of the success or failure of their efforts remains woefully underdeveloped."⁶⁴ In a short time, the Communist

56. Privatization, available in Microsoft Encarta Encyclopedia (1997).

57. Andrei A. Baev, *Civil Law and the Transformation of State Property in Post-Socialist Economies: Alternatives to Privatization*, 12 UCLA PAC. BASIN L.J. 131, 150 (1993) (commenting that privatization is a way of abolishing the socialist command system).

58. See Baker, *supra* note 6, at 238.

59. See Mitrofanskaya, *supra* note 7, 1400-02.

60. See David Gordon, *Privatization in Eastern Europe: The Polish Experience*, 25 LAW & POLY INT'L BUS. 517, 518 (1994) (explaining that competition runs a market economy by generating incentives for maximizing profits, consequently insuring lower prices and better products, calling it the efficient market theory).

61. See *id.* at 518.

62. See Mitrofanskaya, *supra* note 7, at 1402; Sarkar, *supra* note 53, at 706.

63. See Mitrofanskaya, *supra* note 7, at 1406 (noting that although calls for privatization began in the 1970s, most Communist countries did not begin to privatize State enterprises until the early 1990s).

64. J. Robert Brown, *Culture, Chaos and Capitalism: Privatization in Kazakhstan*, 19 U. PA. J. INT'L ECON. L. 909, 910 (1998). The Eastern European Communist Bloc

Bloc countries of Eastern Europe tried various ways, with "varying degrees of seriousness," to move away from the Soviet-style economic system and embrace a free-market system.⁶⁵

The 180-degree switch, from one-party controlled assets to public ownership, created the toughest challenge that the Eastern European countries faced. This challenge was different from other countries striving for privatization.⁶⁶ Author Yulia Mitrosfanskaya notes the following three factors: "first, no other country needed to transfer thousands of enterprises to the private sector; second, privatization in almost all post-Soviet countries was completed within a short period of time - less than ten years; third, post-communist countries used more radical means for transferring state property to private owners."⁶⁷ Therefore, the Eastern European transition was a major event, where not only the economies were in transition, but also the minds of millions of people who had no concept of the "resourcefulness of private property."⁶⁸ After almost a decade, the struggle of economic transition and nation-building still continues with varying results. The Russian Federation and the Czech Republic, like ancient Egypt and Mesopotamia, exemplify two countries facing similar economic challenges but producing different results.⁶⁹

1. The Russian Federation

The Russian Federation emerged from the ruins of the Soviet Union, which disbanded in December 1991, after seventy-four years of communist rule.⁷⁰ The Soviet Union, geographically the world's largest country, led as one of the world's two superpowers since World War II.⁷¹ Yet in the 1980s, the Soviet Union's economy stood in ruins; and even as Mr. Mikhail Gorbachev's economic and political reforms made some

countries included Albania, Bulgaria, Czechoslovakia, East Germany, Hungary, Poland, Romania, the Soviet Union and Yugoslavia. See ALMANAC 2000, *supra* note 2, at 710. Albania was considered a Soviet ally from 1944 until 1960, when, in 1960, it adopted the Chinese-style communism. See *id.* at 769.

65. Brown, *supra* note 64, at 910.

66. See Mitrosfanskaya, *supra* note 7, at 1407. Author Yuliya Mitrosfanskaya presents an interesting distinction between privatization efforts in the Eastern European countries and developed countries. The focus of her writing, however, is the former Soviet Republic of Kazakhstan.

67. *Id.*

68. *Id.*

69. Kent F. Moors, *The Failure of Russian Privatization 1992-94: How the Industrial Nomenklatura Prevented Genuine Reform*, 3 J. INT'L LEGAL STUD. 1, 51 (1997) (concluding that privatization failed to break the traditional hold on industrial power, hence proving bureaucracy's influence on the Russian privatization process).

70. See THE UNIVERSAL ALMANAC 1994 496-98 (1993) [hereinafter ALMANAC 1994].

71. See *id.*

headway, not enough changes occurred to preserve the Union.⁷² The Soviet leaders enjoyed very little public trust during the communist regime, and the trend continued in Russia after the fall of the Soviet Union.

Russia began a massive privatization project after the fall of the Soviet Union.⁷³ The government's role in setting price limits relaxed and private property rights initiated as new promises.⁷⁴ The Russian government started the privatization process with small enterprises, such as food, retail and wholesale companies.⁷⁵ Larger enterprises, such as mining and air transportation, remained outside the private industry.⁷⁶ Soon after, the International Monetary Fund (IMF) announced its support of the Russian economic reform plan, which meant that Russia could receive up to four billion U.S. dollars in IMF aid over a year's time.⁷⁷

The Russian government introduced several programs in order to provide the citizens with opportunities to buy-out state properties and state enterprises.⁷⁸ The voucher system, a "mass privatization" program, offered one of the most prominent reform programs.⁷⁹ The purpose of the voucher system was to provide ordinary citizens with resources (in this case, 10,000 rubles) to purchase forty to fifty percent of state property, thereby creating millions of private owners.⁸⁰ The vouchers provided the means of payment to buy state property or investment funds, but the government also allowed open trading in the market.⁸¹ Some citizens, due to their lack of trust in the government and low expectation of investment return, sold their vouchers for cash.⁸² This led to the devaluation of vouchers, and provided opportunities to the few with multiple vouchers to buy a bigger share in the state enterprises. This created a concentrated class of state property

72. *See id.* Mr. Mikhail Gorbachev was the last leader of the Soviet Union. Mr. Gorbachev tried political and economic reforms to preserve the Union, but the idea of providing freedom in pieces did not work and led to the collapse of the U.S.S.R. *See id.*

73. Anthony V. Raftopol, *Russian Roulette: A Theoretical Analysis of Voucher Privatization in Russia*, 11 B.U. INT'L L.J. 435, 451 (1993) (reviewing Russian economic plans since 1991, specifically the Russian voucher program, introduced in October 1992).

74. *See Moors, supra* note 69, at 6.

75. *See id.* at 8.

76. *See id.*

77. *See ALMANAC* 1994, *supra* note 70, at 498. The International Monetary Fund, IMF, "aims to promote international monetary cooperation and currency stabilization and expansion of international trade." *See ALMANAC* 2000, *supra* note 2, at 886.

78. *See Mitrofanskaya, supra* note 7, at 1414-16.

79. *See Moors, supra* note 69, at 17-31.

80. *See Raftopol, supra* note 73, at 452-55.

81. *See id.* at 455.

82. *See id.* at 456.

owners.⁸³ Nevertheless, the program was partially successful, resulting in 40 million new Russian shareholders, returning 94 million out of 150 million vouchers initially issued.⁸⁴ Overall, Russian privatization programs resulted in approximately "85,000 small enterprises and around 14,000 medium and large enterprises" being transferred to private owners.⁸⁵

Investment opportunities also became available to foreigners.⁸⁶ Foreign investors could freely participate in the privatization of small-sized enterprises, and use the voucher system to participate in medium-sized enterprises.⁸⁷ However, the Russian government did not enthusiastically support foreigners obtaining a big amount of Russian enterprises.⁸⁸ Consequently, foreign investors played a very limited role in the privatization of large enterprises.⁸⁹

The Russian reforms resulted in increasing private properties and economic prosperity, with limited individual freedom. Simultaneously, however, the transition created bureaucracy, powerful state-owned enterprises, lack of rule of law, and uncontrolled corruption. Today, Russians, specifically those at the bottom of the financial ladder, quickly blame capitalism for their problems, as their country continues to struggle with the economic transition.

2. Czech Republic

Czechoslovakia, in the early 1990s, also committed to reform itself in order to move away from the communist system of government, and free itself from Soviet domination and a state-controlled economy.⁹⁰ Czechs and Slovaks, the two major ethnicities in Czechoslovakia, agreed on a bloodless division of the country into two independent states, one of which became the Czech Republic.⁹¹ The "Velvet

83. *See id.*

84. *See* Mitrofanskaya, *supra* note 7, at 1415.

85. *Id.* at 1417.

86. *See id.* at 1416-17.

87. *See* Raftopol, *supra* note 73, at 462.

88. *See* Mitrofanskaya, *supra* note 7, at 1416-17.

89. *See id.* at 1417.

90. *See* Mitrofanskaya, *supra* note 7, at 1408.

91. *See* *History of the Czech People*, (visited Dec. 24, 1999) <<http://www.lawfirmusa.com/medschools/palacky/people.htm>>. At the end of the First World War, Czechoslovakia came into existence, comprising two major ethnic groups: Czechs and Slovaks. *See id.* Czechoslovakia became a Soviet ally at the end of the Second World War, and remained an ally until the collapse of the "Soviet-supported regime" in November of 1989. *Id.* In January 1993, Czechoslovakia was replaced by two independent states, the Czech Republic and Slovakia. *See* *Czech History*, (visited Dec. 24, 1999) <<http://195.113.114.5/udalosti/iscev98/history.htm>>.

Revolution⁹² led the Czech Republic to experience one of the fastest conversions from a state-owned economy to privatization.⁹³ Today, the Czech Republic maintains one of the most stable economies in Eastern Europe.⁹⁴

The reforms in the Czech Republic occurred in two phases.⁹⁵ The first phase commenced in 1990, in both the Czech Republic and Slovakia.⁹⁶ During the first phase, a total of 1492 State enterprises were privatized.⁹⁷ In the second phase, performed only in the Czech Republic, the government privatized a total of 846 state-owned companies.⁹⁸

The Czech government conducted an auction, first offering state-owned properties to Czech citizens to purchase, and then to foreign nationals.⁹⁹ In addition, the Czech legislature offered large-scale state enterprises and investment coupons to promote further privatization.¹⁰⁰ The Czech economic reforms continued further in the areas of financial services, banking, and telecommunications.¹⁰¹

Commentators characterized the privatization process in the Czech Republic as fair, genuine, and democratic.¹⁰² Czech laws imposed very few restrictions on investment activities, and did not offer any favors or special treatment to anyone.¹⁰³ Consequently, the Czech model of

92. See *History of the Czech People*, *supra* note 91. Of all the Communist Bloc countries of the Eastern Europe, Czechoslovakia witnessed the most peaceful change, hence labeled "[t]he Velvet Revolution." See *id.* The Velvet Revolution steered the country in the direction of Western thought and economic prosperity. See *id.*

93. See Michele Balfour & Cameron Crise, *A Privatization Test: The Czech Republic, Slovakia and Poland*, 17 *FORDHAM INT'L L.J.* 84, 93 (1993).

94. George Bogdan, *The Economic and Political Logic of Mass Privatization in Czechoslovakia and Poland*, 4 *CARDOZO J. INT'L COMP. L.* 43, 45 (1996) (reviewing necessary skills and practices for market economies).

95. See *id.* at 50-51 (noting that the first phase involved Czech and Slovak companies).

96. See Mitrofanskaya, *supra* note 7, at 1408 (citing CZECHOSLOVAK LAW ON TRANSFERS OF SOME STATE-OWNED ASSETS TO OTHER LEGAL ENTITIES OR PERSONS, SEC. 3 (1990)).

97. Bogdan, *supra* note 94, at 50-51.

98. See *id.*

99. Mitrofanskaya, *supra* note 7, at 1408-09.

100. See *id.* at 1409 (citing Czechoslovak Act of Feb. 26, 1991 in CONDITIONS OF TRANSFER OF STATE PROPERTY TO OTHER PERSONS (Large Privatization Law) arts. 22-26 (1991)).

101. See Mitrofanskaya, *supra* note 7, at 1410 (citing Henry Gibbon, *Pressing Ahead with Structural Reforms (Privatization of Telecommunication Companies in Central and Eastern Europe)*, *PRIVATIZATION INT'L*, June 1, 1998, at 16 (reviewing privatization in the telecommunications industry)).

102. See *id.* at 1410-11.

103. See Mitrofanskaya, *supra* note 7, at 1411 (citing Mark Kreisel, *Czech Republic: Investment in Freedom and the Future*, *INT'L DIMENSIONS*, Fall 1997, at 6 (explaining that Czech and foreign nationals were similarly treated)).

privatization successfully led to increased economic activities, individual freedom, and better relations with the west.¹⁰⁴ The Velvet Revolution and the Czech government's serious economic reforms renewed the Czech Republic's contact with "Western thought, technology, information, and economic health."¹⁰⁵ In 1995, the Czech Republic became a member of the Organisation for Economic Cooperation and Development (OECD), and currently seeks to become a member of the European Union (EU).¹⁰⁶ In 1998, the Czech Republic won the military trust of the West, with its induction into the North Atlantic Treaty Organization (NATO).¹⁰⁷

III. ANALYSIS

Traditionally, beginning with ancient Egypt, states played an important role in formulating economic policies, and the public expected their governments to interfere and even control everyday economic occurrences.¹⁰⁸ However, state-centered laws and state-controlled

104. See *History of the Czech People*, *supra* note 91.

105. *Id.*

106. See *id.* The OECD was established on September 30, 1961 "to promote the economic and social welfare of all its member countries and to stimulate efforts on behalf of developing nations." ALMANAC 2000, *supra* note 2, at 883. The following countries are OECD members: Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, South Korea, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States. *Id.* See also *Organisation for Economic Cooperation and Development*, (visited Dec. 24, 1999) <<http://www.oecd.org>>. The European Community (EC) was renamed in 1994, to European Union (EU). See ALMANAC 2000, *supra* note 2, at 882. The EU is the collective designation of three organizations with common membership: the European Economic Community (Common Market), the European Coal and Steel Community, and the European Atomic Energy Community (Euratom). See *id.* The EU membership includes: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden, and the United Kingdom. *Id.* See also *European Union*, (visited Dec. 24, 1999) <<http://europa.eu.int/index/htm>>.

107. See ALMANAC 2000, *supra* note 2, at 883. The North Atlantic Treaty Organization (NATO) was created by a treaty, signed on April 4, 1949 and went into effect on August 24, 1949. See *id.* The NATO membership includes: Belgium, Canada, Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Turkey, the United Kingdom, and the United States. *Id.* See *The North Atlantic Treaty Organization*, (visited Dec. 24, 1999) <<http://www.nato.int>>. NATO countries have agreed to settle their disputes peacefully and to regard an attack on one as an attack on all, and will take necessary measures to retaliate. See *id.*

108. Alfred C. Aman, Jr., *The Globalizing State: A Future-Oriented Perspective on the Public/Private Distinction, Federalism, and Democracy*, 31 VAND. J. TRANSNAT'L L. 769, 770-74 (1998) (explaining that in the majority of the countries, states played an important role, however in the case of the Eastern European Communist Bloc, the states had total control over their national economies).

economies began to gradually reduce individual and economic freedom, resulting in frustration, chaos, and economic ruin.¹⁰⁹

Today, the trend continues toward de-centralizing and privatizing what once belonged to the state.¹¹⁰ Progress in rapid transportation, technology, and cultural awareness generated a global network between sovereign states and individuals, resulting in a more prosperous world.¹¹¹ A free-market system may be as old as the ancient civilization of Mesopotamia, nevertheless, it has revolutionized today's world. The need for economic freedom continues to cause the countries with years of centralized and controlled economies to rapidly adopt the free-market economic system.¹¹²

The privatization efforts in Eastern Europe produced varying results. Some countries experienced a successful transition, while the rest still struggle with adopting the new economic system.¹¹³ For instance, the Czech Republic is working shoulder-to-shoulder with the West to improve its economy.¹¹⁴ Conversely, Russia, in order to regain its super-power status, frequently misallocates resources, resulting in drained budgets.¹¹⁵ In fact, given the immense problems with reform, the World Bank took control of assisting governments facing the economic challenges and achieving the reform goals.¹¹⁶ This article discusses the three most common political, legal and economic problems that, if not addressed correctly and promptly, can severely hamper

109. *See id.* (explaining that in recent history in Eastern Europe, the masses began to challenge the government's role in their lives and in the market. Consequently the state-owned economies collapsed, leaving a number of countries striving for individual, political, and economic freedom).

110. *Id.* at 772.

111. *Id.*

112. *See id.*

113. *See Privatization and Enterprise Reform* (visited Dec. 31, 1999) <<http://www.worldbank.org/html/fpd/privatesector/priv-ent.htm>>. The Czech Republic, Hungary and Poland are considered efficient and fast transitions, while the former Soviet Republics, with the exception of the Republic of Kazakhstan, have been very slow and have failed in many attempts to obtain needed improvements. *See Mitrofanskaya, supra* note 7, at 1418-22; Brown, *supra* note 64, at 911-12.

114. *See History of the Czech People, supra* note 91.

115. *See Yeltsin Signs Russian 2000 Budget, Kremlin Says*, RUSSIA TODAY (Dec. 31, 1999) <<http://www.russiatoday.com/investorinsight/business>> (reporting that the last budget signed by President Boris Yeltsin, before resigning, has unrealistic targets).

116. *See Privatization and Enterprise Reform, supra* note 113. The International Bank for Reconstruction and Development (IBRD) (commonly known as the World Bank) "provides loans and technical assistance for projects in developing member countries: encourages cofinancing for projects from other public and private sources." ALMANAC 2000, *supra* note 2, at 885. The World Bank has four affiliates: 1) The International Development Association (IDA); 2) The International Finance Corporation (IFC); 3) The Multilateral Investment Guarantee Agency (MIGA); and 4) The International Center for Settlement of Investment Disputes (ICSID). *See id.*

privatization efforts.

A. *The Political Problem*

An expected result of privatization is "reduced government role." The reduced role, however, does not necessarily mean a smaller role, but rather a different role.¹¹⁷ Privatization is a political process, and therefore without an appropriate government role, a country may face anarchy or total chaos.¹¹⁸ While a successful transition depends on the essential role of government, the system must not tolerate corruption, lawlessness, and violation of individual rights.¹¹⁹ However, a state can play an important role during the transition period by overseeing a fair and balanced reform.¹²⁰

According to the World Bank, a government's role is critical in the privatization process.¹²¹ For instance, a government can do the following: introduce and maintain competition; regulate monopolies; ensure investors that their investments are safe; help negotiate and monitor contracts; use resources productively; and manage the inevitable political and social tensions, especially foreign ownerships and labor layoffs, during the enterprise reform.¹²² Therefore, states can play the role of (economic) observers and (crises) managers, while staying away from directorial and ownership roles.¹²³

The two prominent examples of "redefined" governments are the Czech Republic, in Eastern Europe, and Kazakhstan, a former Soviet Republic in Central Asia.¹²⁴ Specifically, the Czech Republic commenced its privatization process by enacting new laws in October of 1991. These laws provided protection and fair opportunities to the ordinary citizens and foreign investors interested in purchasing state-held enterprises.¹²⁵ Similarly, the Kazakhstan government enacted new laws and created a "State Committee on Privatization" (*Gos Kom*

117. See Sarkar, *supra* note 53, at 720-21 (noting that the state's role must be redefined, because notwithstanding good intentions, state intervention in the private sector produces uneven and disastrous results).

118. See *Privatization and Enterprise Reform*, *supra* note 113.

119. See Sarkar, *supra* note 53, at 720-21.

120. See *id.* For instance, the governments of the Czech Republic, Poland and Kazakhstan effectively enacted pro-privatization laws, lifted price controls and terminated government subsidies to businesses to ensure balanced reform and fair supervision. See Mitrofanskaya, *supra* note 7.

121. See *Privatization and Enterprise Reform*, *supra* note 113.

122. See *id.*

123. See *id.*

124. See Mitrofanskaya, *supra* note 7, at 1408-38.

125. See *id.* at 1408-11 (noting that the Czech laws provided equal opportunity to purchase state-held properties to all citizens and to the foreign investors. Additionally, the laws protected private property rights of the citizens).

Imevshestva or GKI) to oversee the disposing of state-owned enterprises.¹²⁶ By way of contrast, the Russian government's lack of success in redefining its role has brought the nation to the brink of economic chaos.¹²⁷ For instance, Russian President Boris Yeltsin's resignation, on December 31, 1999, represented a sign of anticipated stability.¹²⁸ The Russian government's possible role in laundering foreign aid, President Yeltsin's firing of his prime-ministers, and the continuing war in the southern province of Chechnya have severely hurt Russian efforts toward economic reform.¹²⁹ Hence, a stable government with an appropriate role is not only needed to supervise the reforms, but also to enact and enforce the rule of law, which is equally essential for a successful transition.¹³⁰

B. *The Legal Problem*

An "individual's right to own property," provides the foundation to privatization, and thus, most transitional countries must develop and ensure such rights with a new set of laws, despite their existing laws.¹³¹ Most developing countries in Africa, Asia, and Latin America, with some essence of private ownership, simply had to change their existing regulations and judicial systems.¹³² However, absent the concept of private ownership, the Eastern European countries and the former Soviet Republics faced the need for a complete overhaul of their commercial laws.¹³³

Enacting new commercial laws is not to be confused with adopting Western social values.¹³⁴ Although, some countries, mostly European, have adopted a Western way of life, others, mainly Asian and Latin American countries, are not willing to lose their customs, practices, and culture.¹³⁵ Nonetheless, despite their resistance, the Asian and Latin

126. See Brown, *supra* note 64, at 940.

127. See David Lazarus, *Russia Pummels Stocks Again*, (Aug. 27, 1998) <<http://www.wired.com/news/news/business/story/14702.html>>; David Lazarus, *Russian Roulette Rattles Market*, (Aug. 24, 1998) <<http://www.wired.com/news/news/business/story/14610.html>>; Mitrofskaya, *supra* note 7, at 1417-18 (pointing out that the Russian government's failure to assert its role as a fair supervisor led to the crash of Russian economy during the summer of 1998).

128. See *Russian Shares Surge 10.54 Percent As Yeltsin Resigns*, RUSSIA TODAY (Dec. 31, 1999) <<http://www.russiastoday.com/investorinsight/markets>> (reporting that the Russian Trading System was higher, because Yeltsin's resignation reduced uncertainty).

129. See ALMANAC 2000, *supra* note 2, at 853.

130. See Sarkar, *supra* note 53, at 721-24.

131. *Id.* at 721.

132. See *id.* at 722.

133. See *id.*

134. See *id.* at 722-23.

135. See generally Sarkar, *supra* note 53.

American countries have failed in completely preventing the influence of the Western culture.¹³⁶

Once again, the Czech Republic finds itself on the proper side of the problem due to the government's willingness to reform critical areas of banking, energy, and financial services with fairness.¹³⁷ However, Russia finds itself influenced by a *nomenclatura* of organized crime figures and factory managers.¹³⁸ Additionally, oil, gas, energy and many such industries are still under the Russian government's control,¹³⁹ and the economy is severely infected by increasing corruption.¹⁴⁰ Having a rule of law encourages investment, particularly foreign investment, which is essential to avoid the increasing problem of lack of capital investment.¹⁴¹

C. *The Economic Problem*

The lack of capital investment represents one of the biggest challenges that countries face when making a transition to privatization.¹⁴² Capital investment is essential because restructuring an economy requires the "building of modern roads, airports, and seaports; setting up telecommunications networks" and help supporting "industrial and consumer needs."¹⁴³ Most transitioning countries, particularly the Eastern European countries, lack a wealthy domestic private sector to invest in their own economies due to their previously state-run economies. Consequently, virtually all of the initial investment comes from foreign sources.¹⁴⁴

An appropriate government role and the rule of law, as discussed above, are two essential factors needed to attract foreign investment by satisfying investors' expectations.¹⁴⁵ The expectations, however, are fairly predictable, as most investors seek the following: stable economy without political disturbances; freely convertible currency; the possibility of profits; and rule of law that provides adequate redress in

136. *See id.*

137. *See* Mitrofanskaya, *supra* note 7, at 1410-11.

138. *See id.* at 1417-18.

139. *See* Moors, *supra* note 69, at 46.

140. *See* Daniel McGrory, *Civilizing the Russian Underground Economy: Requirements and Prospects for Establishing a Civil Economy in Russia*, 5 *TRANSNAT'L L. & CONTEMP. PROBS.* 65 (1995) (discussing the old Soviet underground economy and corruption in Russia's privatization efforts).

141. *See* Sarkar, *supra* note 53, at 721-22.

142. *See id.* at 709.

143. *Id.*

144. *See* Sarkar, *supra* note 53, at 709-719.

145. *See id.* at 720-21.

case of conflicts or disputes.¹⁴⁶

Some governments have been a little slow in providing the favorable climate needed to attract foreign investments, while others have provided numerous incentives.¹⁴⁷ For instance, the Czech Republic placed only reasonable restrictions on foreign investments, and entered into treaties with several countries to provide protection against such risks as expropriation, and repatriation of earnings.¹⁴⁸ Russia initially attracted almost every foreign company and investor, but the Russian political instability, the free-falling stock market, and the de-valuation of the Ruble in the last few years have deterred many from investing in Russia.¹⁴⁹

IV. CONCLUSION

The debate over whether a state-run economy or a free market system is superior, is as old as humans. Historical evidence speaks clearly that today's struggle, between the state-controlled economic systems of Eastern Europe and the free-market system of the West, is nothing more than history repeating itself. Moreover, from Egypt to Eastern Europe and from Mesopotamia to the United States, the evidence is convincingly in favor of free-market capitalism winning this war. Perhaps the human nature of freedom and ownership causes privatization to be the natural choice after every other option is exhausted.

Privatization is a complex process and it requires more than just the buying and selling of public property. It demands various levels of sacrifice from everyone, because it not only promotes economic freedom, but also individual freedom. A successful privatization effort in Eastern Europe demands from the governments and people, a total commitment and patience. The glimmering of change that is already apparent is hopeful augury, despite some failures.

146. *See id.* at 721.

147. Cheryl W. Gray & William W. Jarosz, *Law and the Regulation of Foreign Direct Investment: The Experience from Central and Eastern Europe*, 33 COLUM. J. TRANSNAT'L L. 1, 10-14 (1995) (outlining various incentives for foreign investors).

148. *See* Mitrofanskaya, *supra* note 7, at 1411..

149. TIME ALMANAC 1999 288 (1998) (noting that President Boris Yeltsin's young cabinet, the "young reformers," proposed several economic plans including overhauling taxation, welfare, housing, curbing monopolies, but all of these reforms went awry, and the firings of Prime Ministers Viktor Chernomyrdin, Yevgeny Primakov, Sergei Kiriyenko and Sergei Stepashin contributed to the political instability).

IS THE CONTINUED USE OF SANCTIONS AS IMPLEMENTED AGAINST IRAQ A VIOLATION OF INTERNATIONAL HUMAN RIGHTS?

PEGGY KOZAL*

I. INTRODUCTION

Since 1990, the fate of the Iraqi population has constantly been threatened by the most extensive sanctions in the history of the United Nations (UN). These sanctions were imposed on Iraq to influence its government to change its nuclear warfare policies and comply with UN inspections of its chemical, nuclear and biological weapons. The impact of the sanctions, however, has not coerced the Iraqi government to alter its policies, but has instead led to a humanitarian crisis among the innocent civilian population.¹ Saddam Hussein still remains in power and the Iraqi government suffers a small portion of what the economy and people do.²

The international community employs sanctions, *inter alia*, as a method of policing human rights policies in other countries.³ But when the enforcement of the sanctions worsens the humanitarian situation or violates human rights, the efficacy of the method employed must be examined. After ten long years of working toward its goal, it does not appear that these sanctions are means capable of resulting in the ends they are designed to achieve. Assuming *arguendo* that the UN is successfully achieving its objectives, the UN's use of force still should

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1. Political Risk Services, Iraq, *Economic Conditions*, Oct. 1, 1998 (asserting that sanctions have reduced Iraqi living standards to less than 50% of its prewar level).

2. Ali H. Shobokshi, *Economic sanctions suit Saddam and sons*, SAUDI GAZETTE, Nov. 6, 1995; See Maggie O'Kane, *Report Condemns Sanctions on Iraq: Elite Go Unscathed, Ordinary People Go Hungry*, THE GUARDIAN (London), May 18, 1996, at 15.

3. Christopher Wall, *Human Rights and Economic Sanctions: The New Imperialism*, 22 FORDHAM INT'L L.J. 577 (1998).

not violate the well-established principle of war "proportionality".⁴ This doctrine represents the concern that attacks against military targets should not cause excessive civilian suffering.⁵

The employment of sanctions is often criticized as an ineffective method of bringing about the destabilization of political leaders.⁶ The UN economic sanctions on Iraq meet standards asserted by several scholars as criteria for "successful" sanctions.⁷ But after the imposition of more than twenty-five resolutions against Iraq, the UN still has not gained Iraq's compliance with several international norms.⁸

This paper examines whether the continued implementation of UN sanctions against Iraq are a violation of international human rights. The Security Council's accountability for its actions will be discussed in light of the Convention on the Rights of the Child and the UN Charter.⁹

4. Andrew K. Fishman, *Between Iraq and a Hard Place: The Use of Economic Sanctions and Threats to International Peace and Security*, 13 EMORY INT'L L. REV. 687, 719 (1999).

5. *Id.*

6. In 1995, Secretary-General Boutros-Gali criticized sanctions as raising the ethical question of "whether suffering inflicted on vulnerable groups in the target country is a legitimate means of exerting pressure on the political leaders whose behavior is unlikely to be affected by the plight of their subjects." Erica Cosgrove, *The Sanctions Dilemma and the Case of Iraq: Human Rights and Humanitarian Challenges to the Use of Multilateral Economic Sanctions*, 9 WINSOR REV. OF LEGAL AND SOC. ISSUES 65, 93 (1999). See also Lt. Col. Susan S. Gibson, *International Economic Sanctions: The Importance of Government Structures*, 13 EMORY INT'L L. REV. 161, 181 (1999). See also L. Kirk Wilcott, *Ongoing at the Carter Center: Seeking Effective Sanctions*, 11 EMORY INT'L L. REV. 351 (1997) (discussing the imposition of economic sanctions against Cuba in the effort to drive Fidel Castro out of power). See also *Hearing of the Trade Subcommittee of the House Ways and Means Committee, Use and Effect of Unilateral Trade Sanctions*, FEDERAL NEWS SERVICE, Oct. 23, 1997 (debating the role of sanctions and considering effectiveness and consequences).

7. Gibson, *supra* note 6, at 164. Criteria included: the swift imposition of comprehensive sanctions after a violation of an international norm; a U.N. action (as opposed to unilateral or multilateral action); widespread cooperation in the participation of the sanctions; a target country that depends on an export which is easily monitored and controlled; and a regime that is enforced and given time to work. The genocide against the Kurdish people and Iraq's 1990 invasion of Kuwait signify the violations of international norms that worried the international community and led to imposition of the sanctions. Iraq's "Al-Anfal Campaign" in 1987 was aimed at depopulating Iraqi Kurdistan. Over 180,000 people were killed in the massive deportation and execution of men, women and children. The Campaign used chemical weapons to systematically destroy Kurdistan villages. Louis Rene Beres, *Prosecuting Iraqi Gulf War Crimes: Allied and Israeli Rights Under International Law* 41 n. 1.

8. Wilcott, *supra* note 6, at 358.

9. The U.N. Charter is addressed to member states. U.N. CHARTER art. 4. For purposes of this paper, the substance of various provisions in the Charter and other treaties will be addressed. The U.N. Charter does not explicitly say elsewhere that the U.N. itself is obligated to international human rights. However, it is implicit that the U.N. must be bound by the same standards and principles that it sets out for its Members, even though it is not a "state".

The Convention is addressed because the impact from the sanctions affects children the most detrimentally.

A. The Security Council Resolutions as the Basis for Sanctions

On August 6, 1990, following the Iraqi military invasion and illegal occupation of Kuwait, the Security Council imposed comprehensive sanctions on Iraq in Resolution 661.¹⁰ This resolution took measures to secure Iraqi compliance with UN inspection of its chemical, biological and nuclear warfare.¹¹ Resolution 661 put a blanket ban on the importation of Iraqi products and the exportation of all products to Iraq, except those used strictly for medical or humanitarian purposes.¹² It prevented States from exchanging funds or other economic resources with Iraq, unless used for humanitarian purposes.¹³

The authoritative basis for economic sanctions is in Chapter VII of the Charter.¹⁴ The Security Council has the authority to determine the existence of any threat to peace.¹⁵ It “may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and . . . call upon the Members of the United Nations to apply such measures.”¹⁶ The UN may be attracted to the use of sanctions on Iraq since sanctions fall short of the use of military force, but still send a strong message of disapproval.¹⁷

Even though the Resolution exempted from the sanctions foodstuffs and supplies for essential civilian needs, the list of non-essential humanitarian articles is extensive.¹⁸ Textbooks, spare parts for ambulances, nails, a variety of textiles, light bulbs and other commodities that were once readily available, are now unavailable to Iraqi persons.¹⁹ “Dual use” materials that provide a risk to the development of warfare are also prohibited. Chlorine for drinking water is one such item that has greatly contributed to Iraq’s humanitarian catastrophe.²⁰

10. S.C. Res. 661, U.N. SCOR, 2933rd mtg., U.N. Doc. S/RES/661 (1990).

11. *Id.*

12. *Id.*

13. *Id.*

14. U.N. CHARTER art. 39.

15. *Id.*

16. *Id.* art. 41.

17. Gibson, *supra* note 6, at 162.

18. See Violette Daguerre, *End the Blockade against the People of Iraq, Two Texts about Sanctions, Let the Children Live*, Arab Commission of Human Rights (Feb. 24, 1998) <<http://home.swipnet.se/~w-79939/Iraq.htm>>.

19. *Id.*

20. Abdullah Mutawi, *Iraq and the Corruption of Human Rights Discourse*, MIDDLE EAST INTERNATIONAL, Feb. 11, 2000.

In January 1991, a U.S. led coalition launched an air war against Iraq.²¹ Three months later, Iraq accepted the terms of UN cease-fire Resolution 687, which sets the conditions for lifting the sanctions.²² It provides that Iraq must define its borders with Kuwait and affirm its liability for Persian Gulf War reparations.²³ Another requirement is that Iraq must destroy or render harmless, under international supervision, its capacity to employ weapons of mass destruction.²⁴ The Resolution established the UN Special Commission (UNSCOM) as a subsidiary organ of the Security Council that was responsible for on-site inspection and destruction of Iraq's biological, chemical and missile capabilities at designated locations.²⁵

Sources are contradictory as to whether Iraq has showed sufficient compliance with the UN's disarmament requirements. According to, former UNSCOM Chief Inspector W. Scott Ritter, Iraq has been disarmed from a qualitative standpoint and does not possess militarily viable biological or chemical weapons on a meaningful scale, nor can it produce or deploy ballistic missiles, chemical or biological weapons.²⁶ Iraq may not even be a major threat to international security because it fears a nuclear threat from the U.S.²⁷

However, Iraq has repeatedly denied access to some facilities, leading UNSCOM to believe that it has substantial biological and chemical weapons capabilities.²⁸ Many argue that the sanctions interfere with Iraq's national sovereignty and that United States officials unfairly dominate them in order to retain access to oil at a low price.²⁹ Whatever trust there was in the neutrality of UNSCOM was severed when after years of accusations that the U.S. used spies in UNSCOM, Iraq found that UNSCOM had closely cooperated with the

21. Associated Press, *Iraq Crisis Chronology* (Jan. 15, 2000) <<http://wire.ap.org/APnews/center>>.

22. S.C. Res. 687, U.N. SCOR, 2981st mtg., S/RES/687 (1991).

23. *Id.*

24. *Id.*

25. *Id.*

26. Anthony Arrove, *Voices in the Wilderness: A Campaign to End the Economic Sanctions Against the People of Iraq, Myths and Realities Regarding Iraq and Sanctions*, South End Press (visited Apr. 8, 2000) <<http://www.nonviolence.org/vitw/mythsaand%20realities3.html>>.

27. See Ali H. Shobokshi, *Sanctions Cannot Go Unless Iraq Shuns Militarism*, SAUDI GAZETTE (Oct. 16, 1995) (reporting that Baghdad had biological weapons ready in 1990 to use against Kuwait, but did not use them because of a perceived threat from the U.S.).

28. See Edith M. Lederer, *Iraq Said Hiding Biological Weapons*, Feb. 9, 2000, available in 2000 WL 12389648 (suggesting that Iraq has kept secret biological warfare from weapons inspectors); See also Waiel Faleh, *Iraq Nixes U.N. Inspections Bid*, Feb. 10, 2000, available in 2000 WL 12390202 (citing instances where Iraq announced that it would let U.N. inspectors in the country).

29. *The Right of Peoples to Self-Determination and its Application to Peoples Under Colonial or Alien Domination or Foreign Occupation*, U.N. Commission on Human Rights, 55th Sess., Agenda Item 5, at 2, U.N. Doc. E/CN.4/1999/NGO/32, (1999).

U.S. intelligence operatives in Iraq.³⁰ France, Russia and other states promoted the modification, replacement or elimination of UNSCOM, partly due to these revelations.

In December 1999, the Security Council established the U.N. Monitoring, Verification and Inspection Commission (UNMOVIC) as a replacement for UNSCOM.³¹ UNMOVIC is a reinforced system of monitoring and verification, which will address outstanding disarmament issues and identify additional sites suspected of harboring chemical and biological weapons.³² The resolution orders that Iraq "shall allow UNMOVIC teams immediate, unconditional and unrestricted access to any and all areas, facilities, equipment, records and means of transport which they wish to inspect" and to interview any official or other persons under the authority of the Iraqi government.³³ The resolution permits States to import any volume of petroleum or petroleum products of Iraqi origin, and to engage in any financial or other essential transactions directly related thereto.³⁴ It requests that the Secretary-General establish a group of experts to examine alternatives for increasing Iraq's petroleum production and export capacity and to explore the options for the involvement or investment of foreign oil companies in Iraq's oil sector, subject to appropriate monitoring.³⁵

B. Iraqi compliance and dwindling support

Iraqi history of resistance in complying with UN inspectors has led them to believe that Iraq still has strong capabilities for biological and chemical warfare. For example, when UNSCOM and Iraqi officials set a schedule in June 1998 to conclude issues regarding biological and chemical warfare, Iraq did not provide the necessary documents.³⁶ Two months later Iraq declared that it was suspending cooperation with UNSCOM on disarmament activities and putting restrictions on spot inspections.³⁷

30. See Louis Meixler, *UNSCOM Proves to Be Aggressive*, ASSOCIATED PRESS, Nov. 18, 1998. U.S. intelligence is not alone in its spy operations. According to a former high-ranking official in Iraq's secret nuclear weapons program, Iraqi students used American libraries for bomb-making information and Iraqi agents and scientists gathered valuable data at American scientific conferences. Barbara Crossette, *Expert Says Iraq Got Bomb Data From U.S.*, N.Y. TIMES, Mar. 23, 2000.

31. S.C. Res. 1284, U.N. SCOR, 4084th mtg., U.N. Doc. S/RES/1284 (1999).

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 93 A.J.I.L. 470, 472 (1999).

37. *Id.* at 473.

Iraq halted all compliance with UNSCOM on October 31, 1998.³⁸ The U.S. announced its authority to use force, and but then aborted a missile attack when Iraq sent several firm commitments accepting compliance of UNSCOM.³⁹ Provoked by continuous rescission of Iraqi compliance, on December 16, 1998, the U.S. and the U.K. began a seventy-hour missile and aircraft bombing attack against a hundred different military and intelligence sites in Iraq.⁴⁰ China, France and Russia criticized the UN operations, calling for an end to the oil embargo on Iraq.⁴¹ Russia declared the attack as an unprovoked act of force that violated principles of international law and the UN Charter.⁴²

Evidence of increasing opposition to the sanctions on Iraq and the divide within the Security Council over the UN's policies towards Iraq is illustrated by the resignation of several officials who have closely monitored the sanctions. After only 15 months as the UN humanitarian coordinator in Baghdad and overseer of the Oil-For-Food Program, Hans von Sponeck stepped down from the job in February 2000.⁴³ The United States and Britain had pressed for the dismissal of von Sponeck due to frustration with his public statements about the debilitating effects of the UN sanctions on Iraq.⁴⁴ He argues that disarmament issues should be considered separately from sanctions relief.⁴⁵

Similar pressures led his predecessor, Denis Halliday, to resign from the job in October 1998.⁴⁶ Halliday quit the UN in protest of the humanitarian consequences of the embargo and now lobbies for lifting the sanctions on Iraq.⁴⁷ Halliday's position is that not only was the Gulf War itself a violation of the Geneva Convention, but also that the UN sanctions violate sovereignty values and international human rights law enshrined in the UN Charter.⁴⁸ He argues that the sanctions are genocide⁴⁹ and that the UN should lift all non-military sanctions, but

38. *Id.*

39. *Id.* at 474.

40. *Id.*

41. *Id.* at 477.

42. *Id.*

43. Phyllis Bennis, *Will the Last Humanitarian Coordinator in Iraq Please Turn Out the Lights?*, THIRD WORLD RESURGENCE, Feb. 18, 2000.

44. Roula Khalaf, *Britain Urge U.N. Official in Iraq to Quit*, FINANCIAL TIMES, Nov. 2, 1999, at 1.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. Carol Christian, *Sanctions Against Iraq Killing Thousands, Ex-U.N. Official Says*, HOUSTON CHRONICLE, Feb. 24, 1999, at 25 A. Given that the definition of genocide includes an act such as "killing or causing serious bodily or mental harm with the intent to destroy . . . a national, ethnic, racial or religious group," the sanctions against Iraq may constitute genocide. Mutawi, *supra* note 20. The U.N. has targeted Iraq as a "national

still maintain the ban on arms sales for Iraq and all Middle Eastern countries.⁵⁰

The day after von Sponeck resigned, Jutta Burghart, chief of the UN's World Food Programme in Iraq, also quit in protest of the economic sanctions and the failure of the UN's humanitarian programs in Iraq to protect Iraqi civilians from the negative effects of the sanctions.⁵¹ She reported that 70% of household income is spent on food, which, by UN and world standards, is considered an indicator of imminent famine.⁵² Burghardt also criticized the Iraqi regime for only dealing with the food shortage on an emergency basis.⁵³

II. HUMANITARIAN CRISIS AND MITIGATING EFFORTS

Efforts to rebuild its economy and pay its debts may have been attempted,⁵⁴ but the destruction of Iraq's civilian infrastructure during the Gulf War, the Iran-Iraq War and the subsequent imposition of the sanctions have led to a dramatic increase in hunger, disease and death. The more vulnerable populations, such as women, children, and the disabled have been hit hardest.⁵⁵

According to a 1998 UNICEF report, an increase in infant mortality rates for children under the age of five reached an excess of some 40,000 infant deaths annually compared to the rate in 1989.⁵⁶ The high rate of infant deaths is primarily attributed to diarrhea, pneumonia and malnutrition, and is associated with increased illness unattended by

group" and its policy has led to hundreds of thousands of deaths and severe bodily and mental harm. *Id.* Even if there was no intent when the sanctions were first implemented, it can be claimed to have formed. *Id.*

50. Denis Halliday, *End the Public-Health Catastrophe of Sanctions against Iraq*, AUSTIN AMERICAN STATESMAN, Feb. 24, 1999, at A15.

51. Carola Hoyos, *U.N. Food Chief for Iraq Resigns*, FINANCIAL TIMES, Feb. 16, 2000, at 12.

52. Bennis, *supra* note 43.

53. *Id.*

54. In 1990, Iraq announced its intention to repay approximately US\$3 billion dollars that it owed in debt. WORLD CURRENCY YEARBOOK, *IRAQI DINAR* (1996). Iraq's debt accumulated quickly under the sanctions. In three months the price of oil fell \$6 per barrel. Every reduction of \$1 per barrel created a \$1 million loss in revenue for Baghdad. *Id.* War reparations to Iran are estimated at \$90 billion; reparations resulting from the Kuwaiti invasion could amount to over \$100 billion. Repairs to Iraq infrastructure may cost as much as \$200 billion. *Economic Conditions, supra* note 1.

55. See *Identical Letters Dated 20 March 1991 From the Permanent Representative of Iraq to the United Nations Addressed Respectively to the Secretary-General and the President*, U.N. SCOR, S/22366, U.N. Doc S/22364 (1991) (describing conditions in post-war Iraq).

56. UNICEF REPORT, SITUATION ANALYSIS OF CHILDREN AND WOMEN IN IRAQ 42-44, (Apr. 30, 1998), available at http://www.childinfo.org/Other/Iraq_sa.pdf [hereinafter UNICEF Report].

adequate health care, deteriorating living standards and compromised water and sanitation.⁵⁷ Prior to implementation of the UN sanctions, malnutrition was not a public health problem and severe clinical malnutrition was rarely seen.⁵⁸ Now, hundreds of thousands of children are deprived of their basic sustenance needs.⁵⁹

Many Iraqi children of those who fought in the Gulf War suffer from severe deformities as a result of the hundreds of thousands of depleted uranium shells that were fired on the soldiers.⁶⁰ The embargo effectively prevents Iraqi efforts to remedy this severe situation. For example, the Iraqi Social Welfare Act was created to govern disabled rights.⁶¹ It gave the disabled the right to benefit from state-financed services.⁶² Iraqi officials claim that the Act's effectiveness has been jeopardized by the sanctions due to lack of resources, but that the authorities still hoped to open new training and rehabilitation centers.⁶³

The international community has extensively discussed measures that would ameliorate the consequences of the original UN actions, but a lot of talk and little-to-no play has kept some of the same humanitarian problems left to reoccur. In April 1995, the Security Council enacted Resolution 986 as a temporary measure to provide for Iraqi needs.⁶⁴ This "Oil-for-Food" program authorized States to permit a limited import of Iraqi petroleum products and financial transactions related thereto.⁶⁵ The United Nations agreed to permit Iraq to sell US\$1 billion of oil over a 90-day period in order to purchase humanitarian supplies.⁶⁶ Yet, Iraq is in a constant state of need for humanitarian aid.⁶⁷

57. *Id.*

58. *Id.* at 58.

59. *Id.*

60. *Iraq: Blames West for Children's Deformities* (July 30, 1999) <www.UNfoundation.org/unwire/unwire.cfm#16?ID=48127>. Depleted uranium is a waste product of the nuclear industry and has caused deformities in babies such as tiny heads, no feet, huge clefts in their backs, distorted limbs and torsos.

61. U.N. Committee on the Rights of the Child, 19th Sess., 484th mtg. U.N. Doc. CRC/C/SR.484 (1998).

62. *Id.*

63. *Id.*

64. S.C. Res. 986, U.N. SCOR, 3519th mtg., U.N. Doc. S/RES/986 (1995).

65. *Id.*

66. *Id.* Proceeds from the sale of crude oil are deposited into an escrow account managed by the U.N. Of the revenues generated, 53% is allocated for food, medicine and humanitarian supplies in the Central and Southern regions, 13% for food, medicine and humanitarian supplies in the North, 30% for the Persian Gulf War reparations, approximately 3% for the U.N.'s administrative costs. Less than \$1.6 billion remains for the 18 million Iraqi population, factoring to about \$7.50 per person per month. The 90-day period is renewable.

67. UNICEF Report, *supra* note 56. The Oil-for-Food plan has failed to provide adequate protection for Iraqi children, resulting in widespread suffering and malnutrition. Halliday stated that there was no evidence of the Program's funds or

In May 1998, an aircraft coordinated by the Bahrain Red Crescent Society left Bahrain for Iraq to bring 40 tons of medicinal equipment and goods.⁶⁸ This was the eleventh time the society sent its aid to Iraq to curb the effect that the UN sanctions have had on Iraq since 1990.⁶⁹ Due to extreme inflation and plunging wages, it is almost impossible for civilians to buy food in the open market.⁷⁰ Instead, they must rely on limited food rations provided by the government at subsidized prices.⁷¹

Resolution 986 is often criticized for its insufficiency. It encourages increased oil production as oil prices fall.⁷² Over-pumping without sufficient well pressure maintenance destroys a significant number of Iraq's oil fields and has other adverse effects on the environment.⁷³ Without concurrent expenditure on chemicals for drilling mud and other spare parts and equipment, oil-containing rocks and pipelines continue to worsen.⁷⁴ In order to reverse the downward trend in oil production conditions, the Security Council needs to expedite the process of approving applications for spare parts and equipment.⁷⁵

III. INTERNATIONAL HUMAN RIGHTS AND SECURITY COUNCIL ACCOUNTABILITY:

A. *If the Security Council is violating international law, in what forum can the problem be addressed?*

The Security Council has not devoted a commission to monitor the human rights impacts of the sanctions, and is consequently criticized for the failure to recognize its legal obligations to the Iraqi population.⁷⁶ However, international human rights law demands that every nation

supplies being diverted by Iraqi ruling officials, suggesting that the funds are insufficient to satisfy Iraqi hunger needs. Denis Halliday, *Interview*, DALLAS MORNING NEWS, Mar. 21, 1999.

68. *Mercy Aid Flight Bound for Iraq*, GULF DAILY NEWS, Middle East Newsfile, May 18, 1998.

69. *Id.*

70. *Economic Conditions*, *supra* note 1. During the period of 1990-1998, Iraqi unemployment has not fallen below 17.5%. *Id.*

71. *Id.*

72. Jane's Sentinel, *The Gulf States*, Iraq, 31 (1997).

73. *Letter About the State of Iraq's Oil Reserves from Kofi Anan to the President of the Security Council* (July 2, 1999) <www.U.N.org/Depts/oip/reports/sgoil6.html>.

74. *Id.* Some of these needed supplies are included in the embargo under Resolution 661.

75. *Id.*

76. Center for Economic and Social Rights, UNSANCTIONED SUFFERING: A HUMAN RIGHTS ASSESSMENT OF UNITED NATIONS SANCTIONS ON IRAQ 35 (May 1996) available at <http://www.cesr.org/text%20files/sanct.PDF>. The Security Council has instead occasionally taken note of reports by other U.N. bodies and independent research groups.

respect its citizens' human rights, and other nations have the right and responsibility to ensure this obligation is lived up to.⁷⁷

There is a strong claim that the UN's comprehensive sanctions are contradictory to the UN Charter and violate its own human rights standards. Article 1 of the Charter states that in order to maintain international peace and security, the UN may "take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace."⁷⁸ Although this is the basis for the sanctions, in the same article, the Charter declares that a purpose of the UN is to "achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all."⁷⁹ Read with article 24 of the UN Charter, the Security Council must act in accordance with this purpose while using its authority to maintain the peace and security.⁸⁰ Moreover, the UN shall promote "higher standards of living, full employment, and conditions of economic and social progress and development...[and] universal respect for, and observance of, human rights and fundamental freedoms for all."⁸¹ These provisions lead to the conclusion that since the Security Council must comply with the purposes of the UN when using its authority to impose sanctions, it must uphold human rights standards.⁸²

The UN Charter grants the delegation of powers to the General Assembly and the Security Council.⁸³ Chapter V of the UN Charter

77. Bilder, *An Overview of International Human Rights Law: Guide to International Human Right Practices* 3-17 (1983), reprinted in BARRY E. CARTER AND PHILLIP R. TRIMBLE, *INTERNATIONAL LAW* (1995).

78. U.N. CHARTER art. 1, para. 1.

79. *Id.* para. 3.

80. U.N. CHARTER art. 24. Article 24 gives "the Security Council primary responsibility for the maintenance of international peace and security," but also states that "[i]n discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations."

81. U.N. CHARTER art. 55.

82. A similar illustration of this analysis is found in U.N. G.A. Res. 44/215, U.N. GAOR, 44th Sess., Agenda Item 82(b), U.N. Doc. A/RES/44/215 (1989). This General Assembly meeting, entitled *Economic Measures as a Means of Political and Economic Coercion against Developing Countries*, "Calls upon the developed countries to refrain from exercising political coercion through the application of economic instruments with the purpose of inducing changes in the economic or social systems, as well as in the domestic or foreign policies, of other countries; Reaffirms that developed countries should refrain from threatening or applying trade and financial restrictions, blockades, embargoes, and other economic sanctions, incompatible with the provisions of the Charter of the United Nations and in violation of undertakings contracted multilaterally and bilaterally, against developing countries as a form of political and economic coercion that affects their political, economic, and social development."

83. U.N. CHARTER art. 7.

defines and therefore implicitly limits the Security Council's powers.⁸⁴ However, the UN Charter does not give express authority to any other international independent judiciary or political organ to review the Security Council's decisions.⁸⁵

It may be that the International Court of Justice (ICJ), as the UN's "principle judicial organ",⁸⁶ should have the power to determine whether the Security Council has acted *ultra vires* (beyond the scope of its powers).⁸⁷ But even if the ICJ declared the UN sanctions against Iraq as illegal, the declaration is unenforceable. The function of the court is twofold: to settle legal disputes submitted to it by states and to issue advisory opinions on legal issues submitted to it by authorized organs and agencies.⁸⁸ Since the Iraqi situation is not a matter to be adjudicated between states, the Court would only have jurisdiction to give advisory opinions, not binding judgments, based on requests by certain intergovernmental organizations.⁸⁹ Only five organs of the UN, and 16 specialized agencies of the UN, may request advisory opinions.⁹⁰

Article 94, paragraph 1 of the UN Charter, states that all members of the UN must comply with decisions of the ICJ.⁹¹ If any party fails to perform its obligations rendered by the ICJ's judgment, under the UN Charter, the Security Council has the power to enforce judgments.⁹² Therefore, the Security Council would be obliged to enforce a judgment against itself.⁹³ The credibility of the UN as a whole would be at stake if

84. Thomas M. Franck, *The "Powers of Appreciation": Who Is the Ultimate Guardian of U.N. Legality?*, 86 AM. J. INT'L L. 519, 520 (1992). See also U.N. CHARTER arts. 23-32 (defining the Security Council and its powers).

85. J. Alexander Thier, *Between Iraq and a Hard Place: The Paradoxes of U.S. Iraq Policy*, 23 FLETCHER F. WORLD AFF. 193, 197 (Fall 1999).

86. Article 92 of the Charter authorizes the ICJ as the "principal judicial organ of the United Nations." U.N. CHARTER art. 92.

87. Franck, *supra* note 84, at 520. An example of the validity of S.C. sanctions being tested occurred in 1992, when Libya requested that the ICJ conclude that Security Council Resolution 748 was contrary to international law. *Id.* at 521. Resolution 748 imposed Universal mandatory commercial and diplomatic sanctions to persuade the Libyan Government to surrender its two nationals accused of the Lockerbie bombing to stand trial in the U.S. or U.K. *Id.*

88. *International Court of Justice, General Information-The Court at a Glance* (<<http://www.icj-cij.org/icjwww/igeneralinformation/icjgnnot.html>> (visited Mar. 3, 2000)).

89. *Id.* As an alternative action, the Security Council could create a tribunal for Iraq concerning its human rights violations, and bring before it Saddam Hussein and other Iraqi officials who are responsible for crimes against humanity and other violations of international law. Lieutenant Commander Catherine S. Knowles, *Life and Human Dignity, the Birthright of all Human Beings: An Analysis of the Iraqi Genocide of the Kurds and Effective Enforcement of Human Rights*, 45 NAVAL L. REV. 152, 208 (1998).

90. *Id.*

91. U.N. CHARTER art. 94.

92. *Id.* arts. 41-42.

93. See Joy K. Fausey, *Does the United Nations' Use of Collective Sanctions to Protect*

the Security Council were faced with enforcing an ICJ ruling on the validity of the UN sanctions against Iraq.⁹⁴

B. Customary Law

Human rights laws apply universally by the adoption, ratification and accession of treaties and conventions.⁹⁵ Universally accepted norms to which states believe they are bound and from which no derogation is permitted, or *jus cogens*, also obligates states to human rights laws.⁹⁶ Some scholars argue that *jus belli* (the law of war) applies to the use of economic sanctions since they resemble war strategies.⁹⁷ The International Institute of Humanitarian Law (IIHL) asserts that *jus belli* applies whether an economic embargo occurs during peacetime or in armed conflict.⁹⁸ The Geneva Conventions of 1949 and their two Protocols of 1977⁹⁹ are applicable examples of multilateral treaties that codify customary rules and standards on subjects such as bans on particular weapons and cultural property.¹⁰⁰

Such customs and treaties are known as the "international humanitarian law of war," and stand for the idea that the calamities of war should be alleviated as much as possible.¹⁰¹ In the humanitarian law of war doctrine, proportionality is a means of avoiding unnecessary suffering¹⁰² and limiting coercive action in relation to achieving certain goals.¹⁰³ Proportionality and international humanitarian norms are two factors the Security Council must account for when imposing sanctions.¹⁰⁴ The UN sanctions have resulted in the collapse of the Iraqi economy and the deaths of hundreds of thousands of civilians, and have become disproportionate measures for gaining compliance with the cease-fire resolution.¹⁰⁵ The question that must be addressed is whether

Human Rights Violate Its Own Human Rights Standards?, 10 CONN. J. INT'L L. 193, 208 (1994). In order to avoid embarrassment, the Security Council would likely comply with the Charter before the Court disagreed with it. *Id.* at 207.

94. *Id.*

95. Knowles, *supra* note 89, at 169.

96. *Id.*

97. Cosgrove, *supra* note 6, at 71.

98. *Id.*

99. Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict: Protocols I and II to the Geneva Conventions, *opened for signature* Dec. 12, 1977, *reprinted in* 16 I.L.M. 1391 (1977) [hereinafter Geneva Protocols].

100. HENRY J. STEINER & PHILIP ALSTON, *INT'L HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 69 (Oxford University Press) (1996).

101. *Id.* at 70.

102. *Id.*

103. Cosgrove, *supra* note 6, at 61.

104. Fausey, *supra* note 93, at 211.

105. *But see* Majid Khadduri, *Perspectives on the Gulf War*, 15 MICH. J. INT'L L. 847 (1994) (reviewing a book that suggests that Iraq has committed damage proportional to

the human rights concerns caused by the Iraqi government were so severe that they justify depriving human rights to those who were not responsible for the sanctions.¹⁰⁶

Article 54 Protocol 1 Additional to the Geneva Convention prohibits "starvation of civilians as a method of warfare."¹⁰⁷ Since measures short of armed conflict, such as economic sanctions, may also be bound to this prohibition, the UN could be increasingly held responsible for contributing to premature death, hunger and widespread humanitarian suffering.¹⁰⁸

Although the Universal Declaration of Human Rights (Universal Declaration) is non-binding, it is "a common standard of achievement for all peoples and all nations, is the source of inspiration and has been the basis for the United Nations in making advances contained in existing international human rights instruments."¹⁰⁹ The Universal Declaration was incorporated into two binding treaties: the International Covenant on Economic, Social and Cultural Rights (ICESCR)¹¹⁰ and the International Covenant on Civil and Political Rights (ICCPR).¹¹¹

In the ICESCR, States must recognize that "the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights."¹¹² After a decade of sanctions, millions of Iraqis have not been able to enjoy the rights to which they are entitled. The UN's Department of Humanitarian Affairs estimated about 4 million Iraqis live in extreme poverty.¹¹³ The purchasing power of the Iraqi Dinar (ID) reduced from US\$3 = 1 Iraqi Dinar in 1990 to about US\$1 = ID 1,500 in 1997.¹¹⁴ The GDP per capita has decreased from \$3500 to \$600; public workers average salaries are about \$3 to \$5 per month, compared to \$50-100

the U.N. economic sanctions and military operations in Iraq).

106. Fausey, *supra* note 93, at 212.

107. Protocol I and II Additional to the Geneva Conventions of Aug. 12, 1949, and relating to the Protection of Victims of International Armed Conflicts, adopted June 8, 1977, entered into force Dec. 7 1978, U.N. Doc. A/32/144 Annexes I & II, 1125 U.N.T.S. no. 17512-13.

108. Cosgrove, *supra* note 6, at 73.

109. Knowles, *supra* note 89, at 171 (listing a number of provisions relevant to the human rights violations in the Iraqi situation).

110. International Covenant on Economic, Social and Cultural Rights, *adopted* Dec. 16, 1966, *entered into force* Mar. 23, 1976, *reprinted in* 999 U.N.T.S. 3 [hereinafter ICESCR].

111. International Covenant on Civil and Political Rights, *adopted* Dec. 16, 1966, *entered into force* Mar. 23, 1976, *reprinted in* 999 U.N.T.S. 171 [hereinafter ICCPR].

112. ICESCR pmbi.

113. UNICEF Report, *supra* note 56, at 9.

114. *Id.*

prior to 1990.¹¹⁵

In the ICCPR, article 6 states that law of the inherent right to life protects every human being.¹¹⁶ The severity of the sanctions seems to negate that inherent right. UNICEF approximates that there has been an increase of 90,000 deaths annually due to the sanctions (over 250 people die daily).¹¹⁷

*C. The United Nations Convention on the Rights of the Child*¹¹⁸

The UN Convention on the Rights of the Child is the most widely and rapidly ratified treaty.¹¹⁹ All but two countries remain to ratify it.¹²⁰ The pattern of adherence to a treaty is relevant to the argument that its rules have passed into customary law.¹²¹ When many states are a party to a Convention, it is easier to argue that the Convention's rules are customary law.¹²²

The continued implementation of the UN sanctions against Iraq exposes several violations of the Convention's rules. The Convention places an affirmative duty on States to advance the children rights cause through administrative, legislative, and judicial measures.¹²³ Article 6 affirms that it is every State's responsibility to ensure children's inherent right to life and "to the maximum extent possible the survival and development of the child."¹²⁴ Article 24 specifically calls on states to take appropriate measures to "diminish infant and child mortality," to ensure necessary medical assistance and health care, and to combat disease and malnutrition...through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into

115. *Id.* at 27.

116. ICCPR, *supra* note 111.

117. UNICEF Report, *supra* note 56.

118. Convention on the Rights of the Child, *entered into force*, Sep. 2, 1990, G.A. Res 44/25, U.N. Doc. A/RES/44/49, *reprinted in* 28 I.L.M. 1448 [hereinafter Convention].

119. UNICEF, *Convention on the Rights of the Child: Frequently Asked Questions, Who has not ratified and why not?* <http://www.unicef.org/crc/crc.htm> (visited Mar. 22, 2000).

120. Somalia has neither signed nor ratified the Convention, and the United States is a signatory member but has not ratified it. Somalia is unable to ratify the Convention since it is in a state of civil war and its government is not internationally recognized. *Id.*

121. Arthur M. Weisburd, *The Significance and Determination of Customary International Human Rights Law: The Effect of Treaties and Other Formal International Acts On the Customary Law of Human Rights*, 25 GA. J. INT'L & COMP. L. 99, 110 (Fall 1995/Winter 1996).

122. *Id.* Nevertheless, the U.N. Charter calls on all member states to abide by Security Council resolutions, even when they conflict with other treaties. U.N. CHARTER art. 103. This may suggest that Security Council Resolution 661 is binding even if does not comply with the Convention on the Rights of the Child.

123. Convention, *supra* note 118.

124. *Id.* art. 6.

consideration the dangers and risks of environmental pollution¹²⁵ Article 27 of the Convention provides the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.¹²⁶ Despite these responsibilities, the UN continues to ignore the hundreds of thousands of Iraqi children each year who are suffering from the consequences of the economic embargo, which has caused a near breakdown in the Iraqi health care and sanitation systems.¹²⁷

UNESCO once honored Iraq for its active promotion of education.¹²⁸ UNICEF's findings now show that Iraq is "experiencing the unavoidable compromise of the Convention on the Rights of the Child for education."¹²⁹ Every level of formal and informal education suffers from lack of the most basic school necessities such as electricity, sanitation and supplies.¹³⁰ Blackboards, chalk, pencils, notebooks and paper are among items designated by the Sanctions Committee as "non-essential."¹³¹

This is clearly a violation of Article 17 of the Convention, which calls on all States to provide children with access to information and material from a diversity of national and international sources that benefit the social and cultural well being of the child.¹³² It also encourages the production and dissemination of children's books.¹³³ A similar provision in Article 13 grants that "[t]he child shall have the right to freedom of expression. . . [including the] freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally. . . or in print."¹³⁴

The UN sanctions also violate Article 28 of the Convention, governing the child's right to education. It states that parties shall "promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge."¹³⁵

Iraq is not capable of caring for as many children in the same way as previously.¹³⁶ For example, the literacy rate increased from 52

125. *Id.* art. 24.

126. *Id.* art. 27.

127. *See generally* UNICEF Report, *supra* note 56.

128. *Id.* at 88.

129. *Id.*

130. *Id.* at 80.

131. *Id.* at 87.

132. Convention, *supra* note 118, art. 17.

133. *Id.*

134. *Id.*, art. 13.

135. *Id.*, art. 28.

136. Special Topics on Social Conditions in Iraq, An Overview Submitted by the U.N.

percent in 1977 to 80 percent in 1987.¹³⁷ However, five years after the sanctions were implemented, the illiteracy rate was 42 percent and the government estimated that illiteracy was increasing at an average rate of about 5 percent annually.¹³⁸

One way of addressing these issues may be to teach the rights of the child in schools and to refugee children. Article 12 of the Convention states that "the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child."¹³⁹ School is a proper environment for developing children's ability to freely express himself.

Iraq policy makers have claimed that Iraq has tried to comply with the Convention on the Rights of the Child, but that its efforts are muted by the shock of the sanctions. Iraqi officials attribute a rising school drop out rate to the increasing number of children between twelve and sixteen years who have been forced to leave school and help their needy families as a consequence of the economic embargo.¹⁴⁰

Inaccessibility to safe drinking water and absent or defunct sanitation is the likely cause for increases in malnutrition and mortality rates.¹⁴¹ Instead of allowing Iraq to take advantage of its natural resources to benefit its citizens, the sanctions deprive Iraq of basic medical materials such as auto-destruct syringes and bandages.¹⁴² Lines of patients wait to receive medicine in Baghdad, sometimes when only 30% of the stock is available for the normal needs of the patients.¹⁴³ Diseases such as malaria and typhoid were almost under control prior to the sanctions, but are now re-emerging and threatening to appear in areas that previously were not affected.¹⁴⁴ Before the sanctions in 1990, primary medical care reached about 97% of the urban population, and 78% of rural residents.¹⁴⁵ Now there are severe shortages of medical equipment and supplies.

At a 1998 session of the Committee on the Rights of the Child, an Iraqi representative stated that the implementation of the embargo had prevented the government from combating malnutrition.¹⁴⁶ In 1988, the

System to the Security Council Panel on Humanitarian Issues, Mar. 24, 1999, at 30, 31.

137. *Id.*

138. *Id.*

139. Convention, *supra* note 118, art. 12.

140. G.A. Comm. on the Rights of the Child, 19th Sess., 484th mtg., U.N. Doc. CRC/C/SR 484 (1998).

141. UNICEF Report, *supra* note 56, at 32. Water distribution network on which most of the population relies contains broken or destroyed pipes. Treatment plants lack spare parts, equipment, chemicals and an adequate staff. *Id.*

142. *Id.* at 41.

143. *Id.*

144. *Id.* at 52.

145. *Id.* at 7.

146. G.A. Comm. on the Rights of the Child, 19th Sess., 484th mtg., U.N. Doc. CRC/C/SR

daily per capita intake was 3,581 calories and 101.6 grams of protein.¹⁴⁷ In 1997, intake had dropped to 1,030 calories and 24 grams of protein.¹⁴⁸ Beef and chicken are unaffordable for most families.¹⁴⁹ Studies performed by UNICEF and the World Health Organization showed a 22.06 percent rate of emaciation for children under the age of five and a 43.89 percent rate of retarded growth.¹⁵⁰

After a decade of the sanctions chipping away at the Iraqi economy, it is time to change the adverse impact the sanctions are having on the Iraqi population. It is not an easy challenge. While the UN takes on the responsibility of enforcing international norms, it is dually responsible for mitigating the effects the sanctions have on the Iraqi population.

IV. CONCLUSION

The U.S. government announced in January 1999, that it would disburse \$97 million to seven Iraqi opposition groups, including the Iraqi National Congress (INC), in order to back efforts to show a new unified front as an alternative to Saddam's regime.¹⁵¹ However, more than 70 exiled opposition groups complicate unification.¹⁵² One of the advantages for Saddam has been the disorganization of opposition groups.¹⁵³ Additionally, the alternatives to Saddam's leadership seem bleak.¹⁵⁴

One issue that remains indisputable is that hundreds of thousands of Iraqi civilians suffer as a direct consequence to the UN sanctions implemented over a decade ago. The Security Council is long overdue in investigating alternatives to the sanctions that would relive the dire humanitarian situation in Iraq.¹⁵⁵ The Oil-for-Food program has proved inefficient in providing for civilian needs.

Sanctions are not a humane alternative as applied against Iraq.

484 (1998).

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. The Clinton Administration believes that the INC could be a democratic alternative to Saddam's regime. The INC has broadened its base by admitting representatives from the Shia and the Kurds. It has military forces that could potentially be used for a coup against Saddam. However, the Congress's influence is lessened because of division among its twenty factions. Shobokshi, *supra* note 2.

152. *Id.*

153. *Id.* Squabbling in the INC has destroyed its credibility to some extent. The Democratic Centrist Current is an emerging governmental reform group, but divisions among it are appearing. *Id.*

154. *Id.*

155. Fausey, *supra* note 93, at 217-18.

The UN sanctions are directly responsible for a multitude of deaths, whereas the UN itself has not suffered any casualties. There is substantial evidence of Iraq's attempted compliance with the UN Convention on the Rights of the Child, but it falls short due to lack of resources. The UN should be held responsible for its violations of the Convention. Its economic embargo has stood in the way of Iraq's capability to work within the international framework of cooperation to further economic, social and cultural rights.

If we as a global society are ever going to promote the credibility of our Treaties and Conventions, we cannot ignore the consequences of our actions. The sanctions have failed in their desire to influence compliance from the Iraqi government. There is no justification for unduly hindering Iraq of reaching its economic potential by selling as much oil as is necessary to provide for its civilian needs.¹⁵⁶

The goals of the sanctions are of enormous importance. Simply ending the sanctions with Saddam's aspirations to dominate the Middle East and without a strong weapons inspection system could have disastrous effects on the people of Iraq and the region. In order to secure peace in the region, the UN needs to keep working on the elimination of Iraqi capability for chemical, biological and nuclear warfare. But the UN must limit and modify its sanctions in order to uphold its credibility that is already jeopardized due to a lack of compliance with the Convention on the Rights of the Child and other principles of humanitarian law for which it stands.

156. Lifting the sanctions could eventually allow Iraq to export 3-4 million barrels a day, and at a price of \$15 a barrel, Iraq has the potential to earn as much as \$22 billion annually. *Economic Conditions*, POLITICAL RISK SERVICES, Oct. 1, 1998. French, Italian, Russian and potentially Chinese companies have expressed their desire to bid on contracts for the development of Iraqi oil fields once the sanctions are lifted. Shobokshi, *supra* note 2.

NAFTA, GATT, AND THE CURRENT FREE TRADE SYSTEM: A DANGEROUS DOUBLE STANDARD FOR WORKERS' RIGHTS

CHANTELL TAYLOR*

The single, clearest, most direct result of economic globalization to date is a massive global transfer of economic and political power away from national governments and into the hands of global corporations and the trade bureaucracies they helped create. This transfer of power is producing dire consequences for the environment, human rights, social welfare, agriculture, food safety, workers' rights, national sovereignty, and democracy itself.¹

I. INTRODUCTION

A. *The 1999 Seattle Round and WTO's Future*

From November 30th through December 3rd 1999, the 135 member States of the World Trade Organization (WTO)² were scheduled to convene for a round of negotiations in Seattle, Washington "to review the global trading system and ensure its dynamism and responsiveness in the years ahead."³ The Seattle Round is ninth in a series of "negotiating rounds," including the Uruguay Round of 1986-94 that resulted in the official birth of the WTO.⁴ Each round has built off of the last and each has brought in more member countries to negotiate rules for liberalized

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1. The International Forum on Globalization is a research and educational institution comprised of 60 researchers, scholars, activists, and economists from 20 countries. DEBI BARKER & JERRY MANDER, *INVISIBLE GOVERNMENT 1* (International Forum on Globalization, Oct. 1999)[hereinafter *INVISIBLE GOVERNMENT*].

Editor's Comment: This article has not been revised since spring 1999.

2. AGREEMENT ESTABLISHING THE WORLD TRADE ORGANIZATION, adopted 14 Apr. 1994, entered into force, Jan. 1, 1995, *reprinted in* 33 I.L.M 1125 (1994)[hereinafter *WTO AGREEMENT*]. In the words of the WTO itself: "... the World Trade Organization (WTO) is the only international organization dealing with the global rules of trade between nations. Its main function is to ensure that trade flows as smoothly, predictably and freely as possible." See <<http://www.wto.org/wto/about/about.htm>> (visited Dec. 22, 1999). The WTO currently has 135 members, including both industrial and developing nations.

3. World Trade Organization, *Seattle: What's At Stake 1* (1999) [hereinafter *What's at Stake*].

4. *WTO AGREEMENT*, *supra* note 2.

trade.⁵ The Seattle Round was considered the most significant meeting of the members since the 1994 establishment of the WTO because the members intended to map out the WTO's work agenda for the months and years ahead.⁶ It was this part of the agenda that roused controversy between the government bureaucrats and citizen action groups, whose visions for the future of the WTO were in direct conflict.

To many, and particularly to organized labor, the Seattle Round constituted a rare opportunity to capture the attention of global bureaucrats who for years have been crafting international trade rules without democratic participation, transparency or accountability. As early as November 26, 1999, fair trade⁷ activists from all over the world began sprinkling into Seattle homes, hotels and streets — just the beginning of an ultimate activist monsoon. It was earlier predicted that fair trade demonstrators would outnumber the bureaucrats of the WTO by the thousands, and some international trade bureaucrats and lawyers in Washington, D.C. anticipated "real blood and guts."⁸ Their predictions came true . . . with a vengeance.

The controversy between organized labor and the trade bureaucrats of the WTO, while multifaceted, can be plainly stated: the WTO openly declares that labor is not on the agenda and labor thinks it ought to be. According to the WTO, "there is no work on the subject [of labor] in the WTO, and it would be wrong to assume that it is a subject that 'lies ahead.'"⁹ Rather than integrate labor standards directly into WTO rules and agreements, WTO members defer the issue to the International Labour Organization (ILO): "The International Labour Organization (ILO) is the competent body to set and deal with these standards and we affirm our support of its work in promoting them."¹⁰ Conversely, the AFL-CIO,¹¹ America's largest labor union and an avid opponent of the existing WTO,¹² argues:

5. WHAT'S AT STAKE, *supra* note 3, 10-12 (1999); *See also discussion infra* note 52.

6. *Id.* at 15 (1999).

7. The term "fair trade" is often used by opponents of "free trade" agreements such as the North American Free Trade Agreement, the World Trade Organization.

8. Helene Cooper, *Will Human Chains and Zapatistas Greet the WTO in Seattle? Globalization Foes Plan to Hit November Trade Event; 'Make Love, Not Profit,'* WALL ST. J., July 16, 1999. [hereinafter *Make Love, Not Profit*].

9. WORLD TRADE ORGANIZATION, *TRADING INTO THE FUTURE* 60 (2d ed. 1998)[hereinafter *TRADING INTO THE FUTURE*].

10. *Id.* at 61; *see also infra* notes 134-138 for further discussion of the ILO.

11. Add definition and explanation of AFL-CIO.

12. *See generally* AFL-CIO, *WORKERS' RIGHTS AT THE WORLD TRADE ORGANIZATION AND IN U.S. TRADE POLICY* 5 (Publication No. 99155-06-0-5)[hereinafter *WORKERS' RIGHTS*](Unlike some organizations that propose the WTO be completely dismantled, the AFL-CIO takes a reformist approach: calling for the WTO to, among other things, establish a working group on workers' rights, to fix current trade agreements like the North American Free Trade Agreement (NAFTA), and to incorporate enforceable labor stan-

WTO failure to enforce minimum labor standards results in ongoing exploitation of workers in the global market . . . The WTO enforces intellectual property rights, market access and government regulation of investment – and there is no reason why it also cannot enforce basic minimum standards for the humane and decent treatment of workers.¹³

B. Summary

This article compares the corporate rights embodied in the North American Free Trade Agreement (NAFTA) and the GATT/WTO with workers' rights embodied in the North American Agreement on Labor Cooperation (NAALC) and the International Labor Organization (ILO), suggesting that corporations enjoy far greater protection in the global marketplace than workers. This article further argues that unless the system is reformed, workers will continue to be exploited at the expense of corporate profits. By contrasting the NAFTA and the GATT/WTO enforcement mechanisms for commercial rights versus labor rights, this article attempts to expose how the current free trade paradigm procedurally and substantively promotes a double standard. These inequities reflect a fundamental flaw perpetuated in international trade policy today — that international commercial interests can somehow be divorced from the very labor market that fuels globalization.

Section two of this article presents a general background of the NAFTA and the GATT/WTO, including discussion from both sides of the debate and current efforts to clone the agreements in new trade accords. Section three compares the NAFTA's rights for corporations with the NAALC's rights for labor, noting two specific cases brought by corporations under the NAFTA dispute settlement provisions. Similarly, section four compares the GATT/WTO rules governing corporate rights with the ILO principles addressing labor standards. Section five presents conflicting progress reports in the years since NAFTA and GATT/WTO took effect. Finally, this article concludes with recommendations and alternatives to reshape the current trade policy.

II. NAFTA, GATT/WTO, AND THE WALLS CAME TUMBLING DOWN

Two major congressional votes in the early 1990's continue to shape the direction of international trade policy today – the 1993 approval of NAFTA and the 1994 approval of the GATT and the WTO.¹⁴

dards into all new trade agreements).

13. *Id.*

14. DAVID J. SAARI, GLOBAL CORPORATIONS AND SOVEREIGN NATIONS: COLLISION OR

A. NAFTA

1. Background

Although Ronald Reagan was the first U.S. President to propose a trilateral free trade pact between Canada, the United States and Mexico, no one took the notion seriously until the Bush Administration picked up the idea in 1991.¹⁵ At the time, Mexican President Carlos Salinas de Gortari had undertaken major steps to revitalize Mexico's economy, including "the pursuit of a free trade pact with Washington."¹⁶ On February 5, 1991, after the Salinas and Bush Administrations privately affirmed mutual interest, President Bush officially announced to Congress his commitment to negotiate a North American Free Trade Agreement, calling NAFTA "the first step toward a hemispheric common market."¹⁷

Since its inception, the heart of the NAFTA has been to open up markets between Canada, Mexico and the United States.¹⁸ Some of NAFTA's key provisions include:

Elimination of tariffs on North American industrial products within 10 years of implementation;

Elimination of non-tariff barriers and other trade distorting restrictions, such as import licenses, local content, local production, and export performance requirements;

COOPERATION? 103 (Quorum Books 1999) (the author asserts that the beneficiaries of the NAFTA and GATT/WTO trading system consist of CEOs from *Fortune 500* global corporations and World Bank and International Monetary Fund officials, while the non-beneficiaries consist of the "weaker public voice" and "downsized industrial employees.") [hereinafter SAARI.]

15. WILLIAM A. ORME, JR., UNDERSTANDING NAFTA 34 (University of Texas Press 1996)[hereinafter UNDERSTANDING NAFTA].

16. *Id.* at 32.

17. *Id.* at 33-4.

18. North American Free Trade Agreement, signed 1993, Canada, Mexico, United States, available at <<http://www.sice.oas.org/trade/nafta/naftatce.asp>>(visited Dec. 4, 2000 [hereinafter NAFTA])(The North American Free Trade Agreement officially entered into force in 1994 and opened the borders for free trade between Mexico, the United States and Canada. The principle objectives of NAFTA are defined in the first chapter of its text: fundamental principles of national treatment, most-favored-nation (MFN) treatment, and transparency; a commitment to facilitate the transboundary movement of goods and services; and a commitment to provide adequate and effective protection and enforcement of intellectual property rights) see NAFTA, art. 102; see also *NAFTA Key Provisions* <<http://www.mac.doc.gov/nafta/3001.htm>>(visited Feb. 26, 2000)[hereinafter *NAFTA Key Provisions*].

Elimination of investment conditions, such as technology transfers, use of domestic goods or services, set export levels or percentages, and limits on percentage of imports relative to exports;

Guarantees that investors be treated the same as domestic investors (national treatment);

Guarantees to investors the right to fair compensation in the event of expropriation, the right to dispute settlement and monetary damages (legal standing), and the right to repatriate profits and capital (capital mobility);

Expansive protection of intellectual property rights; and

Access to government procurement.¹⁹

2. Proponents of NAFTA and Their Promise to Labor

Congress had not considered the notion of incorporating core labor standards during NAFTA negotiations with Mexico and Canada, rather, their focus was strictly commercial.²⁰ Labor issues became a central part of the debate when Bill Clinton made a 1992 campaign pledge to complete the NAFTA negotiations — but with added protections for labor, the environment and other social issues.²¹

Initially, Clinton was pushing for a NAFTA virtually identical to the Reagan-Bush proposals already on the table. It was not until massive opposition erupted from organized labor and the environmental community, both important constituents to Clinton's campaign, that he pledged to include side agreements on the issues.²² This strategy managed to satisfy the business lobby by keeping labor issues out of the body of the agreement, while appeasing labor groups by not wholly ignoring labor standards.²³ Clinton promised that the proposed labor side agreement would include "strong resolution mechanisms and effective remedies,"²⁴ and a team of Clinton administration economists projected

19. *Id.*

20. CENTER FOR COMMERCIAL LAW STUDIES, *NAFTA AND BEYOND*, 450 (Joseph Norton and Thomas L. Bloodworth, eds.) (1995)[hereinafter *NAFTA AND BEYOND*].

21. See discussion *infra* note 177.

22. Jerome Levinson, *Certifying International Worker Rights: A Practical Alternative*, ECONOMIC POLICY INSTITUTE BRIEFING PAPER, at 2 (May 1999)[hereinafter Levinson].

23. *Id.*

24. *Labor, Business, Agriculture, and Environmental Issues Relating to NAFTA: Hearings Before the Committee on Finance*, 103rd Cong. 169 (1993) [hereinafter 1993 Hearing] (preliminary Analysis by the AFL-CIO).

figures of 200,000 new jobs for Americans in the first two years of NAFTA alone.²⁵

Other proponents of NAFTA made dramatic projections that U.S. export increases to Mexico would create thousands of new, high-paying jobs for Americans. In 1993, Robert B. Reich, Secretary of the U.S. Department of Labor, testified before the U.S. Senate:

In addition to generating more jobs in the United States, NAFTA will lead to better jobs. Jobs created by expanded trade typically are the sorts of higher wage, higher skilled jobs in which the future of the American work force depends. Missing the boat on NAFTA, we will prevent us from reaping these potential gains.²⁶

Senator Lloyd Bentsen also testified to the U.S. Senate that:

Now 700,000 Americans depend on trade with Mexico for their jobs. And things are going to get even better with NAFTA. We calculate that we'll pick up 200,000 more jobs in the next two years alone, and jobs related to trade with Mexico pay about 12 percent better than average . . . This agreement is clearly good for America, and it's clearly good for American workers. We're getting a deal here.²⁷

To ensure that the NAFTA gain much needed approval in the House, the Clinton administration sought assistance from business leaders. In an effort to dispel some of the widespread concern that NAFTA would encourage U.S.-based companies to relocate in Mexico where labor and other standards were lax, Clinton urged major companies to formally pledge that they would not relocate their plants if NAFTA were approved.²⁸ U.S. companies balked at the idea of being bound to such a pledge and ultimately refused to sign.²⁹

The business leaders did, eventually, come to the rescue because they were committed to one thing: passage of a NAFTA without labor or environmental obligations at any cost. To ensure that this goal be met, a coalition of 2,700 companies, including most of the *Fortune* 500, launched a massive campaign called USA*NAFTA.³⁰ USA*NAFTA inundated the American public with radio, television, and news paper ads attempting to ease suspicion about NAFTA benefiting special-interests

25. NAFTA AND BEYOND, *supra* note 20, at 453.

26. 1993 Hearing, *supra* note 24 at 56-57 (statement by Robert B. Reich, Secretary of the U.S. Dept. of Labor).

27. *Id.* at 25-7 (statement of Hon. Lloyd Bentsen, Secretary, U.S. Dept. of the Treas).

28. Asra Q. Nomani, *Clinton Urges Firms to Keep Jobs in U.S.*, WALL ST. J. Nov. 11, 1993.

29. *Id.*

30. *Businessmen for NAFTA*, THE ECONOMIST, Oct. 16, 1993.

at the expense of American workers.³¹

3. NAFTA's Labor Opponents: Promises Not Enough

Opponents of NAFTA argued that even with the labor side agreement, the pact failed to adequately protect labor rights.³² They argued that while private corporations are entitled to enforceable rules protecting their assets, workers are denied enforcement rules to protect their livelihoods.³³

Notwithstanding Clinton's strategy to gain NAFTA approval, the NAALC labor side agreement was not enough to squelch the opposition of organized labor.³⁴ Labor unions predicted that massive job loss and wage stagnation would result in part from U.S. based companies relocating south of the border to capitalize on cheaper markets and lax labor laws.³⁵ In addition, labor advocates predicted that Mexico's already poor enforcement of labor laws would worsen and thus further encourage a southbound exodus.³⁶ A preliminary analysis of the NAFTA by the AFL-CIO stated:

The AFL-CIO believes that the [NAFTA] . . . would be ruinous to the U.S. economy, resulting in the loss of hundreds of thousands of American jobs and a general decline in wages. One of the agreements' primary – though far from only – flaws is its complete failure to promote the upward harmonization of living standards by linking market access with the enforcement of worker rights and labor standards . . . the Clinton campaign promised to solve the problem by negotiating a side agreement . . . [u]nfortunately, the final product negotiated by the Clinton administration falls far short of its stated purpose.³⁷

Additional critics estimated job loss resulting from NAFTA at over 500,000 and anticipated that companies in the U.S. would use the NAFTA as leverage against their workers, thwarting union organizing

31. DAVID C. KORTEN, *WHEN CORPORATIONS RULE THE WORLD*, 144-145 (1995)[hereinafter KORTEN].

32. 1993 Hearing, *supra* note 24 (preliminary Analysis by the AFL-CIO).

33. See NAFTA, Chap. 11; *see also* 1993 Hearing, *supra* note 24 (preliminary Analysis by the AFL-CIO).

34. See, e.g., Levinson, *supra* note 22, at 2; and AFL-CIO: 23rd BIENNIAL CONVENTION, '99 RESOLUTIONS (1999) <http://www.aflcio.org/convention99/res1_6.htm> (visited Dec. 20, 1999).

35. See, e.g., Thea Lee, *Happily Never NAFTA: There's No Such Thing as Free Trade*, *THE CASE AGAINST FREE TRADE* 70-77 (Victor Menotti ed., Earth Island Press and North Atlantic Books 1993)[hereinafter *THE CASE AGAINST FREE TRADE*]; and 1993 Hearing, *supra* note 24, at 169 (preliminary Analysis by the AFL-CIO).

36. John P. Isa, *Testing the NAALC's Dispute Resolution System: A Case Study*, 6 AM. U.J. GENDER & LAW 615 (1998).

37. 1993 Hearing, *supra* note 24 (preliminary Analysis by the AFL-CIO).

by threatening to move to Mexico.³⁸ In his statement at the 1993 Senate hearing on NAFTA, Thomas R. Donahue concluded that, all projections aside:

The real story is not that NAFTA has the support of five former presidents. Rather, it is the fact that NAFTA is understood and opposed by the majority of American citizens – autoworkers in Illinois, truck drivers in California, maritime workers on the East Coast. They know that no promise of worker retraining, no breakthrough in technology, no government-business partnership scheme, can bring back the jobs and investment dollars that NAFTA will take from the U.S. under the conditions enshrined by NAFTA.³⁹

When labor unions demanded an equal voice at the NAFTA negotiating table to ensure that labor rights were given the same merit as capital mobility and investment protections, they were ignored, and NAFTA negotiators ultimately crafted an unbalanced agreement bolstering commercial interests at the expense of labor rights.⁴⁰ After exhaustive debate and massive grassroots opposition, the free-trade champions triumphed and NAFTA was implemented January 1st, 1994.⁴¹

B. GATT/WTO

1. *The Birth of the WTO: From Havana to Uruguay*

NAFTA was the first major trade fight . . . A year after NAFTA took effect, a whole new trade regime came into being with the birth of the [WTO] in January 1995, replacing the much looser set of agreements that had regulated world trade since the late forties.⁴²

The decades-long process of approving the GATT and WTO in 1994 actually began in 1948 with the Havana Charter. Struggling to recover from the hardships of World War II and the Great Depression, countries sought economic security through international cooperation.⁴³ To that end, fifty countries convened in 1946 to negotiate expeditious trade liberalization and "to begin to correct the large legacy of protectionist

38. NAFTA AND BEYOND, *supra* note 20, at 451.

39. 1993 Hearing, *supra* note 24, at 168 (prepared statement by Thomas R. Donahue, explain who he is).

40. See, e.g., Lori Wallach, *Hidden Dangers of GATT and NAFTA*, THE CASE AGAINST FREE TRADE, *supra* note 35.

41. See NAFTA, *supra* note 18.

42. Doug Henwood, *Whose Trade?*, THE NATION, Dec. 6, 1999, at 11.

43. WHAT'S AT STAKE, *supra* note 3, at 10.

measures which remained in place from the early 1930s."⁴⁴ This meeting constituted the first of many future negotiating "rounds." Of the fifty participating countries, twenty-three signed what is now known as the Havana Charter.⁴⁵ The Charter had two primary goals: to establish a multilateral set of rules between participating countries and to establish a regulating body of which each contracting party was a member.⁴⁶ The multilateral rules, namely, the General Agreement on Tariffs and Trade (GATT) was a combination of trade rules and "45,000 tariff concessions affecting \$10 billion of trade, about one-fifth of the world's total."⁴⁷ From 1948 until the Uruguay Round in 1994, the GATT operated as the primary *provisional* agreement regulating multilateral trade.⁴⁸ The second goal of the Charter, to establish the International Trade Organization (ITO) as a regulating body, failed primarily due to opposition from the U.S. Congress.⁴⁹ It was not until fifty years later that this goal was finally achieved with the establishment of the WTO.⁵⁰

2. The "New" GATT and the WTO

The Uruguay Round took seven and a half years, almost twice the original schedule. By the end, 125 countries were taking part. It covered almost all trade, from toothbrushes to pleasure boats, from banking to telecommunications, from the genes of wild rice to AIDS treatments. It was quite simply the largest trade negotiation ever, and most probably the largest negotiation of any kind in history.⁵¹

In several rounds of negotiations after the Havana Charter, an ever-growing number of countries convened to expand the skeletal trading provisions outlined in the 1948 GATT.⁵² The Uruguay Round was

44. TRADING INTO THE FUTURE, *supra* note 9, at 8; see also WHAT'S AT STAKE, *supra* note 3, at 11 ("During the 1930s, in the economic and social disaster of the Great Depression, countries turned inwards. . . they resorted to extreme protectionism, raising tariffs and other trade barriers to levels that choked off imports, and setting up discriminatory arrangements that favoured some countries and excluded others.").

45. TRADING INTO THE FUTURE, *supra* note 9, at 8.

46. JOHN CROOME, *Epilogue to RESHAPING THE WORLD TRADING SYSTEM* 333 (World Trade Organization 1999)[hereinafter CROOME].

47. Trading into the Future, *supra* note 9, at 8.

48. *Id.* at 9, 11 (unlike the GATT as reformed in 1994, the 1948 GATT was merely provisional meaning it was never ratified by members' parliaments and therefore did not constitute binding law).

49. *Id.* at 9.

50. CROOME, *supra* note 46, at 333-34.

51. Trading into the Future, *supra* note 9, at 12.

52. See generally CROOME, *supra* note 46, *Foreword*; and TRADING INTO THE FUTURE, *supra* note 9, at 9 (The list of negotiating rounds and their subject matter after Havana include: Annecy on tariffs in 1949; Torquay on tariffs in 1951; Geneva on tariffs in 1956; Dillon Round on tariffs 1960-61; Kennedy Round on tariffs and anti-dumping measures

the most expansive of them all, broadening the 1948 GATT rules from trade in goods to include trade in services, creating the WTO, and constructing an unprecedented dispute settlement mechanism.⁵³ Explicitly omitted from the 1994 GATT and WTO, however, are provisions on core labor standards.⁵⁴

The Uruguay Round was plagued with constant frustrations and seemingly irreconcilable differences that took over seven years to surmount. But even still, negotiating countries were not convinced of the GATT or WTO's actual fruition until the U.S. Congress was ripe for ratification. The negotiating countries had not forgotten 1948, when congressional disapproval caused the demise of the ITO. Unlike the 1948 GATT, this proposal required that each members' parliament ratify its provisions into law. Thus, a defining moment approving the Uruguay Round was when Congress approved the NAFTA.⁵⁵ Negotiating countries viewed NAFTA approval as a crucial positive signal that Congress would not reject the Uruguay Round proposals, and they were right.⁵⁶

Two key provisions of the GATT (also embodied in NAFTA) are "most favored nation"⁵⁷ and "national treatment."⁵⁸ Most favored nation (MFN) requires governments to treat all products equally regardless of their country of origin; and national treatment (NT) requires governments to accord foreign products the same treatment as domestic products. Thus, actual enforcement of the newly adopted ILO Convention on exploitive child labor⁵⁹ is ironically moot because the convention inherently violates these GATT principles — governments cannot ban products made with child labor and favor products that are not.⁶⁰ These

1964-67; Tokyo Round on tariffs, non-tariff measures, and "framework" agreements 1973-79; Uruguay Round on tariffs, non-tariff measures, rules, services, intellectual property, dispute settlement, textiles, agriculture, and creation of the WTO 1986-94; and recently the Seattle Round on the future working agenda of the WTO in 1999).

53. CROOME, *supra* note 46, at xiii (summarizing the substantive accomplishments celebrated by negotiators of the Uruguay Round: "... the deep cuts to be made by all countries in their barriers to trade; the coming liberalization, at last, of world trade in agricultural products, textiles and clothing; the far-reaching overhaul of the rules for international trade in goods; the new rules to govern and encourage trade in services and the protection of intellectual property; the strengthened system to settle trade disputes among governments; the new World Trade Organization that will put the whole trading system on firm foundations for the first time.").

54. GENERAL AGREEMENT ON TARIFFS AND TRADE (GATT) 1947, concluded at Geneva, 30 Oct. 1947, currently in effect as part of GATT 1994, Annex 1A [hereinafter GATT 1994]; *see also* TRADING INTO THE FUTURE, *supra* note 9, at 60.

55. CROOME, *supra* note 46, at 317.

56. *Id.*

57. GATT 1994, *supra* note 54, art. I.

58. GATT 1994, *supra* note 54, art. III.

59. *See discussion infra* note 181.

60. LORI WALLACH & MICHELLE SFORZA, WHOSE TRADE ORGANIZATION? 175 (Public

provisions are especially powerful when combined with the GATT's unprecedented dispute resolution mechanism.⁶¹

C. Cloning NAFTA and GATT/WTO.

Having won the hard fought battle for NAFTA and GATT/WTO,⁶² the Clinton Administration has wasted no time attempting to replicate the pacts with regional trading blocs around the world.⁶³ Thus, NAFTA's flaws are relevant not only to the three States currently bound by the pact, but also to the countless regions where the Clinton Administration intends to expand NAFTA-like accords. Negotiations to expand NAFTA into Chile have been contemplated for several years with the only hold-up being the fast-track debate⁶⁴ and on-going debate in the Congress contemplates NAFTA-like accords with Africa and the Caribbean Basin.⁶⁵ The NAFTA has also spurred negotiations for the Free Trade Agreement of the Americas (FTAA), a free trade pact that would create one market "from Alaska to the Tierra del Fuego."⁶⁶ The FTAA now has support from every Latin American country except Cuba and would "create a free trade zone of nearly one billion consumers, with a gross domestic product reaching at least \$9 trillion by the year 2005."⁶⁷

Indeed, part of the volatility surrounding the NAFTA and the GATT/WTO is because its proponents extol the agreements as a model for trade policy worldwide. Pointing to "runaway plants, lost jobs, de-

Citizen 1999)(emphasis added) [hereinafter WHOSE TRADE ORGANIZATION?].

61. UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES, concluded at Marrakesh, 15 April 1994, entered into force 1 January 1995, Marrakesh Agreement Establishing the World Trade Organization, Annex 2; reprinted in 33 I.L.M. 1226 (1994)[hereinafter UNDERSTANDING ON DISPUTES].

62. The Uruguay Round not only established the member organization, WTO, but also expanded the 1948 GATT, which focused on simply trade in goods, to include trade in services, intellectual property, and to establish the most expansive international dispute settlement system to date. See generally, TRADING INTO THE FUTURE, *supra* note 9.

63. James M. Cooper, *Spirits in the Material World: A Post-Modern Approach to United States Trade Policy*, 14 AM. U. INT'L L. REV. 957, 979-80 (1999).

64. Carol Pier, *Labor Rights in Chile and NAFTA Labor Standards: Questions of Compatibility on the Eve of Free Trade*, 19 COMP. LAB. L. 185 (Winter 1998) (Fast-track authority gives the United States President executive power to negotiate trade agreements and limits Congressional input to a mere "yes" or "no" vote after extremely limited debate and with no power to change or otherwise amend the text. Chilean leaders will not sign a NAFTA with the United States until it has the guarantee of fast-track because they do not want Congressional scrutiny. Due to congressional skepticism and public dissent, Clinton has not yet convinced Congress to renew fast-track authority).

65. Bureau of National Affairs, *Ways and Means Approves Sub-Saharan Trade Measure*, Daily Report for Executives, Jun. 11, 1999.

66. Second Summit of the Americas, Declaration of Santiago, Santiago de Chile Apr. 18-19, 1998 at <<http://www.summitamericas.org/chiledc.htm>>.

67. *Id.*

clining tax bases, and increased downward pressures on the wages and benefits" of American workers, Congresswoman Marcy Kaptur warned that if NAFTA "is intended to be a blueprint for future accords" than we must first reexamine its impact and "if we can't fix it, then we should junk it."⁶⁸

III. NAFTA'S FREE TRADE RULES: CORPORATE VERSUS WORKER RIGHTS.

From GATT to NAFTA . . . Agreements where the protections for international investors and transnational corporations would fill every phonebook in my home state of Michigan – but where the guarantees for workers, consumers and the environment could be written on a postcard . . . Agreements which make it easier to challenge the infringement of a copyright than the imprisonment of a striking worker.⁶⁹

Absent in the body of the NAFTA and the GATT/ WTO texts are meaningful, binding provisions to enforce labor rights and protections. According to the International Chamber of Commerce, "the trading system was not designed to address these non-trade issues . . . [t]o call on it to do so would expose the trading system to great strain and the risk of increased protectionism . . ."⁷⁰

A. *A Corporate Bill of Rights*

Perhaps the most poignant difference between corporate (or investor) rights and workers' rights in the NAFTA, is the mechanism for enforcement. Chapter 11 of the NAFTA provides that private investors, on behalf of themselves or on behalf of an enterprise, may *directly sue* a national government — a powerful grant of legal standing.⁷¹ Under Article 1116, a claim may be submitted to arbitration if an investor believes that a government has breached an obligation under the NAFTA and that the breach caused the investor to incur a loss or damage as a result.⁷² Nowhere in the NAFTA is this kind of extraordinary power granted to a worker if the worker believes that another Party has caused them damage as a result of job loss, wage reduction, or poor working conditions.

68. *Id.* at 24 (statement of Hon. Marcy Kaptur, a Representative in Congress from the State of Ohio).

69. Statement by Congressman David E. Bonior (D-MI), *Defending Democracy in the New Global Economy*, Speaking at a conference hosted by the AFL-CIO on Workers' Rights, Trade Development, and the WTO (Dec. 1, 1999).

70. Peter Capella, *Business Backs Trade Role for UN*, THE GUARDIAN, London, July 6, 1999.

71. NAFTA, Chap. 11, art. 1116

72. *Id.*

Corporations have an additional dispute remedy provided in Article 20 of the NAFTA. Article 2018 provides that when a government is not in conformity with NAFTA provisions, the government must either agree not to implement the offending measure (typically a federal law) or agree to remove the offending measure.⁷³ If the government continues to be in noncompliance, appropriate compensation must be offered or the aggrieved party may suspend benefits until a settlement is reached.⁷⁴ Both the settlement between the Canadian federal government and Ethyl Corporation and the recent Loewen Funeral Home Trial Case demonstrate how powerful a corporation becomes using the NAFTA investor-state dispute procedure to enforce their rights in the global economy.⁷⁵

1. Ethyl

In the interest of protecting public health, Canada in 1997 banned the importation and transport of methylcyclopentadienyl manganese tricarbonyl (MMT), a gasoline additive and dangerous neurotoxin already banned by the U.S. Environmental Protection Agency.⁷⁶ Ethyl Corporation based in the United States, produces MMT and until the ban enjoyed steady sales to Canadian gasoline refiners.⁷⁷ Six months before the legislation passed in the Canadian Parliament, Ethyl attempted to block the law by notifying the Canadian government that if the law prevailed, the corporation intended to sue for monetary damages under NAFTA Chapter 11.⁷⁸ In spite of Ethyl's threats, Canada passed the ban and less than a week later Ethyl filed a claim for \$250 million in damages.⁷⁹ Ethyl claimed that the Canadian import ban constituted an illegal expropriation (a taking of private property for public use) by precluding sales to Canadian refiners and by tarnishing the company's "good reputation."⁸⁰

Rather than face the \$250 million in damages, Canada instead chose to settle the case. The Canadian government repealed its ban on

73. NAFTA, Chap. 20, art. 2018.

74. NAFTA, Chap. 20, art. 2019.

75. Ethyl Corporation v. Government of Canada: Now Investors Can Use NAFTA to Challenge Environmental Safeguards (Public Citizen Briefing Paper) <<http://www/citizen.org/pctrade/nafta/cases/Ethylbri.htm>> (visited Dec. 19, 1999)[hereinafter Ethyl Briefing Paper].

76. BRIEFING PAPER, NAFTA'S CORPORATE LAWSUITS 2 (Friends of the Earth and Public Citizen, Apr. 1999).

77. *Id.*

78. *Id.* See also MAUDE BARLOW & TONY CLARKE, MAI: THE MULTILATERAL AGREEMENT ON INVESTMENT AND THE THREAT TO AMERICAN FREEDOM 61 (Stoddart Publ'g Co. Ltd. 1998)[hereinafter MAI].

79. *The Sting in Trade's Tail*, THE ECONOMIST, Apr. 18, 1998.

80. Ethyl Briefing Paper, *supra* note 75, at 1.

MMT and agreed to pay Ethyl \$13 million (USD) in compensation.⁸¹ To restore the damage caused to Ethyl's reputation, the Canadian government was required to issue a statement that MMT poses no health risk.⁸²

This case raises two significant concerns among NAFTA opponents. First, NAFTA's dispute settlement provisions enable foreign corporations to intimidate governments by threatening to sue over potentially unfavorable legislation.⁸³ Taken in the context of labor, corporations could threaten to challenge minimum wage or occupational safety laws to prevent increased employment costs. Second, allowing corporations to directly sue governments for limitless monetary damages could mean, as it did in the Ethyl case, that governments would rather overturn vital public legislation than face monetary damages.⁸⁴

2. Loewen Funeral Home Trial Case

Another case that exemplifies the extraordinary power conveyed to corporations under NAFTA is the Loewen Funeral Home Trial Case. The Loewen Group, a Canadian-based funeral home conglomerate, was the defendant in a Mississippi lawsuit and found liable for fraud and gross business conduct.⁸⁵ The trial focused on Loewen's aggressive attempts to ruin a small local funeral home and insurance operator, and the jury awarded damages to the plaintiff in the amount of \$100 million in compensatory damages and \$400 million in punitive damages.⁸⁶ According to Mississippi state law, losing defendants must post a bond worth 125% of damages owed before entitled to pursue a civil appeal.⁸⁷ Rather than appeal, Loewen settled the case for \$150 million.

Now, Loewen has filed a claim for \$725 million from the U.S. government under NAFTA's Chapter 11 claiming that the jury verdict, the punitive damages, and the bond requirement "violated international legal norms of 'fairness,' discriminated against the Canadian-based corporation and attempted to 'expropriate' or seize Loewen's assets. . ." in derogation of NAFTA guarantees.⁸⁸ In addition, Loewen claims that

81. *Id.*

82. NAFTA'S CORPORATE LAWSUITS, *supra* note 76, at 2.

83. *See generally id.*; MAI, *supra* note 78, at 61; and Ethyl Briefing Paper, *supra* note 75, at 1.

84. *Id.*

85. PUBLIC CITIZEN GLOBAL TRADE WATCH, *Briefing Paper: Canadian Corporation Found Liable in Mississippi Courts Uses NAFTA to Claim Legal System Violated Its Rights* at <<http://www.citizen.org/pctrade/nafta/cases/Loewen.htm>> (visited Dec. 12, 1999) [hereinafter Loewen Briefing Paper].

86. *Id.*

87. *Id.*

88. *See* Loewen Briefing Paper, *supra* note 85, at 2; and NAFTA'S CORPORATE

the Mississippi court system was plagued with an "anti-Canadian bias."⁸⁹ The Loewen case is concerning to the public interest community because corporations could utilize NAFTA as a tool to evade liability in local courts — particularly civil and tort liability.⁹⁰ For workers, who lack judicious remedies in the international system, this threatens to take away their only mechanism for justice, namely, domestic courts.

B. Workers Rights: The North American Agreement on Labor Cooperation (NAALC).

In response to the forcible NAFTA opposition from organized labor, the U.S. was compelled to condition its ratification of NAFTA on the drafting of a labor side agreement — the North American Agreement on Labor Cooperation (NAALC).⁹¹ Although the purported purpose of the NAALC was to ensure protection for workers from adverse NAFTA backfire, the final agreement is a fiction. Because all three governments resisted a labor side agreement that would restrict their sovereign right to control domestic labor laws, the language of the NAALC is deliberately vague.⁹² The Mexican government was particularly resistant of the NAALC. To them, cheap labor and lax labor laws are a competitive advantage without which foreign investment could decline.⁹³ Thus, Mexico's support of the NAALC was dependent on vague language and total control over domestic labor laws. In addition, NAFTA drafters feared that enforcement of stringent labor laws would impose new trade barriers and thereby defeat the central purpose of the pact.⁹⁴

For the foregoing reasons, the NAALC did not oblige the government "Parties" to adhere to an internationally set core labor standard, and did not even oblige the Parties to strengthen existing domestic standards, but rather, it simply required that Parties enforce the standards that were already on the books in their respective countries.⁹⁵ "In the end, the NAALC was approved containing strong language in support of workers' rights but weak mechanisms for ensuring their respect in the signatories' countries."⁹⁶ As provided in Article 3 of the agreement, the purpose of the NAALC is "to promote compliance with and ef-

LAWSUITS, *supra* note 76, at 5.

89. NAFTA'S CORPORATE LAWSUITS, *supra* note 76, at 5.

90. *Id.*

91. NAFTA AND BEYOND, *supra* note 20, at 450.

92. Isa, *supra* note 36, at 615.

93. Isa, *supra* note 36, at 616.

94. NAFTA AND BEYOND, *supra* note 20, at 450.

95. North American Agreement on Labor Cooperation, Sept. 13, 1993, at <<http://www.naalc.org/english/infocentre/NAALC.htm>> (visited Apr. 7, 2000), arts. 2, 3 [hereinafter NAALC].

96. Joel Solomon, *Mexico, Labor Rights and NAFTA*, 8 HUM. RTS. WATCH/AMS 2 (1996)[hereinafter Solomon].

fectively enforce" each Party's own domestic labor laws.⁹⁷ Article 2 summarizes the "Levels of Protection" embodied in the NAALC:

Affirming full respect for each Party's constitution, and recognizing the right of each Party to establish its own domestic labor standards, and to adopt or modify accordingly its labor laws and regulations, each Party shall ensure that its labor laws and regulations provide for high labor standards, consistent with high quality and productivity workplaces, and shall continue to strive to improve those standards in that light.⁹⁸

The NAALC lays out eleven labor principles "that the Parties are committed to promote, subject to each Party's domestic law, but do not establish common minimum standards for their domestic law:

1. Freedom of association and protection of the right to organize
2. The right to bargain collectively
3. The right to strike
4. Prohibition of forced labor
5. Labor protections for children and young persons
6. Minimum employment standards
7. Elimination of employment discrimination
8. Equal pay for women and men
9. Prevention of occupational injuries and illnesses
10. Compensation in cases of occupational injuries and illnesses
11. Protection of migrant workers.⁹⁹

These principles provide a fine framework for *thinking* about labor issues, but are meaningless because they lack effective enforcement capability. Although NAFTA proponents point to the NAALC's extremely

97. NAALC, *supra* note 95, art. 3.

98. *Id.*

99. *Id.* at Annex 1.

limited enforcement mechanisms as a coup for labor advocates, these mechanisms are deliberately convoluted such that "the process weeds out most labor-related issues from the ultimate enforcement weapon of imposing sanctions."¹⁰⁰

Structurally, the Commission for Labor Cooperation, Ministerial Council is the highest level of the NAALC and facilitates cooperative compliance among the Parties.¹⁰¹ Below the Ministerial Council, each Party has a National Administrative Office, or NAO, that serves as an in-country contact on NAFTA labor issues.¹⁰² Allegations that a Party has violated the principles of the NAALC are first received by the NAO.¹⁰³ The NAO then determines if the complaint warrants review and if so, initiates consultations with the accused Party.¹⁰⁴ The NAO review is the first of many daunting hurdles that an aggrieved worker, public interest group, labor organization or other complainant must face. There are *no enforcement* provisions at this consultation level, only cooperation and recommendation.¹⁰⁵ Typically, violations of freedom of association, the right to organize, and the right to strike and bargain collectively *never exceed* this first level of review.¹⁰⁶

Only consultations that have reached the Ministerial Council may continue to the second phase of enforcement. However, the issue must involve one of the following: "forced labor, equal pay for men and women, worker' compensation, and protection for migrant workers."¹⁰⁷ Violations in these areas *not* resolved by the Ministerial Council undergo evaluation by an independent panel of experts called the Evaluation Committee of Experts, or ECE.¹⁰⁸ However, as provided in Article 49, before an ECE is commissioned, the issues must be either "trade-related" or covered by "mutually recognized labor laws."¹⁰⁹ Even at this level, the only remedy of the ECE is "non-adversarial and non-binding recommendations on the issue."¹¹⁰ If the ECE determines the issue does not meet the appropriate criteria "the Party has no other recourse."¹¹¹

If the ECE deems the issue worthy, recommendations are submitted to the Ministerial Council. The Ministerial Council is then only ob-

100. NAFTA AND BEYOND, *supra* note 20, at 456

101. North American Agreement on Labor Cooperation, *Review of the NAALC Annual Report*, at <http://www.naalc.org/english/publications/review_annex1_1.htm>

102. *Id.*

103. NAALC, *supra* note 95, art. 3.

104. *Id.*

105. *Id.*

106. Solomon, *supra* note 96, at 2.

107. *Id.* at 3.

108. NAALC, *supra* note 95, art. 23.

109. *Id.*, art. 49

110. Solomon, *supra* note 96, at 3.

111. NAFTA AND BEYOND, *supra* note 20, at 457.

ligated to respond to violations of child labor, minimum wage, and occupational health and safety.¹¹² Even if the violations qualify, the Ministerial Council may only respond if proof exists of a "*persistent pattern* of failure by the other Party to effectively enforce" those standards.¹¹³ Thus, a single incident of failure that results in egregious harm would not qualify unless repeatedly occurring. Perhaps the grandest loophole of the NAALC enforcement mechanism is found in Article 49 defining "failure":

A Party has not failed. . . where the action or inaction by agencies or officials of that Party: (a) reflects a reasonable exercise of the agency's or the official's discretion . . . ; or (b) results from bona fide decision to allocate resources to enforcement in respect of other labor matters determined to have higher priorities.¹¹⁴

So long as Parties can demonstrate that their failure to comply with labor standards was the consequence of a "reasonable" exercise of "discretion" or the result of a "bona fide" prioritization, than governments are off the hook. Combined with the burden to prove a "persistent pattern" of failure that was unreasonable, non-discretionary and wrongly prioritized, workers have little chance to successfully adjudicate their grievances.

Arbitration may be sought if resolution has failed, but only upon a two-thirds vote of the Ministerial Council.¹¹⁵ The arbitration panel may impose fines or sanctions but *only for persistent patterns* of child labor, occupational safety and health or minimum wage violations that are *trade-related* and covered by mutually recognized labor law.¹¹⁶

The NAALC and its lack of accessible enforcement mechanism may have been a temporary resolution to allow NAFTA passage, but if labor rights are to be truly respected worldwide this kind of agreement must be reformed. According to the AFL-CIO:

[The NAALC], established a lengthy and cumbersome process to impose penalties if a country persistently fails to enforce minimum wage, child labor and safety and health protections. But there are no penalties for violations of freedom of association and workers' right to organize, which is why most unions regard the NAALC protections as inadequate.¹¹⁷

Steve Beckman, an international economist for the International

112. NAALC, *supra* note 95, art. 27.

113. *Id.*, art. 27.

114. *Id.*, art. 49.

115. *Id.*

116. *Id.*

117. WORKERS' RIGHTS, *supra* note 12.

Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) assessed the NAALC as an utter failure:

Violations of the fundamental rights of freedom of association and the right to organize and bargain are not even subject to the labor side agreement dispute resolution procedures. The cases that have been filed have not led to the illegally fired workers being rehired, and the offending employers have suffered no sanctions. The ability of independent unions to survive and expand in Mexico has not been advanced by the NAALC. They remain under attack.¹¹⁸

In sum, corporations under NAFTA enjoy the power to sway legislation, to overturn domestic laws that infringe on their profits, to demand compensation for any expropriation of profits, and to exercise unlimited capital mobility; while workers are forced to endure the extremely limited, virtually remediless bureaucracy of the NAALC.

IV. THE GATT/WTO: LABOR STANDARDS "NOT ON THE AGENDA."¹¹⁹

As seen in both the NAFTA and GATT/WTO negotiations and final texts, labor issues are deliberately omitted and instead deferred to side agreements such as the NAALC and alternative institutions, such as the United Nations or the International Labor Organization. Trade bureaucrats openly advocate that enforceable labor standards incorporated into the rules-based trading system would create protectionist policies that impede the ultimate commercial goal of "trade flow as free as possible."¹²⁰ As well, many developing countries of the WTO resist enforceable core labor standards for fear that such standards "undermine the comparative advantage of lower wage trading partners."¹²¹ Yet, in the words of the WTO itself: "[w]ithout a means of settling disputes, the rules-based system would be worthless because the rules could not be enforced." Accordingly, the GATT/WTO established the strongest international enforcement measures of any multilateral agreement to date but for corporate rights, not labor rights.

A. *Dispute Settlement under the GATT/WTO.*

The former Director General of the WTO proudly acclaim that the dispute settlement procedure is the WTO's "most individual contribu-

118. *President's Comprehensive Review of the NAFTA, Hearing Before the Subcomm. on Trade of the House Comm. on Ways and Means, 105th Cong. 200 (1997)* [hereinafter *Hearing on President's Report*] (statement of Steve Beckmen, international economist, International Union, UAW), available at 1997 WL 570269.

119. *Trading into the Future*, *supra* note 9, at 60.

120. *Id.* at 3, 60.

121. *Id.* at 60; Solomon, *supra* note 96, at 2.

tion."¹²² Unlike the United Nations, the ILO, the NAALC, or any other international body, the WTO has granted itself enforcement powers to "demand compliance from its members, and to coerce and force compliance where necessary by means of a variety of disciplines, penalties, and trade sanctions. . ."¹²³

Procedurally, the WTO dispute settlement mechanism embodied in GATT Articles XXII and XXIII, apply strictly to "consultations and the settlement of disputes *between Members concerning their rights and obligations.*"¹²⁴ The Dispute Settlement Body (DSB) holds express quasi-judicial authority to settle disputes between member countries by the establishment of dispute panels and the rejection (by consensus) of their recommendations.¹²⁵ A dispute panel is only convened after a requisite sixty-day consultation period.¹²⁶ If consultations fail, the disputing parties seek resolution from a three-person dispute resolution panel, or tribunal. The panelists are selected by the parties from a designated list of "trade officials and commercial trade lawyers."¹²⁷ Once the panel issues a ruling against a country, the country faces suspension of benefits and trade sanctions unless they overturn or conform the offending law, or pay permanent compensation to the impacted country.¹²⁸ The losing country can appeal, but the ruling is only overturned by a unanimous vote of all 135 members — including the country that brought the challenge.¹²⁹

Critics of the GATT/WTO oppose this dispute mechanism because it allows member countries to challenge virtually any domestic law if it can be shown that the law impedes the free flow of trade.¹³⁰

To date, WTO tribunals have almost always sided with a *challenging* country and ruled *against* the targeted law. In only three out of 22 completed WTO cases did the respondents win. As of July 1999, the U.S. had lost every completed case brought against it, with the WTO labeling as illegal U.S. policies ranging from sea turtle protection and clean air regulations to anti-

122. *About the WTO: The WTO's 'most individual contribution' at* <<http://www.wto.org/wto/about/dispute1.htm>> (visited Mar. 3, 2000).

123. *Invisible Government*, *supra* note 1, at 2.

124. UNDERSTANDING ON DISPUTES, *supra* note 61, Annex 2, art. 1(1). (emphasis added).

125. *Id.* at Annex 2, arts. 2, 11.

126. *Id.* at Annex 2, art. 16.

127. *INVISIBLE GOVERNMENT*, *supra* note 1, at 8.

128. *Id.*

129. *Id.*

130. *Id.* at 7.

dumping duties.¹³¹

Further, critics argue that the dispute resolution process is conducted in secret without public participation or accountability.¹³² The press, the public, labor unions and other non-governmental organizations are totally excluded at each stage of the stealth dispute settlement process.¹³³

A recent example of how the WTO dispute resolution mechanism impacts domestic law is the Massachusetts selective purchasing law. In 1996, Massachusetts passed a law banning state contracts with companies that invest in or do business with Burma.¹³⁴ The Burmese government had been executing egregious human and labor rights violations, including forced labor of women, children, elderly and other unfit citizens.¹³⁵ The Massachusetts law, along with dozens of similar municipal and county ordinances, was passed to "ensure that public money is not used to indirectly support a regime whose conduct taxpayers find repugnant" and to encourage transnational corporations to divest in Burma.¹³⁶ The law was attacked on two fronts: in the U.S. courts by the powerful corporate lobby USA*Engage,¹³⁷ and in the WTO by Japan and

131. WHOSE TRADE ORGANIZATION?, *supra* note 60, at 194.

132. *Id.* at 197 ("Under this WTO rule, dispute panels operate in secret, documents are restricted to the counties in the dispute, due process and citizen participation are absent and no outside appeal is available.").

133. Invisible Government, *supra* note 1, at 8.

134. See *The Case Against the WTO*, THE PROGRESSIVE 9 (Jan. 2000)[hereinafter *The Case Against the WTO*].

135. See e.g., International Labor Organization, *Forced Labour in Mynammar*, July 21, 1998, at <<http://www.ilo.org/public/english/standards/relm/gb/docs/gb273/mynammar.htm>> (visited Apr. 6, 2000) ("There is abundant evidence before the Commission showing the pervasive use of forced labor imposed on the civilian population throughout Myanmar. . . sometimes for the profit of private individuals. . . all of the information and evidence before the Commission shows utter disregard by the [government] authorities for the safety and health as well as the basic needs of the people performing forced or compulsory labor.").

136. WHOSE TRADE ORGANIZATION?, *supra* note 60, at 187-88; see also INVISIBLE GOVERNMENT, *supra* 1, at 38 (It was precisely these kind of sanctions that were used in the anti-apartheid movement in the 1980s to "hasten the transition to democracy in South Africa.").

137. USA*Engage is a coalition of 674 American businesses, including huge multinational corporations such as ARCO, AT&T, Boeing, Coca-Cola, Dow Chemical, GTE, IBM, and Proctor & Gamble. For a complete list of members see <<http://usaengage.org/background/about.html>> (visited Mar. 10, 2000). The coalition was launched on April 16th, 1997 primarily for the purpose of fighting trade sanctions such as this. They claim that "sanctions don't work, and only serve to cut U.S. firms out of lucrative deals while giving them a reputation for unreliability." So far, USA*Engage has succeeded: the Massachusetts state court and a subsequent appellate court has ruled that the law is an unconstitutional intrusion into foreign policy powers. The challenge is now facing a Supreme Court review. Bernard J. Wolfson, *Group decries Mass. Law on business with Burma*, BOSTON HERALD (May 1, 1998) found at

the European Union. The Japan/EU challenge claims such sanctions are patent violations of GATT rules and therefore should be overturned.¹³⁸ Meanwhile, to avoid additional embarrassing WTO challenges, President Clinton has dispatched his Administration to prevent passage of similar human rights sanctions.¹³⁹ In 1998, the Administration successfully persuaded the Maryland legislature to abandon a law barring business with Nigeria.¹⁴⁰

This case is an important statement, not only to the sovereignty of local governments to enact their own public policy, but also to the merits of the ILO. If the WTO turns a blind eye to the ILO report, which details abundant evidence of egregious human and labor rights violations, than what does that say about the effectiveness of ILO protections for workers?

B. Labor Rights Deferred to the International Labor Organization (ILO)

Rather than address labor standards within the WTO, member countries defer all labor issues to the International Labor Organization (ILO), founded in 1919 at the Peace Conference in Paris, France.¹⁴¹ The Peace Conference set up the Labour Commission,¹⁴² who wrote the ILO Constitution between April and January 1919.¹⁴³ The Labour Commission also elects the Governing Body, the ILO Executive Council, structured as a tripartite organization by specifically electing representatives of governments, employers and workers.¹⁴⁴ The two principle functions of the ILO are to set labor standards and to promote the observance of those standards through good faith and, essentially, peer pressure.¹⁴⁵ These standards are embodied in Conventions and Recom-

<<http://usaengage.org/news/980501bh.html>> (visited Mar. 10, 2000).

138. Under GATT rules, when a state or local law is challenged the federal government is responsible for bringing that sovereign into compliance. WHOSE TRADE ORGANIZATION?, *supra* note 60, at 194.

139. *The Case Against the WTO*, *supra* note 134.

140. *Id.*

141. International Labor Organization, *ILO History at* <<http://www.ilo.org/public/english/about/history.htm>> (visited Mar. 5, 2000)(the nine founding countries of the Labour Commission were Belgium, Cuba, Czechoslovakia, France, Italy, Japan, Poland, the United Kingdom and the United States under the chairmanship of American Federation of Labour head Samuel Gompers); *see also* TRADING INTO THE FUTURE, *supra* note 9, at 45.

142. *Id.*

143. *See* ILO Constitution <<http://www.ilo.org/public/english/about/iloconst.htm>> (visited Apr. 5, 2000); *ILO History* <<http://www.ilo.org/public/english/about/history.htm>> (visited Mar. 5, 2000).

144. ILO Constitution, *supra* note 143, at Ch. 1, art. 7 (1) (the Governing Body shall consist of fifty-six persons: Twenty-eight representing governments, fourteen representing the employers, and fourteen representing the workers); *see also* *ILO History* <<http://www.ilo.org/public/english/about/history.htm>> (visited Mar. 5, 2000).

145. ILO Declaration on Fundamental Principles and Rights at Work and Its Follow-

mentations debated, drafted, and eventually ratified by willing countries.¹⁴⁶

At the core of the ILO Conventions are four fundamental rights which all Members, whether they have ratified the Conventions or not, "have an obligation. . . to respect, to promote and to realize, in good faith. . . : (1) freedom of association and the effective recognition of the right to collective bargaining; (2) the elimination of all forms of forced or compulsory labour; (3) the effective abolition of child labour; and (4) the elimination of discrimination in respect of employment and occupation."¹⁴⁷

While the Conventions espouse seemingly industrious labor stands, in fact the principles are meaningless without a concomitant enforcement mechanism. Exactly like the NAALC, the ILO lacks any teeth. For example, ILO Conventions 98 and 87, freedom of association and collectively bargaining, respectively, and the ILO Constitution itself,¹⁴⁸ establish a quasi-judicial committee to which complaints may be filed by either workers or employers.¹⁴⁹ Upon receipt of the complaint, the committee notifies the government concerned and, with their permission only, the committee may conduct an onsite investigation.¹⁵⁰ The committee collects all the evidence and may issue a proposal¹⁵¹ for remedial action: "[t]he committee's effectiveness has, like that of the ILO itself, been limited by the fact that it has neither sanctions nor resources with which to induce an offending government to change its behavior. It has relied upon public suasion and moral authority."¹⁵² Thus, the most powerful remedies for aggrieved workers under the ILO are

up (June 1998) [hereinafter ILO Declaration].

146. ILO Constitution, *supra* note 143, at ch. 1, art. 19 (some of the most significant Conventions to date include: No. 29, *Forced Labour*, 1930; No. 87, *Freedom of Association and Protection of the Right to Organize*, 1948; No. 98, *Right to Organize and Collective Bargaining*, 1949; No. 100, *Equal Remuneration*, 1951; No. 105, *Abolition of Forced Labour*, 1957; No. 111, *Discrimination (Employment and Occupation)*, 1958; No. 138, *Minimum Age*, 1973; and the most recent No. 182, *Worst Forms of Child Labour*); see generally, ILO, ILO Declaration on Principles: A New Instrument to Promote Fundamental Rights, Annex III, ISBN 92-2-111892-4 (2000).

147. ILO Declaration, *supra* note 145, at art. 2 (a)-(d).

148. ILO Constitution, *supra* note 143, at Ch. 1, art. 26.

149. Jerome Levinson, *Certifying International Workers Rights: A Practical Alternative*, ECONOMIC POLICY INSTITUTE 6, (May 1999) [hereinafter *A Practical Alternative*], at <<http://epinet.org>> (last visited Apr. 5, 2000).

150. *Id.*

151. ILO Constitution, *supra* note 143, at ch. 1, art. 28.

152. Levinson, *supra* note 149; see ILO Constitution, *supra* note 143, ch.1, art 29 (1) – (2) (the findings of the committee shall be published, then it is within the *offending government's own discretion* to either voluntarily accept the recommendation, and if not, whether it will choose to submit the complaint to the International Court of Justice – there are *no* consequences if the offending government neither accepts nor submits the recommendation).

remedial proposals, public persuasion and moral authority — a far cry from commercial protections under GATT/WTO-like trade sanctions, an elaborate dispute settlement body, and uncapped monetary compensation.¹⁵³

In June 1998, the ILO adopted new measures to promote the fundamental principles: the ILO Declaration on Fundamental Principles and Rights at Work and Its Follow-up (Declaration).¹⁵⁴ Under the Declaration, ILO Member States who have not ratified a particular ILO Convention are now nonetheless obligated to honor "in good faith and in accordance with the Constitution, the principles" therein.¹⁵⁵ The Declaration also requires "an annual follow-up concerning non-ratified fundamental Conventions"¹⁵⁶ and a global report covering one of the four fundamental rights each in turn.¹⁵⁷

While the ILO has made strides in crafting diligent labor standards, far more must be done to equalize labor protections with commercial protections. As stated by the AFL-CIO:

[I]t is not possible for the ILO to take exclusive responsibility for addressing workers' rights violations. The ILO neither has nor seeks enforcement powers — making it all the more critical that international trade and financial organizations repair a trading system that now rewards those who abuse workers' rights . . . The WTO enforces intellectual property rights, market access and government regulation of investment - and there is no reason why it also cannot enforce basic minimum standards for the humane and decent treatment of workers.¹⁵⁸

As evidenced by the massive labor demonstrations during the 1999 Seattle Round, labor leaders are resolved to oppose future free trade accords "until labor has as much influence over the deals being hashed out as do business groups . . ." ¹⁵⁹

V. THE CURRENT TRADE MODEL: RHETORIC AND REALITIES

The immobility of labor and the mobility of capital is the supposed "genius" of the capitalist (global capitalism) production system — buy labor cheaply, sell goods dearly in the most wealthy markets with no tariff barriers. It sounds like GATT, NAFTA and WTO and free trade

153. *Supra* note 110, at 196.

154. ILO Declaration, *supra* note 145, at art. 2 (a)-(d).

155. *Id.* at art. 2.

156. *Id.* at annex I (3).

157. *Id.* at annex III (A)(2).

158. WORKERS' RIGHTS, *supra* note 12, at 5.

159. Frank Swoboda, *Labor Wants Seat at WTO Talks*, WASH. POST, Oct. 13, 1999.

ideology. If any theory in terms of public policy sounds one-sided and is fishy-smelling, it is a deal like that . . . Labor cannot do anything but lose. . .¹⁶⁰

Now, five years since implementation, the NAFTA and GATT/WTO debates are no less dubious than when first proposed. The NAFTA Implementation Act required the President to provide to Congress, by no later than July 1, 1997, a comprehensive review of the effects of the agreement including the extent to which wages and working conditions had been impacted.¹⁶¹ The President's report stirred a new round of NAFTA controversy in Congress, in the public interest community, and among the populous of the three nations.

Congressman Philip M. Crane, Chairman of the Subcommittee on Trade of the Committee on Ways and Means, opened a September 1997 hearing on the President's report by saying; "The President's report . . . confirms my view that NAFTA has had a decidedly positive impact on the U.S. economy by increasing the competitiveness of U.S. industry and contributing to the creation of high-wage jobs for U.S. workers."¹⁶² In same hearing, Deputy U.S. Trade Representative Jeffrey Lang summarized key points of the report: "[t]he President's July Study indicates the NAFTA has had a positive impact on our GDP, employment, income, investment, and wages . . . These estimates suggest that the NAFTA's impact, isolated from other factors, has boosted jobs associated with exports to Mexico between roughly 90,000 and 160,000."¹⁶³

Conversely, the non-profit fair trade group Public Citizen's Global Trade Watch, found the President's report less than accurate "[u]nfortunately, you would be more likely to find little green men on Mars than the truth about NAFTA in the Administration report . . . The evidence of NAFTA's failure is overwhelming . . ."¹⁶⁴

Public Citizen reported that up to 500,000 jobs had been lost as a result of NAFTA and despite promises otherwise, "it has been high-wage, high-tech jobs that have led U.S. NAFTA job losses . . . U.S. data shows a majority of U.S. workers who lose their high-wage manufacturing jobs find new employment in lower-paying jobs in the service sector."¹⁶⁵ In a February 1999 address, the AFL-CIO announced that the

160. SAARI, *supra* note 14, at 128.

161. Section 512 of Pub.L. 103-182.

162. Hearing on President's Report, *supra* note 118 (statement by Congressman Philip Crane), available at 1997 WL 574986.

163. *Id.* at 38 (statement of Hon. Jeffrey Lang, Deputy U.S. Trade Representative) found in Westlaw at 1997 WL 609767.

164. Lori Wallach, *Clinton Administration's NAFTA Report*, Public Citizen Global Trade Watch News Release (July 11, 1997) <<http://www/citizen.org>> (visited Apr. 5, 2000).

165. *Id.*

United States has lost 285,000 jobs since March 1998.¹⁶⁶

In a 1997 study, the Economic Policy Institute (EPI) tackled the complicated task of untangling the conflicting numbers donned by both pro and anti-NAFTA advocates. EPI discovered that failing to account for all economic factors, including exports *and* imports, resulted in many misleading figures:

This study's new model indicates that the reduction in net exports to Mexico has eliminated 227,663 U.S. job opportunities since 1993, and the reduction in net exports to Canada has eliminated 167,172 job opportunities in the same period. In total, NAFTA resulted in a net loss of 394,835 jobs in its first three years.¹⁶⁷

The study also found that a disproportionate number of these job losses were suffered by minorities, women, white males and especially in the manufacturing sector: "Even workers who found new jobs in the growing U.S. economy face a reduction in wages, with average earning dropping over 16%."¹⁶⁸ Moreover, a 1999 follow-up report by EPI indicated that job losses have continued since the implementation of NAFTA:

The U.S. Department of Labor has certified that 216,156 workers have lost their jobs because of either shifts in production to Mexico or Canada or because of increased imports from those countries.¹⁶⁹

Larry Martin, President of the American Apparel Manufacturers Association, frankly stated in his testimony to the House Subcommittee on Trade; "[t]he fact of the matter is that it is no longer economically feasible to make some kinds of garments in the United States. Our average wage level of about \$8 an hour, plus benefits, makes it very difficult to compete with countries where wages are measured in cents, not dollars."¹⁷⁰ Jay Mazur, President of the Union of Needletraders, Industrial and Textile Employees (UNITE) challenges Congress to disallow such corporate strategies; "NAFTA contributes to a corporate strategy – investment overseas, production cutbacks at home and sharp demands for wage and benefit concessions from workers – that has had a devas-

166. AFL-CIO, *Trade and Deindustrialization*, (Feb. 18, 1999) <<http://www/aflcio.org/pub/estatemts/feb99/cstrade.htm>> (visited Apr. 5, 1999).

167. Jesse Rothstein and Robert Scott, *NAFTA's Casualties: Employment Effects on Men, Women, and Minorities*, ECONOMIC POLICY INSTITUTE ISSUE BRIEF #120, Sept. 19, 1997, at <<http://www.epinet.org/Issuebriefs/ib120.html>> (visited Apr. 5, 2000).

168. *Id.*

169. Robert E. Scott, *Trade deficits, job losses increase through 1998*, ECONOMIC POLICY INSTITUTE, TRADE FAX (Feb. 19, 1999), at <<http://www.epinet.org>>.

170. Hearing on President's Report, *supra* note 36 (statement of Larry Martin, President, American Apparel Manufacturers Association), available in Westlaw, at 1997 WL 566021.

tating impact on American families."¹⁷¹

The 5-year progress reports on the GATT/WTO are similarly at variance. While GATT/WTO proponents point to liberalized market access and increases in export jobs; opponents focus on the increasing gap between the rich and poor and the WTO's ability to threaten, weaken, and overturn national laws. The WTO distributed a press packet at the Seattle Round that touted "1.3 million new jobs supported by exports were created in the U.S. between 1994 and 1998."¹⁷² Conversely, opponents point to studies showing a 10 percent decline in median hourly wage over the last 25 years;¹⁷³ and a "job death" of at least 4.6 million in the American industrial manufacturing between 1980 and 1997.¹⁷⁴ Over 1,400 NGOs agree in a joint statement that "in the past five years the WTO has contributed to the concentration of wealth in the hands of the rich few; increasing poverty for the majority of the world's population; and unsustainable patterns of production and consumption."¹⁷⁵

Unlike the employment statistics, no one seems to refute the statistics that show the world's CEOs are currently experiencing record high salaries. In 1960 the average CEO was paid 41 times more than the average worker, and by 1997 the average CEO was paid 326 times more.¹⁷⁶ The International Forum on Globalization¹⁷⁷ points to a recent report that "the wealth of the world's 475 billionaires is equal to the annual incomes of more than 50% of the people on earth;" and a report that American CEO's are now paid 419 times more than their line workers.¹⁷⁸

VI. FREE TRADE: A TIME FOR REVIEW NOT EXPANSION.

A. *Mobilization Against Globalization: Protest on the Puget*

For over a year, the international civil society had been mobilizing to make Seattle a battleground against globalization. An impressive

171. *Id.* at 211 (statement of Jay Mazur, President of the Union of Needletraders, Industrial and Textile Employees), available in Westlaw, at 1997 WL 570309.

172. Press Pack, World Trade Organization, Seattle (Nov. 30 to Dec. 3, 1999), at 61.

173. INVISIBLE GOVERNMENT, *supra* note 1, at 4.

174. SAARI, *supra* note 14, at 128.

175. Statement from Members of International Civil Society Opposing a Millennium Round or a New Round of Comprehensive Trade Negotiations, (Nov. 27, 1999), (hereinafter International Statement) <http://www.citizen.org/pctrade/gattwto/Seattle%20Ministerial/intl_no_new_round_letter.htm> (visited Apr. 5, 2000) (includes a list of the 1448 signatories from 89 countries).

176. 1997 *Executive Pay Survey*, BUSINESS WEEK (Apr. 20, 1998), available at <<http://www.businessweek.com>>.

177. See INVISIBLE GOVERNMENT, *supra* note 1.

178. *Id.* at 4.

list of 1,448 NGOs representing 89 countries signed a joint declaration against the proposed new round of comprehensive trade negotiations, instead calling for governments to "review and rectify the deficiencies" of the WTO.¹⁷⁹

The citizen activists went to Seattle to protest the world's most prominent trade regulator,¹⁸⁰ the WTO, whose members were converging in Seattle that week to launch a new round of trade negotiations.¹⁸¹ Though the week's activities commenced with a scholarly conference on globalization hosted by the IFG,¹⁸² massive insurgence ultimately gave rise to pepper spray, rubber pellets, civil disobedience, and arrests.¹⁸³ On November 30, 1999, over 40,000 people from all over the globe, including "union members and students and community activists and farmers and religious leaders and people in turtle and butterfly outfits – came together in Seattle to assert that the global economy must be fundamentally changed to respect people and the environment, and not just the interests of multinational corporations."¹⁸⁴ That same day, the International Longshore and Warehouse Union (ILWU) closed the port of Seattle and other ports along the west coast "demonstrating to the corporate CEOs and their agents here in Seattle that the global economy will not run without the consent of the workers."¹⁸⁵

This unprecedented display of vigilant protest that roused the interest of people all over the world begs the question: If globalization is truly the panacea for economic growth, job creation, and higher living standards worldwide, why are so many people resolved to stop it?

179. International Statement, *supra* note 175.

180. See INVISIBLE GOVERNMENT, *supra* note 1, at 1 (calling the WTO the "primary rule-making regime of the globalization process" that is "rapidly assuming the mantle of *bona fide* global government for the 'free trade era'").

181. WTO MINISTERIAL CONFERENCE PRESS PACK, *Background: The Seattle 'Ministerial'*, at 3 (Nov. 28, 1999) (stating that "What's special about this ministerial" is that "The ministerial will launch major new negotiations to further liberalize international trade . . .") [hereinafter WTO MINISTERIAL CONFERENCE PRESS PACK].

182. The International Forum on Globalization (IFG) is a research and educational institution comprised of 60 researchers, scholars, activists, and economists from 20 countries.

183. See *e.g.*, *The New Trade War*, THE ECONOMIST, Dec. 4-10, 1999, at 25 (noting 2,500 activists gathered for the conference but that the "Sea Town became siege town" when "a furious rag-bag" of protestors shut down the city); REUTERS, *Chaos at WTO talks reflects public mistrust* (Dec. 2 1999); CNN, *Street Violence Erupts as WTO Conference Begins* (Nov. 30, 1999).

184. Statement by AFL-CIO President John J. Sweeney on Collapse of WTO Trade Talks (Dec. 4, 1999) <<http://www.aflcio.org/publ/press1999/pr1204.htm>> (visited Dec. 19, 1999).

185. Brian McWilliams, Speech for the WTO Labor Rally <<http://www.ilwu.org/wto/bmcwspeech.htm>> (Nov. 30, 1999).

B. *The Significance of the Seattle Round*

Throughout his presidency, President Clinton has given lip service to labor organizations at home while surreptitiously selling out American workers in trade negotiations abroad.¹⁸⁶ In his 1999 State of the Union address, President Clinton told America that: "we ought to tear down barriers, open markets, and expand trade. But at the same time, we must ensure that ordinary citizens in all countries actually benefit from trade - a trade that promotes the dignity of work, the rights of workers, and protects the environment."¹⁸⁷

Yet the President has aggressively continued to push the status quo free trade agenda, chartering new accords that replicate the existing failed model and refusing to change one iota of substantive obligations that protect labor at home and abroad.¹⁸⁸ In fact, the *only* thing different is the Administration's public relations campaign, which now

186. See, e.g., Levinson, *supra* note 149, at 2 (President Clinton sold the NAFTA to skeptical American workers by promising to condition his support on the signing of a labor side agreement, then betrayed labor when he ultimately caved in to the dissent of Mexico by deleting from the NAALC "provisions that provided the possibility of trade sanctions and monetary penalties for a persistent failure of a party to the NAALC to enforce its own labor laws . . ." The deletion essentially removed all teeth that the NAALC may have had to enforce workers' right to collective bargaining and freedom of association); see also WHOSE TRADE ORGANIZATION?, *supra* note 60, at 194 (In 1996, Clinton pledged to prioritize labor issues in the WTO but then signed the Singapore Ministerial Declaration which formally banished labor issues to the ILO. Then in 1998, Clinton again promised to make labor a priority in the then upcoming Seattle Round but instead settled for a watered-down ban on child labor that lacks enforcement.)

187. Address Before a Joint Session of the Congress on the State of the Union, 35 Weekly Comp. Pres. Doc. 78, 83-4 (Jan 19, 1999) [hereinafter State of the Union Address], available in Westlaw at 1999 WL 20505.

188. See, e.g., *The People v. the WTO*, THE NATION, Volume 269, Number 19, at 3 (Dec. 6, 1999) (This year the Clinton Administration is vehemently pushing for China to be admitted as a member of the WTO, and even requesting an "expedited" Congressional vote to grant China most-favored-nation trading status, despite the notoriety of Chinese leaders egregious human rights violations, including jailing union organizers and quashing union strikes, and more recently, for threatened attacks against Taiwan. Yet the deliberations over China's accession to the WTO have dealt with the concessions China would make to US industries *not* to human or labor rights); see also, *Barshefsky Reveals US Push to Broaden WTO Services Talks*, INSIDE US TRADE (June 4, 1999) (On the issue of the President's trade agenda over the next year, U.S. Trade Representative Charlene Barshefsky said the U.S. "will push for new and improved liberalization commitments in sectors such as finance, telecommunications, distribution, audiovisual, construction, education, health, travel and tourism, and professional services," but made no mention of his purported commitments to improve labor protections); WHOSE TRADE ORGANIZATION?, *supra* note 60, at 179 (1999) (the authors characterize Clinton's public relations campaign as a "charm" strategy to combat free trade dissent and point to the recent "NAFTA-for-Africa" legislation, completely void of substantive labor standards, as an example of his doublespeak).

must combat rising dissent against globalization in its current form.¹⁸⁹ In response to the mounting dissent expressed by opponents of the Seattle Round, President Clinton attempted to appease protestors by taking a rhetorical high ground. He publicly challenged the other WTO members to substantively address labor issues at the WTO meeting, yet his only key initiatives, a ban on child labor and a WTO working group on labor, were both narrow in focus and lacking enforcement. In the end, WTO members would only agree on a ban of the *worst forms* of child labor¹⁹⁰ and the *possibility of* a working group to study labor rights in the WTO.¹⁹¹ Lori Wallach, director of Public Citizen's Global Trade Watch, testified regarding the Seattle Round:

The Administration must replace this public relations strategy with substance . . . If the President's "proposals" are to be understood as anything other than further domestic political fodder for the Administration's attempts to continue the trade status quo, the Administration must produce tangible changes in the WTO to break what is widely perceived in non governmental organizations (NGOs) and Congressional circles as a pattern of chronic insincerity on WTO accountability and openness on labor and environmental issues.¹⁹²

To North American workers who valiantly fought NAFTA¹⁹³ in the early 1990's and have since struggled to block NAFTA expansion, the WTO agenda for new expansive trade liberalization is like adding salt

189. See e.g., Testimony of Lori Wallach Regarding U.S. Preparations for the World Trade Organization's 1999 Ministerial Meeting (May 14, 1999) <<http://www.citizen.org/pctrade/gattwto/Testimon.htm>> (visited Dec. 20, 1999); and *Democratize the Global Economy: The tide is turning against free trade and the WTO*, 40 GLOBAL EXCHANGE 7 (Fall 1999) (reporting that a recent poll shows 58 percent of Americans agree that foreign trade has been bad for the US economy, and 81 percent of Americans say that Congress should not accept trade agreements that give other countries the power to overturn U.S. laws).

190. See WTO MINISTERIAL CONFERENCE PRESS PACK, *supra* note 181 (briefly summarizing that the ban on child labor only includes the *worst forms* of child labor, including "all forms of slavery, child prostitution and pornography, the use of children to traffic in drugs and work which is likely to harm the health, safety or morals of children").

191. Robert L. Borosage, *The Battle in Seattle*, THE NATION, Volume 269 Number 19 at 20 (Dec. 6, 1999) (While these are important steps to take, labor unions think it insufficient: "As AFL-CIO president John Sweeney has made clear, labor will applaud progress on a working group to study labor rights at the WTO but will not end the demand for enforceable labor rights in trade accords."); *but see* Robert Kuttner, *A Push For Worldwide Labor Standards*, THE AMERICAN PROSPECT ONLINE <<http://www.prospect.org>> (Nov. 7, 1999) (Regarding the proposed WTO working group: "U.S. trade representative Charlene Barshevsky blurted out the truth . . . In a press briefing for foreign media, Barshevsky reassured business interests that the U.S. proposal is 'very limited.' She added, 'This is not a negotiating group,' but merely an 'analytic' one. And '[t]he issue of sanctions is nowhere in this proposal and it is certainly not on the table.'")

192. Testimony of Lori Wallach, *supra* note 189.

193. See NAFTA, *supra* note 18, art. 102.

to an open wound. Thus, the Seattle Round was a singular opportunity to remind trade bureaucrats and the corporate lobby that without the workforce, the engines of globalization would shut down. In the words of ILWU President, Brian McWilliams:

[The Seattle Round] gives us the rare opportunity to express first hand our outrage at how workers have been treated across the planet in the profit frenzy of globalization. It further gives us the chance to express our resolve to fight back against a system where workers pay such a high price for corporate greed.¹⁹⁴

The global insurgence and massive labor protests that erupted in Seattle demonstrate, among other things, that the NAALC, the ILO, and the current trading system have utterly failed to combat the adverse effects of globalization on workers rights.

The Seattle demonstrations have also been a wake-up call for Americans: " At the start of 1999, few Americans could even identify the WTO. . ." and now "polls show that Americans are increasingly ill at ease with free trade policies that boost corporate profits while cutting wages, ending farm subsidies, and deregulating environmental and consumer protections."¹⁹⁵ One of those polls found that 59 percent of Americans surveyed thought the current free trade system hurts Americans workers, while 35 percent thought that it helped;¹⁹⁶ and a second poll found "an overwhelming 83 percent" of Americans surveyed believed that before we negotiate trade with other countries they must "meet environmental, job security and labor condition standards."¹⁹⁷

C. *Fair Trade Alternatives that Promote People, Not Profits*

It is not an answer . . . to say let's leave these issues of a free labor market and environmental issues in the case of labor standards to bodies like the ILO and the WTO . . . We have two real alternatives. Pursue these issues in negotiations where they matter, or assume they don't matter very much to our Nation and relegate them to the shadows.¹⁹⁸

194. Brian McWilliams, *President's Report: Standing Up to the WTO* <<http://www.ilwu.org/wto/standinguptothewto.htm>> (last modified Nov. 8, 1999).

195. John Nichols, *Now What? Seattle is Just a Start*, THE PROGRESSIVE 18 (January 2000)(citing a USA Today/CNN/Gallup survey).

196. *Id.*

197. See Survey Shows U.S. Opinion Moving Against Free Trade, CONGRESS DAILY (Dec. 15, 1999).

198. Hearing on President's Report, *supra* note 118, at 16 (statement of Hon. Sander M. Levin, a Representative in Congress from the State of Michigan), available at 1997 WL 570261.

President Clinton stated in a May 1998 speech: "Globalization is not a policy choice – it is a fact." He and other free trade champions extol "globalization" as an opportunity to be seized, not questioned. However, fair trade advocates argue that such a philosophy is deeply flawed. Even if "globalization" is predestined, the "policy choices" are not. The fact is: governments, trade bureaucrats, and the business lobby that hold sway over them, make policy choices to craft trading rules that advance economic before social welfare. But there are *alternative* policy choices.

For starters, 1,448 NGOs call for an immediate moratorium on further WTO negotiations that strive to expand existing trade rules, and during the moratorium, there must be a "comprehensive and in-depth review and assessment of the existing agreements" conducted with full participation of civil society, addressing issues such as marginalized communities, democracy, labor rights and human rights.¹⁹⁹

Public Citizen, a U.S. NGO whose mission is to dismantle the free trade paradigm and erect a fair trade system in its place, further calls for a moratorium on "WTO dispute resolution challenges to domestic health, environmental, consumer protection, food safety, development and human rights policies and laws. . . so as to provide an incentive to renegotiate [GATT/WTO provisions] and safeguard such policies until such changes are completed."²⁰⁰ In addition, Public Citizen challenges the WTO to become more transparent by making WTO documents publicly available, including those documents of negotiating groups and dispute resolution proceedings.²⁰¹ By making WTO documents available to the public on the WTO website, and at a "publicly accessible document room for hard copies in each WTO member country's capital," governments are more accountable to their citizenry.²⁰² This is not a foreign concept in the United States where Congressional records are readily available for public scrutiny – as it should be in the ever-important arena of international legislation.²⁰³ Finally, Public Citizen attacks the disparate impact of the WTO's dispute settlement proceedings on poorer countries, who are typically out-spent in trade disputes, by proposing a WTO agreement whereby a developed country plaintiff must provide legal fees to a qualifying developing country defendant.²⁰⁴

According to the AFL-CIO, each trade agreement that *lacks* strong enforcement mechanisms for labor protections, enshrined in the body of

199. International Society Statement, *supra* note 175.

200. Testimony of Lori Wallach, *supra* note 189.

201. *Id.*

202. *Id.*

203. *See e.g.*, Freedom of Information Action, 5 U.S.C. 552 (the FOIA requires all government agencies to publicly release copies of government documents upon request).

204. Testimony of Lori Wallach, *supra* note 189.

the text, is a missed opportunity to raise labor standards *with* trade liberalization:

Trade preferences linked to improved labor rights and environmental standards change the financial incentives for countries seeking market access and increased foreign direct investment . . . We must strengthen the labor rights protections in NAFTA, so that violations of core labor standards come under the same strict dispute settlement provisions as the business-related aspects of the agreement.²⁰⁵

The AFL-CIO further contends that the WTO "must be overhauled to guarantee workers' basic rights and to enforce and reverse the inequities in the current global economic system."²⁰⁶ Specifically, the AFL-CIO challenges the U.S. government and the WTO to: incorporate enforceable worker rights, strengthen worker rights in domestic law at home, enforce domestic law more rigorously, learn to enforce existing agreements before adopting new ones, exercise the right to withdraw from trade agreements that fail to adequately protect labor, and undergo massive review and reform of existing trade agreements before forging new agreements.²⁰⁷ The IFG also presents a list of "reform conditions for the WTO" including in part: greater transparency and public accountability for WTO decision-making; NGO representation in the WTO dispute resolution process, including a right to appeal; and a moratorium on future negotiating rounds until a public, democratic "assessment round" can assess the effects of WTO to date.²⁰⁸

Viable fair trade alternatives do exist. The challenge is to persuade global policy-makers to listen, and then to depart from the status quo by adopting a new, inclusive, and democratic system for the future.

VII. CONCLUSION

Fair trade advocates oppose NAFTA, GATT/WTO, and the ideology of an unfettered global marketplace, not because these policies promote trade, but because they fail to promote people.²⁰⁹ This article has at-

205. *Trade and Deindustrialization*, *supra* note 166.

206. WORKERS' RIGHTS, *supra* note 12, at 7.

207. *Trade and Deindustrialization*, *supra* note 166.

208. INVISIBLE GOVERNMENT, *supra* note 1, at 42-43.

209. See e.g., Statement by Brian McWilliams, President of the International Longshore and Warehouse Union – AFL-CIO, *An Injury to One is an Injury to All*, statement for WTO labor rally 11/30/99 ("And let us be clear. Let's not allow the free traders to paint us as isolationist anti-traders. We are for trade. Don't ever forget – it is the labor of working people that produces all the wealth. When we say we demand fair trade policies we mean we demand a world in which trade brings dignity and fair treatment to all workers, with its benefits shared fairly and equally. . .") <<http://www.ilwu.org/wto/bmcwspeech.htm>> (visited Apr. 6, 2000).

tempted to show by comparison that the current trading system has established a dangerous double standard where corporations and private investors enjoy extraordinary profit protections far exceeding the basic rights of workers.

Why are free trade advocates, including NAFTA and WTO negotiating countries, so adamant against incorporation of labor standards? The WTO claims: "developing and developed nations believe the issue has no place in the WTO framework."²¹⁰ Aside from the obvious contradiction that the WTO has no problem incorporating *environmental* issues into the WTO framework,²¹¹ it is absurd to state that labor has no place in trade — labor *is* commerce, and commerce *is* trade. It is also deplorable to use protectionist accusations to wholly excuse labor standards from the WTO. Again, the WTO argues that some nations fear "labour standards. . . are little more than a smokescreen for protectionism;"²¹² and at a 1996 WTO Ministerial meeting in Singapore, members declared that they "reject the use of labour standards for protectionist purposes."²¹³ As long as the WTO is negotiating in the area of capital mobility, government procurement, expropriation, and the like, than labor does have a place in the WTO framework; and occupational health and safety, livable wages, the right to organize, and to bargain collectively, are not protectionist, they are essential. The omission of labor standards in the free trade system is a policy choice, and *that is a fact.*

It is an unacceptable evasion of responsible governance to strategically exclude labor issues from the heart of global commerce and instead "defer" the topic to a perfunctory side agreement or third party. To import equality into the current trading system, it is essential to incorporate workers' rights as a core issue, equal in merit to dismantling trade barriers, and protecting intellectual property, direct investment and other commercial interests. Without major reform, this free trade frenzy will continue to devour the unprotected — the global labor market whose only shields are the unenforceable, hortatory recommendations and reports of the NAALC, and the ILO.

This reform will not come from our world leaders, who relentlessly push free trade accords at any cost.²¹⁴ Rather, the reform must come

210. TRADING INTO THE FUTURE, *supra* note 9, at 60.

211. In 1994 the WTO adopted a working group on environmental issues, but at the 1999 Seattle Round members *refused* to adopt a working group to study labor issues. Apparently WTO members feel the environment has more to do with trade than does labor, or perhaps the issue of the environment is simply more benign for business than labor. See *General Agreement on Tariffs and Trade (the Uruguay Round): Ministerial Decisions and Declarations*, 33 I.L.M. 136 (Dec. 15, 1993).

212. TRADING INTO THE FUTURE, *supra* note 9, at 60.

213. *Id.* at 61.

214. In the U.S., each of the leading Presidential candidates unequivocally supported free trade, and based on the policies supported and proposed by both party's leading con-

from a movement by the people, which began in Seattle last year. Howard Zinn²¹⁵ called the demonstrations in Seattle "the weapon of revolution":

What happened in Seattle recently . . . showed how apparently powerless people – if they unite in large numbers – can stop the machinery of government and commerce. In an era when the power of government, and of multinational corporations, is overwhelming, it is instructive to get even a hint of how fragile that power is when confronted by organized, determine citizens."²¹⁶

For labor organizers and workers all over the world, the mobilization against globalization will continue until the double standard has been dismantled, and global trade is empowering, not exploitive.

tenders, the next Administration will likely follow the current free trade status quo. *See e.g., Free trade supporters dominate the presidential campaign*, <<http://www.cnn.com/ALLPOLITICS/stories/1999/11/29/candidates.wto/index.html>> (Nov. 29, 1999) (visited Feb. 13, 2000); *Clinton asks Congress to pass China trade agreement*, <<http://www.cnn.com/2000/US/03/08/clinton.china.ap/index.html>> (March 8, 2000) (visited Mar. 9, 2000). The sentiment is much the same internationally. *See e.g., WHAT'S AT STAKE*, *supra* note 3, at iii (Tony Blair stated in a recent speech: "The GATT's system of trade rules and agreements has contributed massively to global prosperity. It is not something we should take for granted." Nelson Mandela recently stated: "We are firmly of the belief that the existence of the GATT, and now the [WTO], as a rules-based system, provides the foundation on which our deliberations can build in order to improve. . . let us forge a partnership for development through trade and investment.").

215. Howard Zinn is the author of *A People's America* and Professor Emeritus at Boston University.

216. Howard Zinn, *A Flash of the Possible*, *THE PROGRESSIVE* (January 20, 2000).

FEMALE GENITAL MUTILATION: A DISCUSSION OF INTERNATIONAL HUMAN RIGHTS INSTRUMENTS, CULTURAL SOVEREIGNTY AND DOMINANCE THEORY

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"African women, now and throughout history, have developed analyses and strategies for action to take control of our own lives in those areas that we have collectively determined for redress."¹

I. INTRODUCTION

The foundation of international human rights law is the principle that every State has an obligation to respect the human rights of its citizens.² Additionally, the international community has a right and responsibility to protest if there is a violation of this obligation.³

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1. Abena Busia, *Issues Around Human Rights and Women in Africa: A Discussion*, in GENDER VIOLENCE AND WOMEN'S HUMAN RIGHTS IN AFRICA 1 (1994).

2. Richard B. Bilder, *An Overview of International Human Rights Law*, in GUIDE TO HUMAN RIGHTS PRACTICES 3-19 (1983); see also Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217, U.N. GAOR, art. 29, para. 3 [hereinafter Universal Declaration]. See generally U.N. CHARTER art. 1, para. 3; art. 2, paras. 2, 4-6 (outlining the purposes and principles of the United Nations to include promoting and encouraging respect for human rights and fundamental freedoms); Vienna Convention on the Law of Treaties, Jan. 27, 1990, U.N. Doc. A/CONF. 39/27, art. 26 (noting the principles of *pacta sunt servanda* and the observance of treaties and internal laws); International Covenant on Civil and Political Rights, Mar. 23, 1976, G.A. Res. 2200, 999 U.N.T.S. 171 (ratified by the United States June 8, 1992) [hereinafter Civil and Political Rights]; International Covenant on Economic, Social and Cultural Rights, Jan. 3, 1976, 993 U.N.T.S. 3 (The United States has not ratified this convention as of Mar. 4, 2000) [hereinafter Economic, Social and Cultural Rights].

3. See generally treaties cited *supra* note 2. See also Convention on the Elimination of All Forms of Discrimination Against Women, Sept. 3, 1981, 19 I.L.M. 33 [hereinafter CEDAW]. Article 5 of CEDAW asserts:

State Parties shall take appropriate measures: (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customs and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or

Inherent in this principle is the concept that there are, in fact, universal human rights.⁴ However, most of the rights enumerated as "universal" are based on Western values, and can be traced directly to the experiences of France, England, and the United States rather than Islamic, Eastern, and African cultures.⁵ Many international law scholars acknowledge "the meaning of human rights depends upon the specific cultural context."⁶

Another tenet of international law is the concept of State sovereignty.⁷ The concept of sovereignty means a State is "subject to no

on the stereotyped roles for men and women.

CEDAW, art. 5.

4. The rights enumerated in the Universal Declaration as, "a common standard of achievement for all peoples and all nations" include: freedom of dignity; freedom from discrimination; right to life, liberty and security of the person; freedom from slavery; freedom from torture or cruel and degrading treatment; right to recognition under the law; right to equal protection; right to effective remedy; freedom from arbitrary arrest, detention, or exile; right to a fair trial by an impartial tribunal; right to be presumed innocent until proved guilty; freedom from arbitrary interference in a person's privacy, family, and home; right to marry and found a family and equal right during marriage and at its dissolution; right to personal property, right to freedom of thought, conscience, and religion; freedom of opinion and expression, freedom of peaceful assembly, right to take part in the government; right to vote; and the right of equal access to public service. Universal Declaration, *supra* note 2, arts 1-30. See also Kimberly Younce Schooly, *Cultural Sovereignty, Islam, and Human Rights—Toward a Communitarian Revision*, 25 CUMB. L. REV. 651 (1995) (citing Blackstone's definition of the Law of Personal Status as, "The rights of persons considered in their natural capacities are also of two sorts, absolute and relative. Absolute, which are such as appertain and belong to particular men, merely as individuals or single persons: relative, which are incident to them as members of society, and standing in various relations to each other.").

5. Adamantia Pollis & Peter Schwab, *Human Rights: A Western Construct with Limited Applicability*, in HUMAN RIGHTS - CULTURAL AND IDEOLOGICAL PERSPECTIVES 8-10 (A. Pollis & P. Schwab eds. 1979). See also Younce Schooly, *supra* note 5, at 653 (discussing the development of international human rights during the aftermath of the Holocaust and the Nuremberg Trials. Ms. Younce Schooly asserts that many Islamic cultures do not identify with "universal" rights such as autonomy, equality, and freedom, and, therefore, have reservations to the CEDAW). See also Bilder *supra* note 2, at 1.

6. Ved Nanda, *The Human Rights Era at Fifty: Looking Back and Looking Forward*, 5 WILLAMETTE J. INT'L L. & DISP. RESOL. 69 (1997). But see *What's Culture Got To Do With It? Excising the Harmful Tradition of Female Circumcision*, 106 HARV. L. REV. 1944, 1959 (1993) [hereinafter *What's Culture*] (arguing that culture is not simply based on history and tradition, but is a dynamic notion incorporating social, economic, and political influences, and things both individual and collective. The author asserts that present actions and lifestyles reinforce a notion of culture that comprises the traditional as well as the contemporary. Therefore, practices, beliefs, and lifestyles passed down through several generations of an ethnic group need to be re-examined periodically in light of contemporary values and knowledge, in order to ascertain whether the customs deserve to be perpetuated).

7. JACK DONNELLY, INTERNATIONAL HUMAN RIGHTS 28 (1993) (stating that, historically, the idea of sovereignty in international relations dates back to 1648 with the Treaty of Westphalia, which ended the Thirty Year's War).

higher power."⁸ Sovereignty not only refers to a States physical border, but also to its choice of political, social, economic, and cultural systems.⁹ Connected with the doctrine of sovereignty is the concept of nonintervention.¹⁰ Nonintervention means that one State should not interfere with the internal relations of another State out of respect for its sovereignty.¹¹ Therefore, according to basic international law principles, States should respect the politics, religions, social structures, and cultures of other States and refrain from interfering with such sovereign rights.

This conflict between international human rights and the doctrine of cultural sovereignty is ongoing and controversial. Critics of international human rights law argue that "the international community utilizes treaties to loosen sovereignty's rule of restraint."¹² Some of the most controversial treaties involve the rights of women and children encompassing all aspects of a woman's life, which differs according to culture.¹³

Today, this conflict exists between societies that practice Female Genital Mutilation (FGM) and the numerous States and Non-Governmental Organizations (NGOs) that protest the practice.¹⁴ In addition to the existing political conflict between States, there exists an immense cultural conflict where victims of FGM support the practice.¹⁵ There is abundant legal support against the practice including the United Nations Charter,¹⁶ the Universal Declaration of Human Rights¹⁷,

8. *Id.*

9. See U.N. CHARTER art. 2, para. 1. See also Alexander Boldizar, *Out of a Tangled Skein into the International: The Development of Legal Culture*, 5 ANN. SURV. INT'L & COMP. L. 163, 198 (1999) (addressing the traditional meaning of sovereignty to mean the "whole of inviolable rights and privileges of an international actor of the highest rank. Sovereignty ensures that no higher authority can bind the sovereign, deprive it of its equal rights vis-à-vis its peers, nor penetrate its domestic geographical, political, or cultural domain.").

10. Younce Schooly, *supra* note 5, at 654.

11. *Id.* See also LOUIS HENKIN, *HOW NATIONS BEHAVE* 13-27 (2d ed. 1979).

12. Younce Schooly, *supra* note 5, at 654 ("A treaty is contractual agreement by states to accept certain obligations to other states, that is, specified restrictions on their sovereignty.").

13. *Id.* at 656.

14. See Laura Reymond et al., *Female Genital Mutilation- The Facts!*, (visited Feb. 13, 2000) <<http://www.path.org/html/fgm.htm>> [hereinafter *FGM- The Facts!*] (discussing the efforts of NGOs to eradicate FGM, and the obstacles they encounter).

15. *Id.*

16. U.N. CHARTER art. 1, para. 3 (includes in the purposes of the United Nations, "To achieve international co-operation . . . in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.").

17. The Universal Declaration states that, "[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food,

and the Convention on the Elimination of All Forms of Discrimination Against Women.¹⁸ However, there is also legal support for the practice based upon the concept of cultural sovereignty.¹⁹ Thus, the conflict centers on the fine line between respecting one's fundamental human rights and the recognition of a State's cultural sovereignty.²⁰

This article addresses the conflict between the recognition of international human rights and the principle of cultural sovereignty through an analysis of the cultural, social, and political implications surrounding FGM. Section two introduces the torturous practice of FGM, including the reasons given to justify it, as well as the resulting complications and effects. Section three addresses and evaluates

clothing, housing and medical care and necessary social services . . . Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection." Universal Declaration, *supra* note 2, art. 25, paras. 1-2

18. See generally CEDAW, *supra* note 3. The Preamble states:

The Charter of the United Nations reaffirms faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women . . . [c]onsidering the international conventions concluded under the auspices of the United Nations and the specialized agencies promoting equality of rights of men and women, recalling that discrimination against women violates the principles of equality of rights and respect for human dignity, is an obstacle to the participation of women, on equal terms with men, in the political, social, economic and cultural life of their countries, hampers the growth of society and the family and makes more difficult the full development of the potentialities of women in the service of their countries and humanity . . .

Id. at pmbl. Article 3 declares:

States parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

Id. art. 3.

19. See U.N. CHARTER art. 2, paras. 1, 4, 7 (asserting that the United Nations itself is based on the principle of sovereign equality of all its members, that members shall refrain from invasion of the territorial integrity or political independence of any state, and that nothing in the Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state). See also BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW 587-91 (2d ed. 1995) (discussing foreign sovereign immunity and the act of state doctrine).

20. Compare CARTER & TRIMBLE, *supra* note 19, at 652 (asserting that human rights approaches disrespect the cultural integrity of women outside the West, and proposing a Communitarian approach to human rights discourse), with *What's Culture*, *supra* note 6, at 1959 (arguing that culture is a dynamic notion requiring changes and reexamination in light of contemporary values in order to determine whether customs deserved to be perpetuated), and Boldizar, *supra* note 9, at 198-99 (asserting that the concept of sovereignty makes the international legal system a consensual one where States are influenced through interacting processes of justification, discourse, and persuasion creating a non-culture by virtue of surrendering the pretense of idiomatic virginity).

existing international legal instruments that protest FGM. Section four considers the arguments of both FGM proponents and opponents. Section five addresses enforcement mechanisms of international law concerning FGM, and proposes solutions to rectify these issues. In a day and age where it should be commonplace for society to respect women of all cultures and for all women to have the opportunity to make meaningful choices in their lives, the conflicting issues raised in this article show the difficulty women face daily, simply to obtain their freedom.

II. DEFINING THE PROBLEM OF FEMALE GENITAL MUTILATION

Female Genital Mutilation is a general term for a variety of surgical operations performed on girls and women primarily in twenty-eight African countries and among some minorities in Asia.²¹ FGM is the partial or total removal of the female external genitalia including the clitoris, labia, mons pubis (the fatty tissue over the pubic bone), and the urethral and vagina openings.²² The practice is often referred to as 'female circumcision', implying that it is similar to male circumcision. However, the cutting is much more severe and extensive, often impairing a woman's sexual and reproductive functions.²³ It is an ancient custom, which is estimated to affect 130 million girls and women around the world, with a rate of increase of about 2 million new cases a year.²⁴ Recently, the practice has also begun to surface within immigrant communities in Europe, Australia, Canada, and the United States.²⁵

21. See *Female Genital Mutilation: A Fact Sheet*, Research, Action and Information Network for the Bodily Integrity of Women (RAINBO) (visited Oct. 15, 1999) <<http://www.rainbo.org>> [hereinafter RAINBO] (web site of a major advocacy organization striving to eradicate the practice of FGM).

22. *World Health Organization Fact Sheet N 153*, (Apr. 1997) (visited Sept. 1999) <<http://www.who.org>> [hereinafter *WHO Fact Sheet*].

23. See *FGM- The Facts!*, *supra* note 14 (discussing the results of research regarding the immediate and long-term complications of FGM to include increased risk of maternal and child morbidity and mortality due to obstructed labor, increased risk of infertility, increased risk of HIV infection, and repression of women's sexuality). See also Khadija Magardie, *Female Genital Mutilation Shadow Falls on South Africa*, AFR. NEWS SERV., Sept. 10, 1999 (describing the specific complications with childbirth to include extreme difficulty for the doctor to perform internal examinations on labouring women that can have grave consequences for the life of the fetus).

24. *FGM- The Facts!*, *supra* note 14. See also *FGM Research Homepage* (visited Oct. 25, 1999) <<http://www.hollyfeld.org/fgm.html>>.

25. See RAINBO, *supra* note 21. See also, *In re Fauziya Kasinga*, Int. Dec. 3278, available in 1996 WL 379826 (BIA June 13, 1996); Ruth Nabakwe, *The Voice of the Girl Child Asserts Itself*, PANAFRICAN NEWS AGENCY, Feb. 4, 1999 (article published in French newspapers about the sentencing of a 52-year-old Malian woman, Hawa Greou, by a court in Paris for circumcising 50 girls. Female circumcision became a crime in France in 1984,

Most girls undergo FGM when they are between seven and ten years old.²⁶ However, FGM seems to be occurring at earlier ages in several countries because parents want to reduce the trauma to their children and avoid government interference and/or resistance from their children.²⁷

In 1995, the World Health Organization (WHO) defined four types of FGM: (I) Type 1- Clitoridectomy,²⁸ (II) Type 2- Excision,²⁹ (III) Type 3- Infibulation,³⁰ (IV) Type 4- Unclassified, but includes all operations performed on the female genitalia.³¹ Eighty-five percent of genital mutilations are Type I and Type II operations.³² Type III (Infibulation) is common in Djibouti, Somalia and Sudan and in parts of Egypt, Ethiopia, Kenya, Mali, Mauritania, Niger, Nigeria, and Senegal.³³

A. *Complications and Effects of Female Genital Mutilation*

The consequences of FGM on women's health are extensive and range from repeated urinary infections to death.³⁴ The actual number of girls who die because of FGM is unknown, however, the highest maternal and infant mortality rates are in FGM practicing regions.³⁵ A

but the first conviction was not handed down until 1991).

26. *FGM- The Facts!*, *supra* note 14 (citing Calverton, *Demographic and Health Survey- Egypt* 175 (1995)).

27. See FRAN HOSKEN, *THE HOSKEN REPORT: GENITAL AND SEXUAL MUTILATION OF FEMALES* 35 (4th ed. 1993) [hereinafter HOSKEN REPORT].

28. Clitoridectomy is the partial or total removal of the clitoris. *FGM- The Facts!*, *supra* note 14.

29. Excision is when both the clitoris and the inner lips are cut off so the vagina is not covered. *Id.*

30. Infibulation is when the clitoris is removed; partial or total cutting of the labia minora and incisions are made in the labia majora. The surface is either stitched together or kept in contact by tying the girl's legs together until it heals, covering the urethra and most of the vaginal opening leaving only a tiny opening the size of a matchstick head for the passage of urine or menstruation. *Id.*

31. Carol R. Horowitz & J. Carey Jackson, *Female Circumcision: African Women Confront American Medicine* (visited Jan. 7, 2000) <<http://www.fgm.org/Horowitz-Jackson.html>> (The other operations performed on the female genitalia include: pricking, piercing, stretching, or incision of the clitoris and/or labia; cauterization by burning the clitoris and surrounding tissues; incisions to the vaginal wall; scraping or cutting of the vagina and surrounding tissues; and introduction of corrosive substances or herbs into the vagina).

32. See *FGM- The Facts!*, *supra* note 14.

33. *Id.* See also HOSKEN REPORT, *supra* note 27, at 3.

34. HOSKEN REPORT, *supra* note 27, at 3. (research contained in the report shows that the highest maternal and infant mortality rates are in FGM-practicing regions, largely due to a lack of antibiotics. In areas in the Sudan where antibiotics are not available, it is estimated that one-third of the girls undergoing FGM will die. Where medical facilities are ill equipped, emergencies arising from FGM cannot be treated. Thus, a child who develops uncontrolled bleeding or infection after FGM may die within hours).

35. *Id.* at 37.

major reason for death is the unsanitary and crude method used by the practitioner combined with the unavailability of antibiotics.³⁶ Female family members in non-sterile conditions often perform the procedure with instruments including razor blades or broken glass.³⁷ In regions of West Africa, dirt, ashes, or pulverized animal feces are thrown into the wound to stop the bleeding and contributes to severe infection, shock, and uncontrolled hemorrhaging.³⁸

The consequences of FGM on women's health include both short and long-term consequences. Immediate physical problems related to FGM include: intense pain and/or hemorrhaging,³⁹ wound infection, including tetanus,⁴⁰ damage to adjoining organs from the use of blunt instruments by unskilled practitioners, and urine retention from swelling and/or blockage of the urethra.⁴¹ A more recent concern focuses on the possible transmission of the human immuno-deficiency virus (HIV) as a result of using one instrument in multiple operations or the damage to tissue from anal intercourse.⁴² However, the connection between HIV and FGM has yet to be fully explored.

The long-term consequences of FGM encompass psychological as well as physical ailments. Long-term consequences of FGM include: painful or blocked menses,⁴³ recurrent urinary tract infections,⁴⁴

36. *Id.*

37. *Id.*

38. Robin Maher, *Female Genital Mutilation: The Modern Day Struggle to Eradicate a Torturous Rite of Passage*, 23 HUM. RTS. 12, 13 (1996).

39. *FGM- The Facts!*, *supra* note 14 (Intense hemorrhaging can lead to shock during and after the procedure, as well as anemia. Approximately 50 percent of Kenyan women in 1991 suffered hemorrhaging from FGM).

40. *Id.* (50 to 60 percent of women with tetanus die from this infection).

41. *Id.* (A 1991 survey of 1,222 women in four Kenyan districts indicated that 48.5% of the women experienced hemorrhaging, 23.9% infection, and 19.4% urine retention at the time of the FGM operation).

42. *Id.* (discussing how the same unsterilized instrument is used on several girls at a time, increasing the chance of spreading HIV or other communicable disease). *See also*, Michael Ntabaazi, *Preventing Female Genital Mutilation Not So Easy*, AFR. NEWS SERV., Aug. 3, 1998, available in 1998 WL 14361837 (article discusses progresses made to eradicate FGM in Uganda, and addresses the long term consequences to include the likelihood of increasing the risk of HIV infection). *See also WHO Fact Sheet*, *supra* note 22 (In some cases where infibulation prevents or impedes vaginal intercourse, anal intercourse is known to be used as an alternative. The damage to tissue from anal intercourse is also a possible route of infection by HIV).

43. *FGM-The Facts!*, *supra* note 14 (in 1983, 55.4 percent of the women surveyed in Baydhaba, Somalia, reported abnormal menstruation).

44. *See FGM-The Facts!*, *supra* note 14 (a 1983 study in the Sudan revealed that 16.4 percent of women who had the operation experienced recurrent urinary tract infections caused by swelling and or blockage of the urethra). *See also UNICEF Joins in Plan Against FGM*, UNICEF Home Page, (visited Sept. 1999) <<http://www.unicef.org/newsline/fgm.htm>>.

abscesses, cysts, and hardened scars,⁴⁵ increased risk of maternal and child morbidity due to obstructed labor,⁴⁶ infertility, and sexual dysfunction.⁴⁷ In addition to these physical problems, mutilated women also suffer psychological consequences.⁴⁸ These consequences may be

45. See Ntabazzi, *supra* note 42 (article describes the scars that are left from FGM to include dermoid cysts and keloid scars, which is a hardening of the scars). See also Florence Bamanyaki, *Where is the Aesthetic Sense in Female Circumcision?*, AFR. NEWS SERV., Oct. 28, 1996, available in 1996 WL 14178071 (interview with Dr. Gerald Aine, a private gynecologist, who explained the complications caused by fibrous, non-elastic scar tissue include severe pain and tearing during childbirth. The scar tissue does not yield during childbirth, thus making labor prolonged and sometimes obstructed. During this period, the second stage of labor, the head of the baby is already in the vagina, but the opening of the birth canal is closed by the unyielding scar tissue of circumcision).

46. See Bamanyaki, *supra* note 45 (Dr. Aine reported that the constant prolonged grinding of the baby's head on the mother's urinary bladder on top and the rectum behind causes fistula, an uncontrollable passing out of urine and feces. Fistula is common in adolescent girls and it is extremely difficult for these women to give birth to a live child if the fistula is not repaired. If by chance they become pregnant, urine poisons the fetus, causing frequent miscarriages). See also Magardie, *supra* note 23 (article documents the increase in the number of mutilated women coming to government hospitals in South Africa for ante-natal care. Trainee doctors are now being taught how to deal with the obstetric and gynecological complications resulting from FGM. One patient had to undergo serious surgery to repair an acute case of necrosis- a rotting of the area between the vagina and the rectum. Infection in the area left a gaping hole. Most mutilated women have to be cut open for childbirth and re-sewn afterward). See also WHO Press Release, *Female Genital Mutilation: World Health Assembly Calls for Elimination of Harmful Traditional Practices* (1993) (visited Oct. 20, 1999) <<http://www.rainbow.org>> (research revealed that women who undergo FGM are twice as likely to die during childbirth and are more likely to give birth to a stillborn child than other women. Obstructed labor also causes brain damage to the infant and complications for the mother).

47. See Magardie, *supra* note 23 (a mutilated woman remembers her wedding night when she was 14 years old and her husband forced his penis into her opening that was the size of the head of a matchstick. Other women had to be 'opened up' with a kitchen knife on their wedding night). See also *How We Were Genitally Mutilated*, AFR. NEWS SERV., (Oct. 6, 1999), available in 1999 WL 25948826 (article about two female legislators in Benin that relive their FGM experiences as the Edo House proposed a law against FGM. One of the legislators, Mrs. Eshoe Jacobs, said the scar left after the mutilation deprived her of a lifetime of sexual satisfaction. Both women agreed that FGM destroys a woman's sensitivity during sex and can lead to severe bleeding and death).

48. Hanny Lightfoot-Klein, *The Sexual Experience and Marital Adjustment of Genitally Circumcised and Infibulated Females in Sudan*, 26 J. SEX RES. 375-92 (1989) (visited Jan. 8, 2000) <<http://www.fgm.org/HLKarticle.html>>. See also WHO Fact Sheet, *supra* note 22 (report from the World Health Organization about the health consequences of FGM. The report includes psychosexual and psychological health, and says that FGM may leave a lasting mark on the mind of the woman). See also FGM- *The Facts*, *supra* note 14 (asserting that FGM destroys much or all of the vulval nerve endings, delaying arousal or impairing orgasm. Also asserting lacerations, loss of skin elasticity, or development of neuroma can lead to painful intercourse. In a 1993 Sudanese study, 5.5 percent of women interviewed experienced painful intercourse while 9.3 percent of them reported having difficult or impossible penetration. In 1981, 1,545 Sudanese women who had undergone the operation were interviewed, and 50 percent said they did not enjoy sex

submerged deep in the child's subconscious and may trigger behavioral disturbances. These female children may lose their trust and confidence in caregivers and, in the long run, may suffer anxiety, incompleteness, depression, chronic irritability and frigidity.⁴⁹ Additionally, victims are rarely able to enjoy the physical and mental aspects of sexual intercourse, which may result in marital dysfunction.⁵⁰ Research in Sudan revealed that fifty percent of women who had undergone FGM say that they do not enjoy sexual intercourse, but rather they accept it as their duty.⁵¹

B Reasons for Supporting FGM

There are various rationales in favor of FGM. The reasons can be classified as religious, sociological, aesthetic, mythical, and psychosexual. Supporters of FGM argue the concept of cultural relativism — that FGM is an essential part of their culture. As such, FGM should be preserved, and members of FGM practicing States should be allowed to continue with this cultural practice without interference from other States.

1. Religious Reasons

It is a common misconception that FGM is an exclusively Muslim practice. FGM is also practiced by many secular and religious groups; including Egyptian Christians,⁵² Ethiopian Jews, and non-believers.⁵³ In fact, FGM predates Islam.⁵⁴ Some Muslim communities practice

at all).

49. See *WHO Fact Sheet*, *supra* note 22.

50. *Id.* (WHO report says that mutilated women may experience marital conflicts because of sexual dysfunction in both partners resulting from painful intercourse and reduced sexual activity).

51. *FGM- The Facts!*, *supra* note 14 (citing A. DAREER, AN EPIDEMIOLOGICAL STUDY OF FEMALE CIRCUMCISION IN THE SUDAN 81 (1981)).

52. Sami A. Aldeeb Abu-Sahlieh, *To Mutilate in the Name of Jehovah or Allah: Legitimization of Male and Female Circumcision* (visited Jan. 8, 2000) <<http://www.fgmnetwork.org/samialdeeb/Mutilate/index.html>> [hereinafter *Jehovah*].

53. See *WHO Fact Sheet*, *supra* note 22. See also *FGM- The Facts!*, *supra* note 14 (asserting that, until the 1950s, FGM was performed in England and the United States as a common "treatment" for lesbianism, masturbation, hysteria, epilepsy, and other so-called "female deviances"). See also *Female Genital Mutilation: In Africa, The Middle East & Far East*, Female Genital Mutilation Homepage (visited Feb. 15, 2000) <<http://www.fgm.org>> (asserting that FGM is frequently practiced among Christians in Ethiopia and Sudan, as well as by Falachas, or Ethiopian Jews).

54. See *FGM Research Homepage*, *supra* note 24 (article attempting to clarify the misunderstanding that FGM is an exclusively Muslim practice by describing how it is an African cultural practice).

FGM because they believe that their faith demands it.⁵⁵ However, religious scholars have confirmed that there is no mention of FGM in the Koran. There are no final statements (*fatwas*)⁵⁶ about FGM from an Islamic point of view, only that it is a *rnakrama*, a "third or fourth order duty".⁵⁷ This does not, however, stop many religious and secular leaders from claiming that it does have a place in Islam.⁵⁸ In 1994, the Sheikh of Al-Azhar, Sunni Islam's highest authority, persuaded the Egyptian Ministry of Health to issue a decree, which permitted hospitals in Egypt to perform the procedure.⁵⁹ However, three years later, the Sheikh changed his opinion on the issue, and "reaffirmed" his support for the Egyptian Health Ministry's ban on FGM.⁶⁰ Sheikh Mohammed Sayyed Tantawi also made a statement in support of the ban, "I support the Health Ministry's decision to ban excision because it is a medical and not a religious matter."⁶¹ The Sheikh added, "[a]ll the hadith on excision are weak," a reference to the sayings of the prophet Mohammad, one of the foundations of Islamic legislation.⁶² However, many clergy continue to support the practice, and religion continues to be a primary motivation for FGM among Muslim populations.⁶³

2. Sociological Reasons

FGM is an ancient practice cloaked in tradition allowing women to identify with their cultural heritage. The sociological reasons

55. See *Jehovah*, *supra* note 52. See also RAINBO, *supra* note 21 (asserting that contrary to popular belief, FGM is not a religious practice or requirement; it is perpetuated on the bases of custom and tradition. Muslims, Christians, some animists and Ethiopian Jews practice it). But see *FGM Research Homepage*, *supra* note 24 (asserting that in many Muslim countries, such as Jordan and Iran, FGM is nonexistent).

56. A "fatwa" is "a legal opinion or decree handed down by an Islamic religious leader." MERRIAM WEBSTER'S COLLEGIATE DICTIONARY (1996).

57. Amna Hassan, *Sudanese Women's Struggle to Eliminate Harmful Traditional Practices*, (visited Oct. 10, 1999) <<http://www/fgm.org/sudan.struggle.html>> (summarizing the beliefs of modern Islamic scholars in the words of Sheikh Mahmoud Shaltout. "Islamic legislation provides a general principle, namely that certain issues should be carefully examined and if these are proved to be definitely harmful or immoral, then it should be legitimately stopped." Since the harm of excision has been established, excision of the clitoris is not a so-called "Sunnah" or duty).

58. See Maher, *supra* note 38, at 13 (Sheikh of Al-Azhar, Sunni Islam's highest authority, publicly proclaimed that FGM has a place in the jurisprudence of Islam).

59. *Id.*

60. *Religious Leader Reaffirms Opposition to Female Circumcision*, AFR. NEWS SERV., Aug. 4, 1997, available in 1997 WL 12809052 (article discussing the Egyptian Health Ministry's ban on female circumcision despite a court decision to allow the practice. The Sheikh declared that the Islamic community should listen to the advice of doctors who say that FGM is unnecessary).

61. *Id.*

62. *Id.*

63. Maher, *supra* note 38, at 13.

supporting FGM are the strongest as they are imbedded in the daily lives of these women. FGM is performed as a rite of passage to womanhood.⁶⁴ An elaborate ceremony may surround the event where songs and dance are performed to teach the young girl her duties as a good wife and mother. The girl may even receive gifts, such as gold, clothes and food.⁶⁵

If a girl does not undergo the procedure society may shun her; she may be ostracized from her family, and may never marry.⁶⁶ In Kenya, a sixteen-year-old girl, Regina Muakaria, was chased away from her home because she refused to undergo the procedure before entering secondary school.⁶⁷ Failure to be circumcised can lead to tremendous social pressure and harassment. In the Sabiny culture in Uganda, an uncircumcised woman cannot speak in front of elders, hold any position of responsibility, or even marry.⁶⁸ The impact of social pressure from peers, husbands and other extended family members towards female circumcision is expressed by a nineteen-year old woman who was circumcised the previous year. She explains the social pressures she experienced:

I dropped out of school and decided to get married. I did not like to undergo circumcision, but was compelled to accept it. My friends are circumcised, so I was isolated, a social outcast and not respected. I was told by in-laws that if I did not undergo circumcision, dowry would not be paid.⁶⁹

Another pressure women endure comes from mothers-in-law and other wives in polygamous marriages, who want uncircumcised women to look like them and to be respectable.⁷⁰ Interestingly, most women

64. See *Kuka Fights to Stop Female Circumcision*, MONITOR, June 27, 1998, available in 1998 WL 13213179 (article describing the Uganda Minister of State for Gender and Cultural Affairs' account of her crusade against FGM. Jane Frances Kuka explains that the practice is one of the most fundamental aspects of the Sabiny culture and persisted largely because it is supported by the Sabiny Elders Association and regarded as a source of cultural pride. Female circumcision marks the transition from childhood to womanhood). See also Hassan, *supra* note 57 (explaining the areas where FGM is performed as a rite of passage include Northern Sudan, Somalia, Kenya and Mali). See also Bamanyaki, *supra* note 45.

65. Hassan, *supra* note 57 (however, the article asserts that the ceremonial aspects are disappearing due to eradication campaigns).

66. *Id.* See also Ntabazzi, *supra* note 42 (article describes the harassment women endure if they are not circumcised).

67. John Mwaura, *A Defiant Kenyan Girl Who Said No to Tradition*, PANAFRICAN NEWS AGENCY, Feb. 25, 1999, available in 1999 WL 12923300 (describing how she was assisted by a social welfare officer after a local NGO assisted her. Eventually, the Kenyan government intervened and sponsored her to go to school through its bursary fund).

68. See Ntabazzi, *supra* note 42.

69. *Id.*

70. *Id.*

who have been subjected to FGM strongly favor it for their daughters.⁷¹

3. Aesthetic and Hygienic Reasons

As with every culture, there are distinct physical qualities that FGM practicing societies consider attractive. FGM practicing societies believe that external female genitalia are dirty and unattractive.⁷² The female body is viewed as more simple and beautiful without the genitalia, and some argue that circumcision makes the face more beautiful.⁷³ Therefore, members of society admire women who have their genitalia removed, while those who have their genitalia are scorned or even ostracized.

Hygienic reasons for FGM are based on the idea that the clitoris is dirty, and bad female odors can be eliminated by removing the clitoris and labia minora.⁷⁴ Some FGM supporters claim that the clitoris is a poisonous organ, and believe that contact with the clitoris can cause a great deal of harm to men and babies.⁷⁵ They further believe that men can become impotent by contacting a clitoris, and that a baby will be poisoned when its head contacts the clitoris during birth.⁷⁶

4. Psychosexual Reasons

The psychosexual reasons asserted in support of FGM are connected to the way FGM practicing societies view women. These cultures believe that "women are fundamentally sexual creatures and naturally promiscuous; thus the purpose of FGM is to prevent women from succumbing to these impulses and to protect them from the aggression of others."⁷⁷ Some argue that older men may not be able to match their wives sex drive and may have to resort of illegal

71. *FGM- The Facts!*, *supra* note 14 (research in Egypt reveals that 50 percent of the women surveyed reported that they had at least one daughter who had undergone the procedure, while 38 percent intended to in the future. Most of the women want their daughters to undergo the same type of procedure they had).

72. See *Female Genital Mutilation: In Africa, The Middle East & Far East*, Female Genital Mutilation Homepage (visited Feb. 15, 2000) <<http://www.fgm.org/>> [hereinafter FGM Homepage]. See also, *WHO Fact Sheet*, *supra* note 22.

73. See FGM Homepage, *supra* note 72.

74. *WHO Fact Sheet*, *supra* note 22.

75. *Id.* (asserting that a man could sicken or die if his penis contacts a woman's clitoris).

76. *Id.* See also Ntabazzi, *supra* note 42 (quoting a woman worried that the necessary cleansing ceremonies will not be done on babies who are born to uncircumcised women, and that the babies will die). See also Bamanyaki, *supra* note 45 (interview with Finda Mbriwa, an elder who defends the practice, where she states that if the baby's head touched the clitoris during child birth, it would die).

77. *WHO Fact Sheet*, *supra* note 22.

stimulating drugs.⁷⁸ Supporters of FGM believe that they can reduce sexual desire in females by eliminating the sensitive tissue of the outer genitalia, particularly the clitoris. By attenuating women's sexual desire, the women can maintain their chastity and virginity before marriage and fidelity during marriage. Teachers in Gambia blame a recent "baby-dumping" trend among young unmarried girls on their unchecked sexuality because they are uncircumcised.⁷⁹ They also believe that removal of female genitalia results in higher male sexual pleasure. As one male member of the Sabin culture explains:

[m]en used to hunt and whenever they left women behind, they were always uncertain of their faith towards going around with other men. To control this, they started circumcising their women. When that thing [the clitoris] is removed, there is a difference. If not removed, the woman will sleep with other men or not allow the husband to sleep. This can cause friction in the home because after a day's work, a man needs to have enough rest. So the woman must be circumcised to reduce her sexual urge.⁸⁰

In summary, the practice of FGM is mired in tradition, culture, and religion. Thus, there exist numerous complexities. Religions may reinforce this practice, tacitly or explicitly. History and poor education about women's reproduction and sexuality combine to make FGM difficult to stop. Solutions are not easy and enforcement is even more difficult.

III. ANALYSIS OF THE APPLICABLE INTERNATIONAL LEGAL INSTRUMENTS TO FGM

Female Genital Mutilation is an international human rights violation addressed by numerous principles, treaties, and conventions of international law.⁸¹ The most basic argument against FGM is that it is

78. See *Jehovah*, *supra* note 52.

79. Joseph Kamah-Kanu, *Young Gambian Mothers Dump Their Babies*, PANAFRICAN NEWS AGENCY, July 1, 1999, available in 1999 WL 21216723.

80. *Id.*

81. See Universal Declaration, *supra* note 2, at pmbl, arts. 2, 7, 16, 25; Economic, Social and Cultural Rights, *supra* note 2, arts. 2, 3, 10, 12; Civil and Political Rights, *supra* note 2, arts. 2, 3, 14, 16, 18, 23, 24, 26; Convention on the Rights of the Child, Nov. 20, 1989, available in, 28 I.L.M. 1448, at pmbl, arts.1, 2, 24, 29; CEDAW, *supra* note 3; Declaration on the Elimination of Violence Against Women, Dec. 20, 1993, GAOR 48/104 [hereinafter DEVAW], African Charter on Rights and Welfare of the Child, OAU Doc. CAB/LEQ/24.9/49 (1990), World Conference on Human Rights, Vienna Declaration and Programme of Action, A/CONF.157/23 (1993); and U.N. High Commission on Refugees, Statement Against Gender-Based Violence (1996), available at <<http://www.path.org/html/fgm.html>>.

a clear violation of human rights as stated in the U.N. Charter.⁸² Additionally, numerous U.N. conventions and declarations provide for the protection and health of women and girls.⁸³ In practice, international human rights law can only have effect if each nation makes these rules part of its own domestic legal system.⁸⁴ Most governments in FGM practicing countries have ratified these conventions,⁸⁵ passed laws of their own, or support the eradication of FGM.⁸⁶ However, the practice continues, despite States' acceptance of international human rights conventions, signaling a huge enforcement problem.

Several international organizations, nongovernmental organizations (NGOs) and other interested parties have been working toward the elimination of FGM.⁸⁷ The United States Congress passed legislation against FGM making it a crime to perform it on a person under the age of eighteen years old.⁸⁸ As a result, the Immigration and Naturalization Service (INS) must provide information on the harmful effects of FGM as well as on the legal consequences of FGM under criminal or child protection statutes to all aliens issued United States visas.⁸⁹

82. U.N. CHARTER art. 1, para. 3 (the United Nations shall promote "respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion . . .").

83. See *supra* notes 2-3 and accompanying text.

84. Bilder, *supra* note 2, at 9-10.

85. See *Chart of Ratifications of Four Human Rights Conventions*, in *The Human Rights of Women - A Reference Guide to Official U.N. Documents*, Mar. 1998 (visited Oct. 20, 1999) <<http://www.umn.edu/humanrts/instrree/women/engl-wmn.html>>.

86. Countries that support the eradication of FGM, or with laws or regulations against FGM include: Benin, Burkina Faso, Cameroon, Central African Republic, Cote d'Ivoire, Djibouti, Egypt, Eritrea, Ethiopia, Gambia, Ghana, Guinea, Kenya, Niger, Senegal, Sudan, Tanzania, Togo, and Uganda. *FGM- The Facts!*, *supra* note 14.

87. Organizations working toward the elimination of FGM include: UNICEF, the World Health Organization (WHO), United Nations Population Fund (UNFPA), U.S. Agency for International Development (USAID), the Inter-African Committee on Traditional Practices, The comite National de Lutte contre la Pratique de l'Excision in Burkina Faso, the National Association of Nigerian Midwives, the Maendeleo Ya Wanawake Organization in Kenya, the National Research Network in senegal, the National Union of Eritrean Youth, the Seventh Day Adventist Church in Kenya, Program for Appropriate Technology in Health (PATH), Research, Action and Information Network for the Bodily Integrity of Women (RAINBO), Equality Now, the Centre for Development and Population Activities (CEDPA), Population Council, Wallace Global Funds, and the Women's International Network. *Id.*

88. H.R. 11829, 104th Cong. § 645 (1996).

89. See Center for Reproductive Law and Policy, *Legislation on Female Genital Mutilation in the United States* (visited May 22, 2000) <<http://www.crlp.org/0717/legonfgm.html>>.

1. U.N. Charter⁹⁰

According to the introduction of the U.N. Charter, one of the primary purposes for the formation of the United Nations is to reaffirm faith in fundamental human rights and in the equal rights of men and women.⁹¹ Additionally, Article 55 of the U.N. Charter states that Member States shall promote “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”⁹² Thus, the foundation of all international legal discussions is the assertion that States shall respect and promote the rights and dignity of all humans. However, FGM practicing societies do not protect a woman’s right to choose whether she wants her genitals mutilated. Although women support the practice, women do not have the freedom to decline the procedure without repercussions, such as being ostracized, cast out from their home, or discriminated against. Some States are beginning to implement programs to support women who do not wish to undergo FGM,⁹³ however, the majority of States are violating the fundamental principle of equal protection for both sexes in allowing the continued practice of FGM.

Supporters of FGM use Article 2(1) of the UN Charter to argue that each State is sovereign and has a right to its culture, religion, customs and traditions without interference from other States.⁹⁴ However, Article 2 must be read in its entirety. The second part of Article 2, Article 2(2), requires that “[a]ll members . . . shall fulfill in good faith the obligations assumed by them in accordance with the present charter,” thereby clarifying that each State has a right to sovereignty unless it violates international law.⁹⁵ A basic principle essential to the effective operation of international law is that international law, which includes a myriad of relations and voluntary consensus,⁹⁶ overrules

90. See generally U.N. CHARTER.

91. U.N. CHARTER introduction. (asserting “the peoples of the United Nations determined . . . to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small . . .”).

92. *Id.* art. 55.

93. See Mwaura, *supra* note 67.

94. U.N. CHARTER art. 2, para. 1 (stating “[t]he Organization is based on the principle of the sovereign equality of all its Members.”).

95. *Id.* art. 2, para 2.

96. HENKIN, *supra* note 11, at 14-15 (defining international law as more than a few prohibitory rules; law includes the structure of that society, its institutions, forms and procedures for daily activity, the assumptions on which the society is founded and the concepts which permeate it, the status, rights, responsibilities, obligations of the nations which comprise that society, the various relations between them, and the effects of those relations).

States' right to sovereignty. Without this principle, international law would be meaningless. A State could pick and choose when to adhere to the law and when to violate it in the name of sovereignty.

2. The Universal Declaration of Human Rights⁹⁷

The Universal Declaration of Human Rights specifies that, "all are equal before the law and are entitled without any discrimination to equal protection of the law."⁹⁸ As argued above, women in FGM practicing societies do not have equal protection under the law. Article 25 of the Universal Declaration of Human Rights states that "[e]veryone has the right to a standard of living adequate for the health and well-being of himself" and that "[m]otherhood and childhood are entitled to special care and assistance."⁹⁹

Women who undergo FGM receive no care or assistance that is beneficial. In fact, persons perform FGM with no medical or surgical training, or medications to treat infections. Mortality rates are high for women after the procedure, especially during childbirth. In fact, FGM practicing societies use this fact to scare women so they will not risk extra-marital pregnancy.¹⁰⁰ Women and girls in FGM practicing societies suffer terrible health problems that men and boys do not have to endure as a result of FGM. Male circumcision is a mere removal of the foreskin of the penis. To compare this to the mutilation and removal of the entire outer genitalia with broken glass or razor, and then stitched shut, is ludicrous. According to Dr. Trudy Smith of South Africa, male circumcision makes physiological sense, but FGM makes no sense whatsoever.¹⁰¹

Societies practicing FGM violate many norms of international law. These States refuse to: treat genders equally; provide women equal opportunities to work, in marriage, or in regard to their own body; or to provide equal rights to adequate health and well-being as required by the Universal Declaration of Human Rights. These societies especially do not afford motherhood and childhood special care and assistance, as required by the Declaration. Instead, FGM makes motherhood and childhood extremely difficult, painful, and deadly. FGM practicing societies are guilty of violating the Universal Declaration of Human Rights by failing to provide women and children with 'special care' as

97. See generally Universal Declaration, *supra* note 2.

98. *Id.* art. 7.

99. *Id.* art. 25.

100. *The Scars of a Crude Custom*, INDEPENDENT, Apr. 6, 1999, available in 1999 WL 14355674 (article tells of a fifteen year old girl who lived with years of psychological torment fearing the inevitable procedure).

101. Magardie, *supra* note 23.

stipulated in the Declaration. These violations constitute a breach of international law.

3. International Covenant on Economic, Social and Cultural Rights¹⁰²

The International Covenant on Economic, Social and Cultural Rights stipulates that the rights enunciated will be “exercised without discrimination of any kind as to race, colour, sex, language, religion . . . or other status.”¹⁰³ Article 3 provides for men and women to have equal right “to the enjoyment of all economic, social and cultural rights.”¹⁰⁴ Both sides, both for and against FGM, argue this article in support of their position. Supporters of FGM argue that the practice of FGM is a cultural and social right that they choose to practice. Since many supporters of FGM are women, this argument seems convincing. Under the International Covenant on Economic, Social and Cultural Rights, they have a right to enjoy their cultural rights, including FGM.

However, opponents of FGM argue that every woman has the right to equal economic, social, and cultural opportunities, and FGM is admittedly performed to take away women’s equal status in society.¹⁰⁵ Supports argue that FGM is necessary to ensure women remain subservient to men. Article 12(1) states that parties to the Covenant recognize the “right of everyone to the enjoyment of the highest attainable standard of physical and mental health” and that the “steps to be taken . . . to achieve the full realization of this right shall include those necessary for . . . the reduction of the stillbirth-rate and of infant mortality.”¹⁰⁶ Women do not have the same rights as men regarding circumcision, for they cannot choose to have a safer, less damaging procedure, or forgo the procedure altogether. The fatal consequences of FGM described above clearly violate this Convention and international law.

As a result of economic dependence, women have no free choices regarding FGM. Women’s choices are not truly meaningful, but rather are shaped by a male dominated culture over thousands of years. FGM robs women of equal enjoyment of their economic, social, and cultural rights, and this is a clear violation of the International Covenant.

102. See generally Economic, Social and Cultural Rights, *supra* note 2.

103. *Id.* art. 2.

104. *Id.* art. 3.

105. See notes 77-80 and accompanying text.

106. *Id.* art. 12.

4. International Covenant on Civil and Political Rights¹⁰⁷

In addition to the right of freedom from discrimination, the International Covenant on Civil and Political Rights states that everyone has the right to freedom of thought, conscience and religion.¹⁰⁸ Article 18(4) further provides that parties must respect the liberty of parents to practice their religious beliefs and enforce them on their children.¹⁰⁹ Supporters of FGM use this argument to defend their right to practice what they consider a religious custom. However, as previously noted, many of these supporters are mistaken in their belief that the Koran requires FGM.¹¹⁰ Rather, FGM is a custom that has developed in male dominated societies without any input from women and girls. The International Covenant on Civil and Political Rights asserts that everyone has a right to their thoughts, conscience, and religion.¹¹¹ Women in these societies were not free to form the belief that FGM is a religious dictate or understand that FGM was instituted to curb their own sexuality. In fact, women are restricted from refusing to succumb to this practice, and if they do, they may be beaten, raped, shunned, or ostracized.¹¹²

The International Covenant on Civil and Political Rights also asserts equality of rights and responsibilities of spouses regarding marriage,¹¹³ and to children for protection on the part of her family, society and the State.¹¹⁴ FGM is part of a system that operates to keep women subservient to the men in society. First, women are subservient to their father, and then they are subservient to their husband. A woman who has not undergone FGM may never be able to marry and may have to fend for herself.¹¹⁵ Additionally, there is no equality of rights for children who must undergo FGM. No one is protecting the child from this painful procedure. By allowing the practice of FGM on young girls, the State violates its obligation to protect women and children under this Covenant.

107. See generally Civil and Political Rights, *supra* note 2.

108. *Id.* art. 2.

109. *Id.* art. 18, para. 4 ("The State parties to the present Covenant undertake to have respect for the liberty of parents, and when applicable, legal guardians to ensure the religious and moral education of their children in conformity of their convictions").

110. See *supra* notes 52-63 and accompanying text.

111. Civil and Political Rights, *supra* note 2, art. 18.

112. See Mwaura, *supra* note 67.

113. Civil and Political Rights, *supra* note 2, art. 23.

114. *Id.* art. 24.

115. See Hassan, *supra* note 57; Ntabazzi, *supra* note 42.

5. Convention on the Rights of the Child¹¹⁶

As with the other conventions, the rights stipulated here include the right to freedom from discrimination based on sex.¹¹⁷ Article 24 of the Convention on the Rights of the Child recognizes the right of the child to the enjoyment of the highest attainable standard of health, and to facilities for the treatment of illnesses and rehabilitation of health.¹¹⁸ The Convention further requires that States take measures to diminish infant and child mortality¹¹⁹ and to ensure appropriate pre-natal and post-natal health care for mothers.¹²⁰

As described above, FGM greatly threatens the health of mothers and daughters.¹²¹ This threat is illustrated in almost every woman's experience with FGM. The story of Waris Dirie, a Somalian woman modeling in the United States, is typical.¹²² Dirie was infibulated at the age of five, and survived, but her younger sister did not. Two of her cousins also died of complications from FGM. Dirie says that their deaths were not unusual.¹²³ Dirie's story reveals the threat to women and children's lives from FGM, and therefore, a clear violation of the Convention on the Rights of the Child's protections against discrimination based on sex.

The Convention on the Rights of the Child further lays out the guidelines for educating children. Education should be in the spirit of understanding, peace, tolerance, and equality of the sexes. This spirit is void in societies that subject girls to FGM without a choice, and is a clear violation of international law.

6. Convention on the Elimination of All Forms of Discrimination Against Women¹²⁴

The Convention on the Elimination of All Forms of Discrimination Against Women notes that the U.N. Charter reaffirms faith in fundamental human rights, the dignity and worth of the human person, and the equal rights of women.¹²⁵ The Convention further defines the term 'discrimination against women' to mean:

116. *See generally* Convention on the Rights of the Child, *supra* note 81.

117. *Id.* at pmb1.

118. *Id.* art. 24.

119. *Id.* art. 24, para. 2(a).

120. *Id.* art. 24, para. 2(d).

121. *See supra* notes 34-51 and accompanying text.

122. *See* Maher, *supra* note 38, at 14.

123. *Id.*

124. *See generally* CEDAW, *supra* note 3.

125. *Id.* at introduction.

[a]ny distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural or other field.¹²⁶

FGM practicing societies single out women based on their sex to suffer tremendous physical pain and psychological consequences. FGM practicing societies do not believe that men's sexuality must be 'kept under control' by circumcision or mutilation. Women are excluded from enjoying a full, pleasurable, and natural sex life.¹²⁷ Women have the fundamental right to enjoyment of their sexuality as a human being, the same as men. FGM supporters justify the difference in treatment by asserting that women are more promiscuous than men are, therefore, their enjoyment of sex must be diminished.¹²⁸ One could argue that such an irrational argument is based on fear and ignorance, and violates the Convention on the Elimination of All Forms of Discrimination Against Women.

There are numerous statements in the CEDAW requiring States to take action to protect equal rights of men and women.¹²⁹ Article Five directly addresses the issue of social and cultural patterns.¹³⁰ Specifically, Article Five states that parties to the Convention shall take appropriate measures:

[t]o modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customs and all other practices which are based on the idea of the inferiority of either of the sexes or on stereotyped roles for men and women.¹³¹

The reasons described above in support of FGM reveal mythical stereotypes and extreme prejudicial treatment of women in obvious violation of the Convention.¹³² Therefore, this Convention provides a strong legal argument justifying the modification of injurious, discriminatory, and ancient prejudicial practices such as FGM:

The Convention also addresses a woman's right to participate in the formulation of government policy and implementation.¹³³ If women

126. *Id.*

127. See *WHO Fact Sheet*, *supra* note 22.

128. See *id.*

129. CEDAW, *supra* note 3, arts. 2-16.

130. *Id.* art. 5.

131. *Id.*

132. See *supra* notes 52-80 and accompanying text

133. CEDAW, *supra* note 3, art. 7.

in FGM practicing societies had more opportunity to voice their opinions, government policy would reflect their voices and lead to improvements. Even if these women decide to continue the practice, the practice would likely be performed in a safer and more sanitary manner.

7. Declaration on the Elimination of Violence Against Women¹³⁴

The Declaration on the Elimination of Violence Against Women (DEVAW) is the most direct and comprehensive statement of the “rights to be applied to ensure the elimination of violence against women in all its forms.”¹³⁵ The DEVAW is important because it acknowledges on a universal scale that violence against women is an “obstacle to the achievement of equality, development and peace.”¹³⁶ Additionally, the DEVAW defines for the international community what the term ‘violence against women’ encompasses. Article 1 defines ‘violence against women’ as “[a]ny act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life.”¹³⁷

This definition of violence against women addresses the harms that can result from FGM, including sexual and psychological harm, and codifies them. Therefore, FGM practicing societies cannot assert that FGM does not harm women if she has no physical complications. Additionally, Article 2 specifies that violence against women *includes female genital mutilation and other traditional practices harmful to women.*¹³⁸ Thus, the DEVAW expressly ensures that FGM practicing societies cannot argue that FGM is not an act of violence against women.

The DEVAW goes farther than just defining violence against women; it also codifies actions that should be taken to eliminate it. Article 4 requires that States condemn violence and “should not invoke any custom, tradition, or religious consideration to avoid their obligations with respect to its elimination.”¹³⁹ Thus, the DEVAW rejects the religious and cultural justifications for FGM. Article 4 also outlines the appropriate actions that States should take to eliminate violence against women, including FGM.¹⁴⁰ Additionally, the DEVAW specifies

134. See generally DEVAW, *supra* note 81.

135. *Id.* at pmb1.

136. *Id.*

137. *Id.* art. 1.

138. *Id.* art. 2 (defines violence against women as encompassing physical, sexual and psychological violence occurring in the family, including female genital mutilation).

139. *Id.* art. 4.

140. *Id.* (the appropriate actions are: ratify or accede to the Convention, punish acts of

the actions that the organs and specialized agencies of the United Nations system should take to contribute to the recognition and realization of the rights and the principles set forth in the Declaration.¹⁴¹ The DEVAW makes it clear that FGM is an act of 'violence against women' that States have an obligation to eliminate. Article 6 further declares that the DEVAW contains the minimum level of protection for women, and "any provision that is more conducive to the elimination of violence against women that may be contained in the legislation of a state" shall apply.¹⁴²

8. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment¹⁴³

Article 1 defines "torture" as:

[a]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.¹⁴⁴

Although FGM is not practiced for the purpose of obtaining a confession or punishment, it can be argued that it is practiced to

violence against women, develop penal, civil, labor and administrative sanctions in domestic legislation to punish and redress wrongs caused to women who are subjected to violence, develop national plans for action to protect women against any form of violence, make sure that law enforcement officers and public officials responsible for implementing policies to prevent, investigate, and punish violence against women receive training to sensitize them to the needs of women and children, adopt all appropriate measures, especially in the field of education, to modify the social and cultural patterns or conduct of men and women to eliminate prejudices, customary practices and all other practices based on the idea of superiority or inferiority of either of the sexes and on stereotyped roles for men and women, encourage the development of appropriate guidelines to assist in the implementation of the principles set forth in the present Declaration, recognize the important role of the women's movement and non-governmental organizations and cooperate with them at local, national, and regional levels, and encourage intergovernmental regional organizations of which they are members to include the elimination of violence against women in their programs, as appropriate).

141. *Id.* art. 5.

142. *Id.* art. 6.

143. See generally Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, June 26, 1987, 23 I.L.M. 1027 [hereinafter Convention Against Torture]. Ratified by the United States in 1994.

144. *Id.* art. 1.

intimidate a person based on one's sex by controlling women's sexuality by limiting their enjoyment of sex.¹⁴⁵ The brutal practice of cutting away the labia minora with a razor or broken glass is clearly cruel, inhuman, and degrading, despite the fact that women support the practice.¹⁴⁶ Recently, more women have been using Article 3 of this Convention to seek asylum in other countries relying on Article 3, which states:

[n]o party shall expel, return or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. For the purposes of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.¹⁴⁷

There have not been many awards of asylum based on this Convention in the United States because the Immigration and Naturalization Service (INS) is afraid that it will open the floodgates to all kinds of new categories of people seeking protection.¹⁴⁸ One of the first cases brought under the Convention involves a woman, Virginia Anikwata, from Nigeria.¹⁴⁹ Anikwata came to the U.S. on her now deceased husband's student visa, and sought asylum under this Convention because she never sought asylum under one of the five established groups as a refugee.¹⁵⁰ Anikwata asserted that her daughter would be subjected to FGM, and her deceased husband's relatives would rape her, if she was sent back to Nigeria.¹⁵¹ Anikwata chose to fight under the convention because it forbids deportation when there are substantial grounds for believing a person would be in danger of torture in their home country. Although the Convention does not grant formal refugee status, it enabled Anikwata to stay for the time being.¹⁵²

In 1996, the INS issued a decision stating "under certain circumstances, [FGM] . . . may form the basis for asylum."¹⁵³ The case

145. See *WHO Fact Sheet*, *supra* note 22.

146. See *FGM- The Facts!*, *supra* note 14.

147. Convention Against Torture, *supra* note 143, art. 3.

148. Jenna Greene, *Making a New Case for Asylum*, *LEGAL TIMES*, Jan. 11, 1999 (visited Jan. 5, 2000) <<http://www.lawnewsnetwork.com/stories/jan/e011199.html>>.

149. *Id.* at 2.

150. The five grounds for refugee status include: persecution based on race, religion, national origin, political opinion, or membership in a particular social group. Telephone Interview with Marilyn Aiten, Colorado Refugee Services, Denver, CO. (Jan. 5, 2000).

151. Greene, *supra* note 148.

152. *Id.*

153. Maher, *supra* note 38, at 13.

involved Fauziya Kasinga from Togo.¹⁵⁴ Ms. Kasinga was seventeen when she was forced into a polygamous marriage with an older man in Togo.¹⁵⁵ Ms. Kasinga was not circumcised because her father had protected her from the practice.¹⁵⁶ However, after his death, and her forced marriage, she was confined to a storage room to wait for a circumciser to arrive.¹⁵⁷ She managed to escape and fled to the United States to seek political asylum.¹⁵⁸ When she arrived in 1994, she was promptly incarcerated by the Immigration and Naturalization Service (INS) to wait extradition.¹⁵⁹ Ms. Kasinga remained there for 16 months, where she endured repeated strip searches and a tear gassing during a riot over living conditions at the facility.¹⁶⁰ Ms. Kasinga's first claim as a refugee was denied.¹⁶¹ However, her case drew the attention of Rep. Pat Schroeder, and women's rights groups like Equality Now, who arranged for new legal representation.¹⁶² The publicity caused international outrage that forced the INS to release her while her appeal before the Board of Immigration of Appeal (BIA) was pending.

Ms. Kasinga won asylum because the court found she met her burden of proof through submission of credible testimony and supporting documentary evidence, which included letters from her family concerning her flight from FGM and the law.¹⁶³ Ms. Kasinga also submitted into evidence two extensive reports on female genital mutilation, which confirmed that it was practiced in Togo and that there were no laws in Togo to protect women from the deadly practice.¹⁶⁴ In an extraordinary decision, the BIA recognized women as a social group. The BIA held that a reasonable person in Kasinga's circumstances would fear persecution in Togo because of her membership in a recognized social group.¹⁶⁵ Ms. Kasinga had established a well-founded fear of persecution.¹⁶⁶ Additionally, the court noted that, "most African women can expect little government protection from FGM."¹⁶⁷ Despite this victory, however, the preferable way to gain asylum is still by claiming refugee status because it is difficult to prove torture under the Convention and the asylum granted

154. In re Fauziya Kasinga, *supra* note 25.

155. *Id.*

156. *Id.*

157. Maher, *supra* note 38, at 12.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* at 12-13.

163. In re Fauziya Kasinga, *supra* note 25.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

is usually only temporary.¹⁶⁸

IV. ANALYSIS OF FGM CONSIDERING CULTURAL SOVEREIGNTY, INTERNATIONAL LAW, AND FEMINIST THEORY.

Where is the line between a State's right to sovereignty and humanitarian intervention for violations of international human rights? The practice of FGM is deeply rooted in the culture of the societies practicing it, making prevention and enforcement extremely difficult. In fact, it is a widely accepted cultural practice, and many FGM practicing societies do not want to change, nor do their women. This leads one to question how a State can enforce international human rights law on another State and force it to change its entire way of thinking and its societal structure.

1. Universal and Fundamental Human Rights

When considering whether a State has committed a human rights violation, one must consider whether the act in question violates a human being's fundamental right to liberty, dignity, and the security of the person.¹⁶⁹ However, not all cultures have the same understanding of each person's right to liberty.¹⁷⁰ In fact, the substantive rights protected in Islam are different from the West.¹⁷¹ Although Islam recognizes a right to individual freedom, it does not mean the same as it does in the West because Islam does not promote the concept of free will.¹⁷² Therefore, according to Islam, liberty has limits. Rather than individual rights, Islam focuses on group identity as a fundamental right. Islamic law is divided into two categories: duties to God and duties to others.¹⁷³ Therefore, those who justify FGM on religious grounds believe they are asserting their fundamental rights according to their duty to God and society.

168. Greene, *supra* note 148 (article about a woman claiming asylum to protect her daughter from undergoing FGM).

169. See Universal Declaration, *supra* note 2, art. 3 (asserting that everyone has the right to life, liberty and security of person). See also *What's Culture*, *supra* note 6, at 1960-61 (asserting that, although human nature is necessarily defined by cultural contexts, the decisions regarding which customs will be preserved in the name of culture or tradition must be oriented toward promotion and protection of universal human rights in order to have legitimacy in contemporary society).

170. See Younce Schooly, *supra* note 5, at 666 (explaining that the term "rights" has a completely different meaning in Islamic countries than in Western societies).

171. *Id.* (the rights in Islam include: 1) dignity and brotherhood, 2) equality among members of the community, without distinction of race, color, or class, 3) respect for the honor, reputation, and family of each individual, 4) the right of each individual to be presumed innocent until proven guilty; and 5) individual freedom).

172. *Id.*

173. *Id.* at 667.

2. Cultural Sovereignty and the Meaning of Culture

In addition to considering differing definitions of human rights, it is also necessary to consider the definition of "culture." African culture is a *mélange* of "pre-colonial, colonial, and contemporary, as well as things social, economic, and political, and things both individual and collective."¹⁷⁴ Supporters of FGM argue that culture is history and tradition.¹⁷⁵ However, present actions and lifestyles also affect culture by either reinforcing history and tradition or changing them. For a culture to survive, it necessarily must be responsive to change, or risk extinction.¹⁷⁶ Customs with contemporary legitimacy survive because of practical utility that reinforce shared values of modern society without being physically or mentally injurious.¹⁷⁷ Practices, beliefs, and lifestyles that are not supported by contemporary values or factual legitimacy, but inflict harm on adherents must be abandoned.

3. FGM and Feminist Theory

According to the leading feminist dominance theorist, Catherine MacKinnon, sexuality is the sphere by which men exert control over women, and FGM is a prime example.¹⁷⁸ Catherine MacKinnon views equality as a question of the distribution of power and centers her theory on the domination of women in the sexual sphere — emphasizing male dominance is sexual and sexuality is a social construct of male power. She asserts that sexuality is defined by men, forced on women, and constitutes the meaning of gender.¹⁷⁹ Therefore, "the gender issue . . . becomes the issue of what is taken to be "sexuality"; what sex means and what is meant by sex, when, how, with whom, and with what consequences to whom."¹⁸⁰ Gender would not mean difference if it did not have social consequences of power and reflect the social hierarchy of men over women. The definitions of male and female are created through the erotization of dominance and submission, and these differences define each other.¹⁸¹

All women are sexually objectified and choose to be; they have no

174. *What's Culture*, *supra* note 6, at 1959.

175. *See supra* notes 52-80 and accompanying text.

176. *See What's Culture*, *supra* note 6, at 1960 (asserting that practices, beliefs, and lifestyles passed down through several generations of an ethnic group need to be re-examined periodically in light of contemporary values and knowledge, in order to ascertain whether the customs deserve to be perpetuated).

177. *Id.*

178. *See* CATHERINE MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 113 (1989).

179. *Id.* at 128.

180. *Id.*

181. *Id.* at 113.

alternative. Catherine MacKinnon asserts that women have been deprived of their own terms to define their experiences, including their own sexual reality.¹⁸² An analysis of the “sexual objectification of women—first in the world, then in the head, first in visual appropriation, then in forced sex, finally in sexual murder”¹⁸³ will provide insight to how gender is socially created. She defines sexual objectification as “having a social meaning imposed on your being that defines you as to be sexually used, according to your desired uses, and then using you that way.”¹⁸⁴

In the case of FGM, a woman, especially a child, does not have a meaningful right to choose whether to undergo this painful and harmful practice. She has two choices, succumb to the mutilation, or refuse and suffer banishment from her family and from society, with a great chance that she will die. This is not a real choice, rather a decision which evil to suffer. A vital element of liberty is that men and women have ‘meaningful choices’ in their lives, not that they be forced to make a decision between two horrible consequences.

It is true that every culture creates its own unique idea of beauty. In the United States thousands of women willingly suffer terrible pain from cosmetic surgery to live up to what they believe is society’s standard of beauty. No matter how warped that may be, they are not forced to make a decision whether to undergo cosmetic surgery or be cast out of society. Women in the United States are free to choose, in the physical sense, whether or not to undergo excruciating pain for a perceived benefit.

The practice of FGM is a custom developed over thousands of years in societies where women’s voices were not heard. Women did not participate in any decisions, especially decisions regarding their own bodies. Even today, African women’s voices are rarely heard.¹⁸⁵ Therefore, in order to have liberty for all members of society as required by the U.N. Charter and the other human rights instruments, each citizen must first have a voice in the formation of society’s customs, traditions, and beliefs — otherwise there is no liberty. The women in FGM practicing societies do not have a meaningful choice whether to subject themselves to the potentially fatal practice, and never have. If they at least had an opportunity to question the practice and refuse it, then the cultural relativist argument of the right to practice whatever

182. *Id.* at 129.

183. Catherine MacKinnon, *Sexuality*, in *THE SECOND WAVE, A READER IN FEMINIST THEORY* 158 (Linda Nicholson ed., 1997).

184. *Id.* at 168.

185. Molarra Ogundipe-Leslie, *Invite Tyrants to Commit Suicide: Gender Violence, Human Rights, and African Women in Contemporary African Nation States*, in *GENDER VIOLENCE AND WOMEN’S HUMAN RIGHTS IN AFRICA* 1 (1994).

customs a person chooses would have some merit. However, as it stands, the women and children in FGM practicing societies do not have a meaningful choice, therefore FGM is a clear violation of these women and children's fundamental right to dignity, liberty, and security of their person.

V. ENFORCEMENT OF INTERNATIONAL LAW CONCERNING FGM

Enforcement is the next big obstacle. How does one change the thinking of an entire society to allow its members to question itself and change? The issue is no longer one of passing judgment on another's traditions, rather enabling it to raise its own awareness, reconsider its values, practices, and traditions, and then alter them if it so decides.

1. Humanitarian Intervention

The principle of humanitarian intervention is to intervene to save lives in response to egregious violations of human rights, often using force.¹⁸⁶ Criteria suggested to evaluate whether humanitarian intervention is required include the severity and necessity of the act, the nature of the act, the purpose of intervention, whether the intervention be collective or unilateral, and balancing the factors considering the outcome.¹⁸⁷

The principles of customary international law recognize nonintervention, founded on respect for sovereignty, and allow intervention only when utilized as self-defense.¹⁸⁸ It is difficult to use force to change a society's way of thinking, so many NGOs and international organizations have taken the lead in fighting FGM through advocacy and education. International organizations, NGOs, and other interested partners have been working toward the elimination of FGM. The heads of three UN agencies, the World Health Organization (WHO), the United Nations Population Fund (UNFPA), and the United Nations Children's Fund (UNICEF) have developed a well-designed and well-coordinated campaign against the practice.¹⁸⁹ These organizations emphasized a multi-disciplinary approach both within the States where FGM is practiced, as well as at the regional and global levels. This approach brought together governments,

186. See generally Ved Nanda, *The Validity of United States Intervention in Panama Under International Law*, 84 AM. J. INT'L L. 494 (1990).

187. *Id.* at 495-96.

188. See, e.g., *Corfu Channel (UK v. Alb.)*, 1949 I.C.J. 4, at 34 (Apr. 9); U.N. CHARTER art. 51 (Customary rules of international law are well-established state practices to which a sense of obligation is attached).

189. *Agencies Call For an End to Female Genital Mutilation*, UNICEF press release, Apr. 9, 1997 (visited Oct. 3, 1999) <<http://www.unicef.com>>.

political and religious institutions, international organizations, NGOs and funding agencies in their efforts to eliminate FGM.¹⁹⁰

The UN interagency approach is to educate the public and law-makers on the need to eliminate FGM; to attack FGM as a violation of human rights as well as a danger to women's health; and to work with the entire United Nations system to encourage every State where FGM is practiced, to develop a national, culturally-specific plan to eradicate FGM.¹⁹¹ The interagency teams' efforts are directed at changing public opinion in the States still practicing FGM. They educate and raise awareness about the harmful physical and psychological effects of FGM. The teams target all levels of society including the general public, medical professionals, decision-makers, governments, political, religious and village leaders, and traditional healers.¹⁹²

This approach has found success within the international community. Many countries, including Cameroon, Egypt, Kenya, Sudan, Burkina Faso, and Ivory Coast have passed legislation to stop the practice.¹⁹³ However, enforcement of this legislation poses a problem because many of these countries simply passed the legislation only to "please American sensitivities" and never intended to enforce it.¹⁹⁴ In fact, some say that by criminalizing the practice, the government is in effect undermining the local efforts.¹⁹⁵ Criminal law works only when the criminals are the minority. When the entire society participates in the criminal activity, it is impossible to enforce the law without mass terror.¹⁹⁶

The most effective measures are those at the grass-roots level working with the African women themselves to raise their awareness of the harmful effects of FGM.¹⁹⁷ Because there are various reasons for supporting FGM, the multi-disciplinary approach succeeds in addressing them equally. However, political actions at higher levels send a message to society that FGM is harmful, and that it should be reconsidered and stopped.

VI. CONCLUSION

FGM cannot be truly eliminated without changing the societies

190. *Id.*

191. *UNICEF joins in plan against FGM*, UNICEF press release, Mar. 20, 1997 (visited Oct. 3, 1999) <<http://www.rainbow.org>>.

192. *Id.*

193. See *FGM Research Homepage*, *supra* note 24.

194. *Female Genital Mutilation. Is it Crime or Culture?* ECONOMIST, Feb. 13, 1999.

195. *Id.*

196. *Id.* (quoting Gerry Mackie, a political scientist from Oxford University).

197. *WHO Fact Sheet*, *supra* note 22.

that practice it — but what right do other States have to do this? The right lies in international law, which continues to gain more credence as the consciousness of the world is raised and the mechanisms are put in place. Increasingly, the argument that there is no such thing as universal human rights weakens in comparison to the growing recognition of fundamental human rights.¹⁹⁸ The U.N. Charter declares that the purpose of its formation is to reaffirm the international community's faith in fundamental human rights.¹⁹⁹ The Universal Declaration of Human rights specifies that all persons are equal before the law and entitled to equal protection.²⁰⁰ In the DEVAW, the UN General Assembly recognizes the urgent need for the universal application to women of rights and principles with regard to equality, security, liberty, integrity and dignity of all human beings.²⁰¹ Considering the bounty of international human rights agreements and, there can be no doubt as to the legitimacy and universality of international human rights.

Unfortunately, resistance to change is strong because it is rooted in fear — fear of change and its consequences. Societies wonder what will happen to their power structure, and the possible ramifications in daily life. The same could be said of all human rights violations because they are all rooted in cultural, religious, or societal customs and traditions. However, this does not mean that change should not occur. It does indicate that change must begin at the heart of society's structure. Societies must continuously change to evolve or risk extinction. In fact, the customs they cling to are the result of changes made in the past, instead of absolute truths.

Therefore, FGM is a symptom of a bigger problem, an oppressive mentality that must be changed in order to eliminate it. However, care must be taken not to dictate change from outside because such forced alteration of a society will not last. Change must come from within, considering the particular context of the unique culture and values of the society. Otherwise, there will be an upheaval in society and chaos will result. Therefore, it is necessary to use an educative and politically inclusive approach so change does not appear to be a mandate from outside. Women need to be supported, educated and involved in the political structure in order to stop FGM. There must be an inherent

198. See CEDAW, *supra* note 3 (as of Jan. 19, 1998, 161 States were parties to the convention). See also Economic, Social and Cultural Rights, *supra* note 2 (as of Jan. 19, 1998, 137 States were parties to the Covenant), and Convention on the Rights of the Child, *supra* note 80 (as of Jan. 19, 1998, 191 States were parties to the Convention); and Civil and Political Rights, *supra* note 3 (as of Jan. 19, 1998, 140 States were parties to the Covenant).

199. U.N. CHARTER introduction.

200. Universal Declaration, *supra* note 2, art. 7.

201. DEVAW, *supra* note 81.

change in the social position of women. As opportunities become available outside of marriage, FGM will lose much of its importance to these women.

However, the structure, as it exists, will not change without pressure from outside. This is the role of international conventions and organizations. If there is to be any change in the practice of FGM, it must come internally with external pressure for political change. International Organizations, NGOs, and States operate to raise awareness and consciousness of violations to influence the power structures of those countries and to generate change from within at the grassroots level. Most importantly, women must be educated and allowed to participate in politics to be able to represent the voices of women. The structure now does not provide for this opportunity, so International Organizations assume that role with the hope that someday they will no longer be needed.

THE COMPUTER PIRACY SUPERHIGHWAY

TANYA POTH*

I. INTRODUCTION

A. Summary

With the current technology available through Internet services and the ability to exchange and update computer software in an instant, corporations that deal in the production and marketing of computer software are becoming increasingly concerned with the amount of software and copyright loss of profits occurring through product piracy.¹ Additionally, corporations are becoming more aware of possible sanctioning if caught in the act of using pirated software. Internationally, governments are being educated on the detrimental effects this piracy has on their economy. Yet, little policing power and economic recovery is currently available. Although a number of private and governmental agencies are beginning to surface with the mission of creating better protection, the international intellectual property arena must develop a more effective stance in the coming years.

Section one of this article delineates the basic concerns of international piracy through a discussion of general statistics regarding lost profits and gives tangible examples of litigation surrounding corporations caught using illegal software. Section two sets a historical perspective of the computer software industry and examines the important international treaties currently in force to help curb the situation. Section three discusses the difficulties in attempting to lower current piracy rates. Section four considers the types of international protections currently being tested or proposed for the future. Finally, section five concludes with what should occur in the next decade to ensure that the problem of computer software piracy dramatically

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1. Piracy is defined by one author as the “unauthorized copying, reproduction, use or manufacture of software.” *Microsoft to Donate \$25 Million from Software Piracy Recoveries; Donations Help Increase Access to Technology for Disadvantaged Communities Worldwide*, PR Newswire Ass’n, Inc., May 20, 1999, available in LEXIS, Academic Universe Database.

declines. The time is ripe for an international convention specifically addressing the following issues: (1) solidifying choice of law questions; (2) establishing what bodies will be responsible for hearing cases; and (3) creating enforcement strategies to hold countries accountable.

B. General Statistics

What do the Los Angeles Police Federal Credit Union,² an enormous number of small retailers in the Philippines,³ and Glorious Sun Enterprises Ltd.,⁴ a local garment manufacturer in Hong Kong, have in common? They have all recently settled suits brought against them by private international organizations⁵ whose goals are to seek out users of illegally copied computer software.

Computer software theft has become a criminal act of worldly proportions with the technological boom of Internet use and the breakdown of digital boundaries that cannot be tangibly seen or determined. Current statistics on lost revenue worldwide from computer software piracy place the loss to industry at an estimated \$11 billion⁶ (US) for 1998.⁷ Domestically, 25% of United States business software packages were pirated last year, "while 38% was stolen

2. The Los Angeles Police Federal Credit Union, along with a number of private and public corporations, was caught using unlicensed computer software by the Business Software Alliance. These cases showed the wide array of businesses and public entities that are involved in computer software piracy. In this instance, the Credit Union was subjected to fines in order to settle the potential suit. See Eric Young, *U.S. Officials Vow to Crack Down on Software Piracy*, THE SACRAMENTO BEE, July 24, 1999, at B4.

3. In another investigation by the Business Software Alliance, most of the companies who were caught using pirated software were small retailers and businesses. Although 100 cases of piracy are currently being heard in the local courts, the 40 final court decisions thus far have yet to render a court judgment for Business Software Alliance. The real effort is to begin targeting the large abusers of piracy, but as of yet, the major corporate sector has been difficult to apprehend in the Philippines. See Joel D. Pinaroc, *Locating Source a Major Problem for Anti-Piracy Campaign*, METROPOLITAN COMPUTER TIMES, June 18, 1999.

4. Glorious Sun Enterprises, a local business, was caught pirating software through one of the piracy hotlines implemented by the Business Software Alliance of Hong Kong. The \$129,000 (US) settlement represents one of the largest settlements to date. The company was also required to destroy any pirated software at their facilities. See Martyn Williams, *BSA Hong Kong Settles Major Software Piracy Case*, NEWSBYTES, Sept. 19, 1999, available in LEXIS, Academic Universe Database.

5. The private international organizations in these examples are discussed in more depth in Section IV: International Copyright Protections – Today and in the Future. See Subsection C, *infra*.

6. All currency discussed in this article is United States currency.

7. See Adam Creed, *Business Software Piracy Globally Costs \$11 bn Says BSA*, NEWSBYTES NEWS NETWORK, May 26, 1999, available in LEXIS, Academic Universe Database.

worldwide."⁸

Although piracy shows no discrimination as to who is capable of loss in terms of socio-economic standards, political stance, or organizational affiliation, major contributing nations to the world market are showing the highest percentages of pirated software.⁹ Although the United States is generally hardest hit (with losses averaging \$3.2 billion during 1998),¹⁰ the international arena hosts significant losses in countries all over the world. "After the US, the countries contributing the highest dollar losses due to software piracy in 1998 were China, Japan, Germany, the UK, France, Brazil, Italy, Canada, and Russia."¹¹ Additionally, "[t]he losses from these ten countries (including the US) made up 67% of worldwide losses, or \$7.3 billion."¹² The most pirated computer software products worldwide not surprisingly belong to the world's largest maker of computer software, Microsoft Corp.¹³ The corporation's two most prominent products, Office 97 and Windows 98, continually prove to be the most illegally copied Internet entities.¹⁴

A comparison may also be drawn regarding the amount of pirated products currently available on the market of several countries. Although certain countries may not feel as much of the lost revenue as the prominent ten countries previously mentioned, the amount of pirated software available in these countries is staggering. According to a survey done by a number of software industry trade associations, 97% of Vietnam's current software in their corporate and private market is pirated, as is 95% of China's software.¹⁵ Ninety-two percent of both Indonesia and Russia's national software has been obtained by illegal means.¹⁶ Thus, most agree that computer copyright piracy occurrences have reached astronomical rates.

8. Kenneth Li, *Software Piracy Costs the World \$11 Billion in Lost Sales*, N.Y. DAILY NEWS, June 8, 1999.

9. Asian countries, including Vietnam, China, and Indonesia top the list of percentages for pirated software. *Id.* But countries that are not technologically developed are also showing astronomical percentages of piracy. See Mary Mosquera, *Piracy Stunts Latin American Software Growth*, TECHWEB NEWS, Oct. 6, 1999.

10. Creed, *supra* note 7.

11. *Id.*

12. *Id.*

13. See *E-Com Security Alliance Formed*, USA TODAY TECH REPORT, Oct. 11, 1999, (visited Oct. 25, 1999) <<http://www.usatoday.com/life/cyber/tech/ctg392.htm>>.

14. Li, *supra* note 8.

15. Creed, *supra* note 7.

16. *Id.*

II. HISTORY AND BACKGROUND OF ISSUE

A. *History of the Internet and Computer Functioning*

Originally, the Internet was created as a free flow of knowledge where all users could have a shared and instantaneous connection with which to educate, inform, and gather information from all around the world.¹⁷ This concept is in direct conflict with the premise behind copyright restrictions, namely where laws are in place to protect the creators and distributors of a work product from having to share anything more than that which they are consciously giving their approval of disseminating.¹⁸

To understand the act of computer piracy, one must have a basic understanding of the ease with which piracy can occur. One can generally separate computer parts into two categories: hardware and software.¹⁹ Hardware is often referred to as any piece of the computer that is tangible to its functioning, such as the monitor, keyboard, disks, etc.²⁰ Software includes the less tangible parts of computer functioning, such as programs, databases, operational systems that run programs, etc.²¹ Computer piracy occurs where software is manipulated in a way that does not recognize copyright protections which may be in place.

A computer basically consists of its central processor, the memory, and all input/output mechanisms.²² Computers process information when a user tells the computer where electronic impulses comprising information is stored and how to retrieve it.²³ The electronic impulses are recognizable to the computer and recorded into the computer's memory to be altered, copied, manipulated, and eventually to be changed back into recognizable form for the user, or person seeking data.²⁴

The Central Processing Unit (CPU) is the brains of computer functioning since programs run from this location.²⁵ Because the CPU functions at a speed of millionths of a second, it spends much of its time idling, which allows many different users access to a CPU at once.²⁶

17. Barbara Cohen, *A Proposed Regime for Copyright Protection on the Internet*, 22 *Brook. J. Int'l L.* 401, 405 (1996).

18. *See Id.*

19. MICHAEL C. GEMIGNANI, *COMPUTER LAW* 16 (1985).

20. *See Id.*

21. *See Id.*

22. *See Id.*

23. *See* STEPHEN FISHMAN, *SOFTWARE DEVELOPMENT* 12/2 (2nd ed. 1998).

24. GEMIGNANI, *supra* note 19, at 17.

25. *See Id.* at 20.

26. *See Id.* 32-bit CPU's are becoming a common memory system, thus increasing

Any users who are sharing a CPU may feel that they are functioning alone on a system, since mainframes can handle such large numbers of users at once without disrupting the activity of one user for the sake of another.

The actual act of computerizing data is done from incredibly small electronic signals, called bits, which are the smallest units for computer memory.²⁷ Databases are the compilation of a series of bits that the user manipulates to alter, add, and copy data.²⁸ This database is the software grouping that is manipulated to allow exchange of information on a server or through a general CPU. Databases are also where computers can create electronic protections for unauthorized copying of programs, files, data systems, etc.²⁹

Computer software theft problems arise when personal computer users who are attached to large CPU systems utilize their mainframe server access to download, copy, and send programs to users outside the authorized scope of the program's use.³⁰ This can also happen when a user outside of the CPU authorization zone finds a "trap door" to gain access to the CPU data information systems and then downloads that information for his or her own use.³¹ Furthermore, an Internet Web Site is an unknown entity in that an ordinary person who browses a site has no idea who is hosting the site. Many sites now allow for easy downloading of information, including making legal and illegal programs available from the site.³² Since a user cannot know where the Internet site is emanating from, choice of law issues arise.³³ Thus one can see that with a limited amount of knowledge as to the technical workings of computer software, copying programs that have certain legal protections is not a difficult task.

B. *History of Relevant Treaties*

Many nations have already begun to recognize the ease with which

memory capability far beyond that which any single mainframe user would possibly need to run multiple programs. See also MICHAEL C. GEMIGNANI, *COMPUTER LAW CUMULATIVE SUPPLEMENT* 33 (1993).

27. GEMIGNANI, *supra* note 19, at 32.

28. *See Id.*

29. *See Id.* at 34. A number of security locks have been created to disallow certain transfer of data systems. The concept of creating electronic computer protections is further discussed in Section IV: International Copyright Protections – Today and in the Future, Subsection B, *infra*. See also *The Administration's Clipper Chip Key Escrow Encryption Program: Hearings Before the Subcommittee on Technology and the Law*, 103rd Cong. 2nd Sess. (1994) [hereinafter *Clipper Chip*].

30. GEMIGNANI, *supra* note 19, at 490.

31. *Id.* at 492.

32. PETER SWIRE & ROBERT LITAN, *NONE OF YOUR BUSINESS: WORLD DATA FLOWS, ELECTRONIC COMMERCE, AND THE EUROPEAN PRIVACY DIRECTIVE 68* (1998).

33. *Id.*

users pirate software and have turned to international law to seek some level of protection. Currently, a number of international treaties shape the parameters of protection for international intellectual property. These treaties give general guidelines to nation states as to what is acceptable behavior in the copyright realm. In order to apply these treaties to the new world of computer activity, one must place the conventions in the appropriate light of the historical times surrounding their ratification.

1. The Berne Convention

The first treaty to address copyright issues was the Convention for the Creation of an Intellectual Union for the Protection of Literary and Artistic Works, also known as the Berne Convention.³⁴ This treaty was adopted in 1886, but not ratified by many countries until much later.³⁵ The purpose of the Berne Convention was to create a Union of contracting states to ensure "the protection of the rights of authors in their literary and artistic works."³⁶ Although the Berne Convention has been revised six times, it still serves as the basis for international copyright protection.³⁷

In 1886, the term "literary works" was defined as including "every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression. . . ."³⁸ That form was designated as "books, pamphlets, and all other writings. . . in fact, every production whatsoever in the literary, scientific, or artistic domain which can be published by any mode of impression or reproduction."³⁹ Even then, the drafters allowed for science, technology, and the arts to create new forms of "literary works" by adding that "[i]t shall be a matter for legislation in the countries of the Union to prescribe that works in general or any specified categories of works shall not be protected *unless they have been fixed in some material form [emphasis added]*."⁴⁰ Thus, the original stated protection of the convention may cover

34. See generally Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 223 U.N.T.S. 11850 [hereinafter Berne Convention].

35. The United States, for instance, did not ratify the Berne Convention with the Berne Convention Implementation Act until more than one hundred years after the original signing. See The Berne Convention Implementation Act of 1988, S. Rep. No. 100-352, (1988) [hereinafter The Berne Convention Implementation Act].

36. Berne Convention, *supra* note 34, at Art. 1.

37. Cohen, *supra* note 17. The original ratification within the first year of the treaty was made in large part by European nation states, and had no Asian or North American signatories. See Berne Convention, *supra* note 34, at Additional Article and Final Protocol.

38. Berne Convention, *supra* note 34, at Art. 4, § 1.

39. *Id.*

40. *Id.* at Art. 2, § 4.

intellectual property issues of today's computer copyright violations.

The Berne Convention affords nation states the right to enforce adherence to copyright laws under a concept of "national treatment." This means that the national laws of protection in the original author's state are the standards that allow application of its own copyright protection laws to citizens of another nation state.⁴¹ Additionally, the treaty delineates a set of minimum standards for all members of the treaty, regardless of a particular nation state's level of national protection.⁴² A minimum standard example found in the Berne Convention is an allowance for the duration of a copyright for the "life of the author plus 50 years," which means that the author's work should be protected throughout his lifetime and 50 years following for his estate holder.⁴³

2. The Universal Copyright Convention

The next substantially effective treaty on international copyright issues was the Universal Copyright Convention, signed into enforcement on September 6, 1952 and revised July 24, 1971.⁴⁴ The purpose set forth in its Preamble mirrors the purpose of the Berne Convention in that both desire to protect the copyrights of literary, scientific, and artistic works.⁴⁵ The Universal Copyright Convention also created certain specificity in determining the parameters of protection.⁴⁶ For instance, Article 2 states "[p]ublished works of nationals of any Contracting State and works first published in that State shall enjoy in each other Contracting State the same protection as that other State accords to works of its nationals first published in its own territory."⁴⁷ This article reaffirms the notion of national treatment of non-citizens as set forth in the Berne Convention.⁴⁸

Formalities for the acquisition of a recognized copyright under the treaty are designated as those works bearing the © symbol.⁴⁹ This is to ensure that reasonable care has been taken to give notice as to an author's claim of copyright and does not preclude any additional forms

41. *See Id.*

42. *See Id.*

43. *See Id.*

44. *See generally* Universal Copyright Convention, Sept. 6, 1952, 6 U.S.T. 2731. Revised July 24, 1971, 25 U.S.T. 1341.

45. *Id.* at Proclamation.

46. *See generally Id.*

47. *Id.* at Art. 2.

48. *See generally Id.* *See also* the United States comparison of the Berne Convention and the Universal Copyright Convention set forth in the Berne Convention Implementation Act, *supra* note 35, at Legislative History.

49. Universal Copyright Convention, *supra* note 44, at Art. 3, § 1.

of notice that a nation state may require.⁵⁰ The treaty also specifically delineates a course of action for disputes arising between nation states that have ratified the convention.⁵¹ It should be noted that a number of second and third world countries have ratified the treaty, including Cambodia, Pakistan, and Haiti,⁵² which becomes important when discussing remedies currently in place, specifically with the implementation of the World Intellectual Property Organization (WIPO) in Section IV.

When the treaty was revised in 1971, greater specificity was once again added for the protection of copyright claimants.⁵³ Article V of the treaty gives a narrow application for when copying and distribution are protected activities by allowing "for the purpose of teaching, scholarship or research" or where the "sending of the copies and their subsequent distribution to recipients is *without the object of commercial purpose [emphasis added]*."⁵⁴ Compensation for properly licensed software should be "consistent with standards of royalties normally operating in the case of licenses freely negotiated between persons in the two countries concerned. . . ."⁵⁵

Both the Berne Convention as the leading authority and the Universal Copyright Convention served as the basis of international copyright protection for the greater part of this century.⁵⁶ Yet, even with the specific parameters incorporated into the Universal Copyright Convention, the Berne Convention affords its members a higher standard of protection and enforcement.⁵⁷ Although both treaties utilize a national treatment concept in determining choice of law, the Berne Convention specifies a variety of minimum standards, which must be adhered to regardless of the legal protections of any particular nation state.⁵⁸

Many world powers did not sign either or both of the treaties until the age of computer technology was well into its formative years. For

50. *Id.* at Art. 3, § 2.

51. *Id.* at Art. 15. This article states that a "dispute between two or more Contracting States concerning the interpretation or application of this Convention, not settled by negotiation, shall, unless the States concerned agree on some other method of settlement, be brought before the International Court of Justice for determination by it."

52. *Id.* at 2827.

53. Universal Copyright Convention as revised at Paris, July 24, 1971, 25 U.S.T. 1341.

54. The emphasis is used to show that where software copyright infringement is occurring and pirates are turning a profit for this activity, the treaty may be used as a legal justification for punishment. *Id.* at 1355.

55. *Id.* at 1356.

56. Cohen, *supra* note 17.

57. The Berne Convention Implementation Act, *supra* note 35, at Legislative History.

58. *Id.*

example, the United States, though a world leader in technology and international import/export trade, did not formally address the effect of piracy and ineffective copyright protection until the late 1980's with the Berne Convention Implementation Act.⁵⁹ The Soviet Union was also conspicuously absent from participation as a member of the treaty.⁶⁰

3. The Berne Convention Implementation Act

Currently, no treaty specifically defines and addresses the computer software piracy issues prevalent in so many countries.⁶¹ As the world leader in software exportation, the United States minimally realized a need to be a signatory to these presidential treaties through the Berne Convention Implementation Act of 1988.⁶² When the United States finally decided to ratify the Berne Convention more than a hundred years after its creation, the United States stated its purpose for ratification as follows:

The Berne Convention Implementation Act of 1988 amends title 17, United States Code, to make the changes to the U.S. copyright law that are necessary for the United States to adhere to the Berne Convention for the Protection of Literary and Artistic Works signed at Berne, Switzerland, on September, 9, 1986.⁶³

In the Berne Implementation Act, the United States explained its rationale for joining the Berne Convention.⁶⁴ The United States acutely realized its need to be involved in the policing, formulating and managing of international copyright law, specifically as the world's largest exporter of copyright materials.⁶⁵ Most importantly was the use of the words "works protected by copyright – such as books, sound recordings, motion pictures, and *computer software . . . [emphasis added]*."⁶⁶ Finally, language dealing with computer software as a protected work began to emerge, though only as an issue on one country's national front.

59. Although the United States was an original ratifier of the Universal Copyright Convention, it did not sign the Berne Convention until 1988. *See Id.*

60. *See Id.*

61. Even in the United States where the national laws governing piracy are clearly stated, the governing national statute does not state anywhere in its definitions what the effects and scope of *computer software* law and protection should be. 17 U.S.C.A. § 101 (West Supp. 1999).

62. *See* The Berne Convention Implementation Act, *supra* note 35, at Legislative History.

63. *Id.*

64. *See Id.*

65. *Id.*

66. *Id.*

4. General Agreement on Tariffs and Trade

A discussion of international intellectual property protection would not be complete without a discussion of the General Agreement on Tariffs and Trade (GATT) and its effects on intellectual property rights. Currently 117 nations have ratified GATT and it is purported to be the most important treaty in existence on international trade.⁶⁷ GATT includes an intellectual property agreement called Trade Related Aspects of Intellectual Property Rights (TRIPS).⁶⁸ TRIPS defines computer programs as protected entities under Berne Convention standards for protection.⁶⁹ Most importantly, the agreement requires member states to give significant legal relief and remedy for copyright infringement found within their countries' borders.⁷⁰

Infringement under GATT consists of both injunctive and monetary damages relief, creating a much higher standard of relief by international agreement than seen in either the Berne Convention, its amendments, or the Universal Copyright Agreement.⁷¹ Member countries also agree to enforce illegal software importing to the extent reasonably possible, while recognizing the difficulty of policing the Internet.⁷² Finally, GATT establishes the World Trade Organization (WTO) as a proper body to handle disputes arising from cross-border disputes of pirated software situations.⁷³ The TRIPS agreement does effectively attempt to recognize the struggles of third world countries in policing such highly developed systems of software exchange by allowing them compliance by the year 2006.⁷⁴ Thus, for the first time, a number of nation states are stipulating a particular body as a legitimate forum for hearing computer copyright disputes.

III. CURRENT PROBLEMS WITH LOWERING PIRACY RATES

Once a clear international interest and rationale for protection is established, many obstacles stand in the way of reaching a political, economic, and legal market for computer software companies. Three distinct problems emerge when attempting to lower piracy rates internationally. The first challenge arises in attempting to police a medium as fluid and intangible as the Internet. Second, is the difficulty

67. See FISHMAN, *supra* note 23, at 10/8.

68. *See Id.* at 10/9.

69. *See Id.*

70. *See Id.*

71. *See Id.*

72. *See Id.*

73. The World Trade Organization is an international agency based in Geneva, Switzerland. *See Id.*

74. *See Id.*

in dealing with the various people involved in the process. The final challenge involves the various issues surrounding choice of law.

A. *Challenges in Policing the Internet*

By its very nature, the Internet is a virtual web of continuously updated cites, digital loops, and encrypted bits. None of these entities are tangible in terms of touch or sight. Even the term to describe this entity, "cyberspace," was coined to capture the essence of this limitless void where, similar to outer space, the limits cannot be properly quantified.⁷⁵ Business commerce on the Internet is reaching astronomic proportions.⁷⁶ Alan Hodel, a spokesman for Compaq Computer Corp., currently the world's largest personal computer maker, stated that e-business will continue to expand.⁷⁷ He further stated that "[a]s PC's evolve, the standards for security need to evolve with them."⁷⁸

Although many people in the industry generally agree with Mr. Hodel's perception, not everyone agrees with his future predictions. Steven Metalitz, the Information Industry Association General Counsel from the United States, held a contrary view at a hearing that was held as part of the White House National Information Infrastructure proceedings.⁷⁹ Mr. Metalitz argued that copyright law must inherently stay flexible and unfettered for a number of reasons.⁸⁰ First, the very fluidity of the computer software world makes it a difficult realm in which to impose a high level of regulation and enforcement.⁸¹ He argued that what was most needed to achieve the objectives of protection was a loosely held set of parameters that will expand and move with the future of the technology.⁸² Second, he argued that what was needed for protection instead of greater regulation was for the legal world of contracts to become a greater player in the digital environment.⁸³ In essence, with creative contracting of software use and sales, one could just as easily meet protection ends.⁸⁴ This is,

75. Cohen, *supra* note 17.

76. USA TODAY TECH REPORT, *supra* note 13. See also Communications Daily, Sept. 15, 1999, available in LEXIS, Academic Universe Database. Online software piracy losses are costing the computer industry \$11 billion per year and almost 2 million current Web sites are guilty of selling or providing opportunities for computer software theft.

77. Internet commerce in 1998 was \$43 billion and is expected to increase to \$103 trillion by 2003. See USA TODAY TECH REPORT, *supra* note 13.

78. *Id.*

79. *Information Law Alert: A Voorhees Report, Will Information Highway Trample Intellectual Property Rights? Excerpts from Hearing on NII*, VOORHEES REPORT, Jan. 21, 1994, available in 1994 WL 2403765.

80. See *Id.*

81. See *Id.*

82. See *Id.*

83. See *Id.*

84. See *Id.*

however, the opinion of a small and diminishing minority.

B. Challenges in Dealing with the Human Element

The fluidity of the product and cyberspace issues prevent many people from rationalizing that the behavior of illegally acquiring software is truly theft, in both the ethical and legal realm.⁸⁵ One popular philosophy is that software prices are too expensive to justify giving the patent holders protection.⁸⁶ Another philosophy is that the inventors of computer software already make substantial profits on their product's creation and should not be reaping benefits in addition to this economic gain.⁸⁷ The people who believe either of these philosophies are in both the developing and the developed countries, as seen by the wide array of countries experiencing high percentages of illegal software.⁸⁸

A reasonable person in most cultures and nations understands that walking into a store and taking an item that they did not pay for, even if that item is a 50-cent piece of candy, is considered theft by society's standards.⁸⁹ Yet, large masses of people do not believe that sharing computer software that they did not purchase should be considered illegal.⁹⁰ This is especially true in the communist and less developed countries where sharing resources is both a philosophy and a standard for life. This comparison directly correlates with the view that the very essence of software copyright is not an entity to be legally protected. The people who share these philosophies are either staunch advocates of a free flow of information on the Internet⁹¹ or are, more generally, people who do not hold a strong view on the subject but do not see the ethical improprieties of copying the software of a friend or a colleague.⁹²

There are also those who fully acknowledge the illegality of software piracy, but have other reasons for disregarding copyrights laws. These groups of people are generally either "hackers"⁹³ or are part of the organized crime movement in piracy. Hackers and members of the organized crime groups both act intentionally, however their

85. See CORPORATE MISCONDUCT: THE LEGAL, SOCIETAL, AND MANAGEMENT ISSUES 139 (Margaret P. Spencer & Ronald R. Sims, eds., 1995).

86. See *Id.*

87. See *Id.*

88. See Creed, *supra* note 7. See also Li, *supra* note 8. See also Mosquera, *supra* note 9.

89. See CORPORATE MISCONDUCT, *supra* note 85.

90. Cohen, *supra* note 17 at 409.

91. *Id.*

92. See CORPORATE MISCONDUCT, *supra* note 85.

93. "Hacker" is a term reserved for that body of people who consider it sporting to try and beat the encryption and protection systems set up by software manufacturers.

primary goal may be different. Often, economic advantage is secondary to the hacker's personal need to "beat the system" of a powerful computer corporation.

Organized crime, on the other hand, is becoming a worldwide economic activity. Between 1997 and 1999, criminal software counterfeiting rings have been unearthed in numerous states including: California, Texas, China, Russia, and the United Kingdom.⁹⁴ Profits from these rings are distributed to support more traditional forms of organized crime, including money laundering, narcotics, and terrorist operations.⁹⁵ The most telling fact that demonstrates the reach of organized crime software pirates is that much of their copied software is being sold to legitimate corporations. These corporations discover after the fact that they purchased unlicensed goods and have no arena to seek an appropriate remedy for poorly functioning software.⁹⁶ For all these reasons, the human element continues to be a factor in curbing the tide of computer software piracy.

C. *Challenges in Dealing with Choice of Law*

An additional problem with lowering the piracy rate is that the issues surrounding choice of law across national boundaries are seemingly more complex than that of dealing with people on an individual basis.⁹⁷ Nations may have laws governing copyright protection within their borders and may be willing to only abide by that domestic standard for protection, however inadequate it may be for copyright holders.

Nation states have dramatically varying viewpoints as to the necessity and protection of software copyrights. Despite the numerous treaties set up to allow a standard of "national treatment"⁹⁸ to determine choice of law, nation states have such varying laws and guidelines for their national treatment that no true uniformity exists. Additionally, other nation states that are not members of any of these industry-leading treaties may apply a completely different minimum standard or no standard of protection whatsoever.⁹⁹

Another point of contention exists in determining the exact point the copyright infringement occurs; whether it be at the point of transmittal, at the receiving end, or when applicable, when raw

94. *Microsoft to Donate \$25 Million*, *supra* note 1.

95. *Id.*

96. *Id.*

97. Cohen, *supra* note 17, at 407-08.

98. See discussion of the Berne Convention and Universal Copyright Convention in Section II: History and Background of Issue, *supra*.

99. Paul Edward Geller, *From Patchwork to Network: Strategies for International Intellectual Property in Flux*, 31 VAND. J. TRANSNAT'L L. 553, 557 (1998).

transmitted data is actually changed into usable software.¹⁰⁰ For example, consider the choice of law issues that arise if the European Union (EU) transmits raw data to China, where European Union law has national treatment protection against reception of transmitted software but does not consider raw data to be a finished product.¹⁰¹ To complicate the choice of law issue, the receivers in China only protect for software reproduction and are more comfortable disregarding sanctioning where their nationals are in receipt of raw data but are not the sellers of the end product software across trans-boundary lines.¹⁰² Does this mean that a country with relaxed transmittal laws, like the EU in this example, will become safe havens from which pirates can transmit?¹⁰³

The European Union boasts over 340 million consumers, making it the largest trading body in the world.¹⁰⁴ All countries within the EU have chosen to create an intellectual property directive, called the EC Software Directive, which mirrors the United States in its treatment of software copyright protection.¹⁰⁵ Thus, copyright holders in either the EU or the US can feel relatively secure in their ability to protect their works, since the laws tend to compliment each other.¹⁰⁶ The same reciprocity exists for copyright holders in Japan, which accounts for 20% of the worlds computer markets.¹⁰⁷ Canada is another country with similar laws governing copyright protection and is a signatory to the Berne Convention and GATT, along with Japan, the EU and the US.¹⁰⁸ Choice of law becomes a great issue when dealing with countries that either have not ratified any or all of the treaties discussed, or for countries that do not have the resources or interest in policing within their borders.

Some governments and private corporate affiliations have even struck back at international private organizations that attempt to police piracy, as was the case recently in the United Kingdom.¹⁰⁹ The Association of Chartered Certified Accountants (ACCA) attacked the Business Software Alliance (BSA) for being too aggressive in its policing of local corporations.¹¹⁰

100. *Id.* at 556.

101. *Id.*

102. *Id.*

103. *Id.* at 556-57.

104. *See* FISHMAN, *supra* note 23, at 10/11.

105. *See Id.*

106. *See Id.*

107. *Id.* at 10/13.

108. *See Id.* at 10/15.

109. *See* Guy Middleton, *Anti-Piracy Group Accused of Bullying*, CMP MEDIA, INC., Aug. 26, 1999, available in LEXIS, Academic Universe Database.

110. *Id.*

The ACCA went so far as to tell corporations to disregard warnings from BSA about possible litigation and called BSA's behavior ineffective "bullying."¹¹¹ The ACCA flatly believed that the BSA activity was out of the policing power of the privately supported organization and should not have occurred.¹¹²

International backlash as to what is appropriate policing behavior is not altogether surprising when one considers the differing opinions present within a country's national boundaries.¹¹³ Some individuals believe in opening up patent control so that technology can continue to advance at its rapid pace without being hindered by many of the issues surrounding protection.¹¹⁴ Often, the companies screaming about no international protection against piracy are the same institutions that demand a breakdown of current protective barriers.

IV. INTERNATIONAL COPYRIGHT PROTECTIONS – TODAY AND IN THE FUTURE

A number of options are available domestically and internationally to both force compliance of copyright laws and patents on computer software, and to lower losses through piracy. Foremost in these new attempts at protection is the creation of the World Intellectual Property Organization (WIPO). Nations and private computer companies have also explored the possibility of adding encryption devices to their software as a means of shielding their software from illegal copying. Additionally, privately supported policing organizations have emerged and have begun receiving a certain amount of authority in regulating the industry. Many of the companies represented by these private organizations have also taken strides to implement media strategies such as hotlines or by donating large copyright settlements to charities in an effort to get the average employee interested in assisting in the fight against piracy. Finally, many companies, regardless of their level of technology, have taken active steps to implement internal safety nets so that the company will not fall prey to the dangers of litigation by copyright holders. These copyright protections are discussed below.

111. The ACCA claimed that the BSA was sending letters to companies demanding compliance within certain frameworks of time and alluding to fines and punishment of prison for those companies who chose not to comply. *Id.*

112. *See Id.*

113. For example, outcry over computer software patents dealing with technologies and systems that were issued in the United States from 1982 to 1989 was so great that Bruce Lehman, then commissioner of patents and trademark, implemented a re-examination of patent control and licensing. *Will Patents Hinder Development of Electronic Highway? Events in 1994 Hold the Answer*, 2 VORHEES REPORT 2, Jan. 21, 1994 at 1.

114. *Id.*

A. *The World Intellectual Property Organization*

WIPO is one of the 16 specialized agencies under the organizational structure of the United Nations.¹¹⁵ The Convention Establishing the World Intellectual Property Organization signed at Stockholm on July 14, 1967 and as amended on September 28, 1979 officially established WIPO as a fully authorized entity with the official support of the United Nations.¹¹⁶ Headquartered in Geneva, Switzerland, the organization was created to deal with the education and promotion of intellectual property.¹¹⁷ This purpose includes structuring and ratifying multilateral treaties that address the concerns of intellectual property.¹¹⁸ As of August, 1998, over 170 nation states are active members of WIPO.¹¹⁹

Although a specific computer reference is not made within "Article 2 – Definitions" of the WIPO Convention, Article 2 does designate the following to be within the field of intellectual property: "inventions in all fields of human endeavor, . . . industrial designs, . . . trademarks, service marks, and commercial names and designations, . . . and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields."¹²⁰ Thus the protection of computer software is inherently understood to be within the scope of WIPO protection. WIPO also sets forth in its International Protection of Copyright and Neighboring Rights (also called the WIPO Rights), designations of what types of works are considered "protected works" under the WIPO umbrella of specialization.¹²¹ The WIPO Rights specifically state that "[s]ome copyright laws provide that *computer programs* are to be protected as literary works."¹²²

115. The World Intellectual Property Organization Official Web Site (visited Nov. 29, 1999) [hereinafter Official Web Site] <<http://www.wipo.org/eng/dgtext.htm>>.

116. Convention Establishing the World Intellectual Property Organization, July 14, 1967. *Revised* Sept. 28, 1979 [hereinafter WIPO Convention].

117. See Official Web Site, *supra* note 115.

118. The other major purpose of the organization is to act as an assistant in the development of intellectual property in underdeveloped countries. *Id.*

119. Six additional nation states were parties to WIPO treaties as of that date and had not yet become official members. Over 50 Least Developed Countries have gained membership into WIPO and are seeking assistance in their intellectual property development. Included are members from Africa, Asia, the Pacific Islands and the Caribbean. A few countries by name are Haiti, Somalia, Cambodia, Chad, Nepal, and Samoa. *Id.*

120. See WIPO Convention, *supra* note 116, at Article 2.

121. Many of the "protected works" discussed are those works specifically designated in the Berne Convention of 1886; including literary works, technical drawings, and musical works. See Official Web Site, *supra* note 115. See also Berne Convention, *supra* note 34.

122. See Official Web Site, *supra* note 115.

The designated WIPO rights further clarify when a copyrighted work can receive protection.¹²³ The most typical copyrighted protections require that the user must have authorization from the works' author in the following situations, "the right to *copy or otherwise reproduce* any kind of work [and] the right to *distribute* copies to the public."¹²⁴ These protected situations directly relate to the use of pirated software as an illegal activity. WIPO further stipulates that "international protection" is designed to allow nation states the right to concern themselves with "acts accomplished or committed in the State itself."¹²⁵ Thus, a citizen may find his rights unprotected in a nation state where he is not a citizen.¹²⁶

On December 20, 1996, The Agreed Statements Concerning the WIPO Copyright Treaty (Agreed Statements) was adopted by the Diplomatic Conference on Certain Copyright and Neighboring Rights Questions in Geneva, Switzerland.¹²⁷ This was an important piece of treatise in that it unequivocally attached international protection to the "digital environment" as set forth in the Amendment "Concerning Article 1(4)."¹²⁸ Specifically, the agreement stated that "reproduction right, . . . and the exceptions permitted thereunder, fully apply in the digital environment, in particular to the use of works in digital form."¹²⁹ Thus, WIPO recognized computer software piracy as a legitimate problem to be afforded the protections and punishments of any organizational issue within the sphere of the United Nations. Although this was a substantial step forward in intellectual property protection, choice of law issues were still not fully resolved.

123. *Id.*

124. *Id.*

125. *Id.*

126. WIPO Internet Domain Name Process describes another convention which met specifically to deal with the intellectual property issues and conflicts surrounding international use and protection of Internet domain names for web sites. The organization made a recommendation to create a sub group called the Internet Corporation for Assigned Names and Numbers (also known as ICANN) the purpose of which is specifically to manage and negotiate conflicts in domain names at the international level. Thus WIPO is opening its purpose to all forms of complex issues facing the digital environment. See generally WIPO Internet Domain Name Process (visited Nov. 29, 1999)

<<http://exommerce.wipo.int/domains/process/eng/wipol.html>>.

127. More than 600 delegates comprising over 160 governments and 150 non-governmental agencies came together to take a dramatic step in updating the Berne Convention. WIPO Official Web Site CRNR/DC/96 – WIPO Diplomatic Conference on Certain Copyright and Neighboring Rights Questions (visited Nov. 29, 1999) <<http://www.wipo.org/eng/diplconf/distrib/96dc.htm>>. See also *Computer Industry Groups Support New WIPO Treaties*, M2 COMMUNICATIONS LTD., Dec. 6, 1996, available in LEXIS, Academic Universe Database.

128. WIPO Official Web Site CRNR/DC/96, *supra* note 127.

129. *Id.*

B. The Use of Encryption as a Means of Protection

Another option to help curb copyright infringement is the use of encryption for software. This option has been explored at the governmental and at the private corporate levels. One example of this is the Clipper Chip, a United States government creation that essentially acts to encrypt computer technology so that unauthorized users cannot pirate the encrypted information or programs.¹³⁰

Clipper serves a greater number of functions as it is upgraded and applied to computerized programming in the general course of business. The United States government's regulation of the Clipper Chip would allow two government agencies the ability to decode any forms of communication that seemed questionable to national security.¹³¹ Essentially, if Clipper or some international standard of cryptography were available, it would allow users to further safeguard their programs.

One application would allow authorized users of a protected program to call a help service as part of its rights under the licensing agreement in order to receive a passkey for use.¹³² The government's Clipper Chip is not the only one of its kind. Wave Systems of New York is implementing similar types of chips that are installed into a computer, thus allowing a program to be sent in scrambled form and unscrambled on a pay-by-use basis.¹³³ Electronic Publishing Resources of Sunnyvale, California has developed the most aggressive invention so far.¹³⁴ Their application of encryption is a virtual "container" that surrounds digital works. In effect, this container leaves behind a traceable trail of the program as it is used and even as it travels through computer networks, allowing the author of the program to collect royalty fees in the event that the program is copied or

130. Originally the chip was installed into computer mainframes and enabled users to encrypt data messages. Then when a court order deemed investigation appropriate, the government could decode the messages. The first prototype was a creation of AT&T who used it in cell phones to assist in scrambling messages so as to keep cell phone conversations protected. Originally Clipper was created as a means of watch-guarding certain classified government contracts and databases from falling into the hands of terrorists and gangsters. *Why Care About Clipper*, 2 VOORHEES REPORT 7, Mar. 25, 1994 at 1.

131. *Clipper Chip*, *supra* note 29. President Ronald Reagan gave the Department of Defense and the National Security Agency the responsibility of setting standards for cryptography through use of Clipper in both the government and private sectors in 1984. *See also* VOORHEES REPORT, *supra* note 130 at 4.

132. *Technological Solutions Rise to Compliment Law's Small Stick Guarding Electronic Works*, 3 VOORHEES REPORT 11, June 16, 1995 at 1.

133. *Id.* at 2.

134. *Id.* at 3.

distributed elsewhere on the Internet.¹³⁵

Even technologically advanced systems like these have their drawbacks. Many large international companies are concerned as to who will hold the rights to decrypting. Additionally, many states would like to see this encryption technology widely used and deregulated, creating a type of "copyright within a copyright" situation for the inventors of the encryption devices.¹³⁶ Thus, the rationale for using encryption as a form of piracy protection would inevitably backfire, allowing exterior entities access to business information. Whatever the outcome of encryption devices, one can be certain that as encryption techniques are developed there will be some computer wizard or hacker discovering ways to get around such devices.

C. Organizations Dedicated to Educate, Punish, and Litigate Against Piracy Offenders

Privately established organizations are currently attempting to regulate and lower the amount of computer software piracy internationally. The rationale for these organizations was that companies attempting to sue for enforcement of their copyrights had an extremely expensive undertaking. Thus software trade associations gave individual companies the ability to become members of organizations that would enforce standards on their behalf.¹³⁷ These organizations serve a number of important functions: collecting appropriate data on the amount of international software piracy; following longitudinal trends to see where and how piracy is losing ground; and, in recent years, enforcing, punishing, and litigating against offenders.¹³⁸

The most prominent of these is the Business Software Alliance (BSA), which has affiliations and branches all over the world.¹³⁹ Originally a Washington-based private interest, the BSA represents companies like Adobe, Macromedia Inc., and Symantec Corporation.¹⁴⁰ Additionally such recognized and leading companies of personal computer software are members including, Apple Computer, Autodesk,

135. *Id.*

136. For instance, in the United States where the Clipper Chip was first implemented, if the national government saw reason to decode a particular communication or a series of data exchanges, businesses might be forced to defend their right to not be invaded by government. See VOORHEES REPORT, *supra* note 130 at 2.

137. FISHMAN, *supra* note 23, at 10/24.

138. FISHMAN, *supra* note 23, at 10/25.

139. The BSA is active in more than 65 countries and has been litigating against offenders since 1988. *Computer Industry Groups Support New WIPO treaties*, M2 PRESSWIRE, at 2, Dec. 6, 1996, available in LEXIS, Academic Universe Database [hereinafter *Computer Industry Groups*].

140. Young, *supra* note 2.

Bentley systems, Lotus Development, and Microsoft.¹⁴¹

As part of BSA's interest in heightening awareness as a means of lowering piracy rates, the association recently published a study on the effect of piracy in Australia concluding that local businesses are losing \$286 million per year to piracy. The BSA then followed up that study with education on how such a grave loss affects the economy as a whole for the country.¹⁴² By educating governments on the national effects of piracy regarding their economy, BSA creates a dual purpose in both educating and getting the government actively involved in movement towards protection.

Latin America is another example where the BSA has gotten the government directly involved with piracy issues so as to substantially increase national revenue and boost the economy. Nearly 150,000 jobs and \$3.5 billion in sales were generated in Latin America in 1998 through the computer software trade.¹⁴³ Robert Holleyman, president of BSA International, stated that "reducing software piracy would double those figures".¹⁴⁴ "Reducing piracy to even 25 [%] would have produced \$5.3 billion more in sales, 206,400 more jobs, and \$1.9 billion in tax revenues in 1998, the report said."¹⁴⁵ Additionally, "in 2002, sales would reach \$10.3 billion, 291,600 jobs, and \$3.6 billion in tax revenue."¹⁴⁶

The BSA is not simply an information gatherer. It acts as an enforcer and informant to governments around the world. At a three-day event held in Switzerland by WIPO, Holleyman told members of the organization that as of late 1999, there were more than 2 million Web Sites which have downloadable files or links to pirated software, also known as "warez" in Internet terminology.¹⁴⁷ Thus, through BSA's studies, governments have a better idea of where to look for copyright abuse. Additionally, greater results are seen where private organizations like BSA are jointly enforcing with government enforcement entities. Such was the case in Singapore where the BSA

141. *Computer Industry Groups*, *supra* note 139.

142. *Australia's Business Software Association asks Federal Government to Take Action Against Piracy which it says Costs Local Businesses \$286 Mil/Yr.*, 11 3rd WAVE COMMUNICATIONS PARTY LTD. 26, July 9, 1999, available in LEXIS, Academic Universe Database.

143. Mosquera, *supra* note 9.

144. Holleyman's study determined that greater than six out of ten software applications installed throughout Latin America in 1998 were not properly copyright protected. *Id.*

145. *Id.*

146. *Id.*

147. This figure is more than double the numbers of warez sites from 1998. Sylvia Dennis, *E-Piracy Threatening E-Commerce, Says BSA's Holleyman*, POST-NEWSWEEK BUSINESS INFORMATION, INC., Sept. 14, 1999, available in LEXIS, Academic Universe Database.

informed the government of significant piracy rings and the government proceeded to exercise more than 700 raids of companies.¹⁴⁸

Finally, the BSA has recently begun to publish guidelines, programs, and packages that companies can internally use or governments can externally adopt in order to lower piracy rates. The Guide to Software Management (The Guide), a manual established in the United Kingdom, was purposely designed "to provide a practical guide to combating the damaging effects of illegal software and how it affects the competitiveness of British businesses."¹⁴⁹ The Guide includes a presentation disk to be used as a teaching manual for upper management, a demonstration audit disk to teach how companies can do their own internal auditing, and information on UK law such as the European Software Directive.¹⁵⁰ A similar BSA program exists in the Philippines called Technology Asset Management, which focuses on how businesses realistically benefit from enforcing intellectual property rights.¹⁵¹

The Software Publishers Association (SPA) is another organization dedicated to fighting international software piracy. Originally created to fight piracy in the United States, SPA is now attempting to lower piracy infringements in Singapore, Korea, Taiwan, France, Mexico, Brazil, Australia, and Italy.¹⁵² SPA recently conducted a study that determined 99% of the software used in Pakistan, Thailand and Indonesia was pirated from other countries.¹⁵³

A third organization called the Alliance Against Counterfeiting and Piracy (AACP) has recently joined the battle. The focus of AACP is similar to SPA and BSA in that this organization comprises a number of private industry leaders who have named as their main purpose the education of governments on the detrimental effects of piracy concerning their national economies and private sectors.¹⁵⁴ AACP hopes to not only teach certain disinterested nation states that piracy is as clearly theft as any other type of illegal taking, but that these nation

148. More than 700 million pirated items were taken from the businesses and destroyed. *Software Watchdog Seeks Pact with ISPs in Singapore*, ASIA PULSE PTE. LIMITED, Nationwide Financial News Section, Sept. 7, 1999, available in LEXIS, Academic Universe Database.

149. *New BSA Guide Will Help Companies Reduce Risk of Illegal Software*, M2 COMMUNICATIONS LTD., Oct. 1, 1997, available in LEXIS, Academic Universe Database.

150. *See id.*

151. Erwin Lemuel G. Oliva, *Biz Sector is Top Software Pirate, Says BSA*, POST-NEWSWEEK BUSINESS INFORMATION, INC., June 14, 1999, available in LEXIS, Academic Universe Database.

152. FISHMAN, *supra* note 23, at 10/24.

153. Additionally, China has piracy rates of 94%, Brazil is at 83% and Taiwan is around 84%. *Id.*

154. David Bicknell, *Multi-Industry Alliance to Beat Piracy*, COMPUTER WEEKLY, July 8, 1999, available in LEXIS, Academic Universe Database.

states should also create criminal sentencing under a nation's general criminal penalties for theft.¹⁵⁵ With the help of private organizations such as these, nations are becoming increasingly educated on the need for action at the national and international level.

D. Hotlines and Charitable Donations of Settled Suits

Recently, two other tools for curbing piracy have emerged worldwide. The first of these new tools creates greater self-enforcement through the establishment of computer piracy hotlines. Organizations like BSA have established 24-hour hotline numbers for anonymous tips regarding piracy. The BSA operates more than 35 such lines around the world, allowing a caller to not only report unauthorized activity that they might be aware of, but also to get information regarding a certain prohibited activity.¹⁵⁶ With the tips they receive, BSA can then do internal audits of a company's compliance with piracy law. Even countries like Malaysia, struggling to fully step into the modern world of computer technology, have found benefits in establishing the hotlines.¹⁵⁷

Another popular tool in computer education and enforcement is establishing charities that assist in computer education through money received in piracy settlements. For example, in Hong Kong, the BSA offered to donate free software to the nation's charities every time it wins a copyright protection suit.¹⁵⁸ Two non-profit organizations have been chosen as the first organizations to receive \$30,000 in software for their use, once BSA reaches its next big litigation settlement.¹⁵⁹ Additionally, the BSA continues to offer \$15,000 rewards for successful tips on corporations violating copyright laws.¹⁶⁰

Private industry organizations are not the only ones using these types of incentive programs. Private companies like the Microsoft Corporation have also implemented programs where non-profit organizations focusing on information technology education receive

155. *Id.* The alliance consists of the BSA, the Federation Against Copyright Theft, and the European Leisure Software Publishing Association.

156. Again, the focus of many of these services is for education. *Computer Industry Groups, supra* note 139.

157. *Malaysian Company Launches New Anti-Software Piracy Hotline*, ASIA PULSE PTE. LIMITED, Apr. 23, 1999, available in LEXIS, Academic Universe Database.

158. The Pegasus Organization and Caritas Institute for Further and Adult Education, which provide information technology educational services around Hong Kong, have been chosen to receive these settlement donations. IT Daily, *Hong Kong Charities to Benefit from Anti-Piracy Drive*, POST-NEWSWEEK BUSINESS INFORMATION, INC., Aug. 18, 1999, available in LEXIS, Academic Universe Database.

159. *Id.*

160. Williams, *supra* note 4.

money obtained from settlement recovery and judicial awards.¹⁶¹ Microsoft has set aside a \$25 million donation that will be distributed at a rate of \$5 million per year for the next 5 years. One of these programs, CyberCare, a Microsoft establishment in Kuala Lumpur, Malaysia, donates money and computers to orphanages throughout the area.¹⁶² Another such program is Microsoft's European Scholar Programme that has provided over 6,000 unemployed members of the EU with the technology education to become valuable workers in the technology industry.¹⁶³ Programs such as these are creating a greater incentive for people to inform organizations like the BSA of illegal corporate activity.

E. Internally Implementing Self-Policing Practices

The battle between copyright protection and free-for-all software piracy is experiencing some victories. BSA stated that piracy rates have been falling modestly since 1994.¹⁶⁴ The organization discusses several reasons for the decline, including lowering the price of commercial software to make it more affordable.¹⁶⁵ Also, governments are taking a more active role in protecting intellectual property rights within their own borders and in relation to international trade.¹⁶⁶ The rise in piracy litigation is also acting as a deterrent.¹⁶⁷

Researchers also suggest that companies take internal steps to minimize the chance of being caught in litigation over piracy issues by taking some proactive and precautionary measures.¹⁶⁸ First, educating employees is key to ensuring that they understand the liability involved in copyright theft.¹⁶⁹ Through appropriate training, companies can educate employees on the risks they all face and the possible detriments to the overall effectiveness of a company if it does not adequately protect itself.¹⁷⁰ Second, the company should publish an official stance

161. Microsoft first began this campaign in the United States in 1983 and took the program international in 1998. *Microsoft to Donate \$25 Million, supra* note 1.

162. *Id.*

163. *Id.*

164. Young, *supra* note 2.

165. *Id.*

166. For instance, the United States is a forerunner in this endeavor through the joint efforts of the State Department, the U.S. Trade Representative, and Department of Commerce's Patent and Trademark Office who are all formally asking foreign governments to take an active role in piracy. *Id.*

167. *Id.*

168. CORPORATE MISCONDUCT, *supra* note 85.

169. Corporations must recognize that their employees will very likely fall into the category of people discussed above who have no feelings toward the illegality of sharing software. *Id.*

170. *Id.*

on piracy and a method of office protocol for dealing with offenders.¹⁷¹ Thus, employees recognize that their employer regards piracy as a serious issue.

Finally, companies can help enforce an anti-piracy policy by creating a generalized code of computer ethics for all of the employees.¹⁷² Many employees may not have a full grasp of what constitutes piracy. A general code of computer ethics allows employees to better understand what is expected of them within the workplace in terms of computer usage.¹⁷³ All of these company protections may seem extreme until they are weighed against the punishments available for companies participating in software piracy. Thus, all companies can take proactive, self-policing steps to ensure that they are not at risk for copyright infringement. Where there is clarity, employees will be less likely to engage in behavior that may later cost the company millions in litigation.

V. CONCLUSION

A. *Rationale for Supporting Copyright Protection*

The reasons for international support regarding copyright protection cover a wide spectrum. First, the most obvious rationale for protection of private persons or corporations is that illegal copying of software creates a direct loss in profits to the creator of the software or to the holder of the software patent.¹⁷⁴ These losses are enormous, evidenced in the statistics previously noted.¹⁷⁵

Secondly, the support of copyright protection ensures that the end product purchased has product quality equal to that of every single legal user of the product.¹⁷⁶ Pirated products have a higher probability of poor software quality.¹⁷⁷ Furthermore, once a problem arises, the lack of legal copyright verification leaves them with little remedy or the ability to use a software help service, since they have no legal licensing documentation to direct their inquiries.¹⁷⁸

Finally, nations themselves are beginning to take note of the

171. *Id.*

172. *Id.*

173. *Id.*

174. Young, *supra* note 2.

175. See Creed, *supra* note 7. See also Li, *supra* note 8. See also Mosquera, *supra* note 9.

176. Microsoft to Donate \$25 Million, *supra* note 1.

177. Customers who purchase illegal products over the Internet continuously find that their software is plagued with viruses or is substantially lacking in quality. *Id.*

178. *Id.*

significant economic losses that their country suffers through lost wages, lost taxes, and lost economic gain. For example, BSA of Australia published a study to their government where they stated that local businesses are losing approximately \$286 million per year to piracy.¹⁷⁹ Where Australia is estimating that 33% of business software is copied illegally, the organization has asked the national government to assist in policing measures in order to bring this percentage down to 27%.¹⁸⁰ Ultimately, where governments are taking an active role in policing and punishing offenders, their national piracy rates are destined to drop.

Many more examples of governments feeling the loss in their national economies through illegal software sales exist.¹⁸¹ However, national economies do not simply suffer through lost wages and taxes. Some developing and under-developed countries currently find themselves in a detrimental position where international computer corporations will not even establish a market in the country since there are no anti-piracy laws of any kind in effect to protect the company. Pakistan recently overcame this hardship when Microsoft Corporation finally solidified plans to set up corporate branches and agreed to invest roughly \$150 million for employee training, potentially creating \$100 million in new revenue for the country.¹⁸² Thus, whether a country is highly developed or developing, computer software piracy is a topic that needs immediate attention.

B. Time for an International Computer Copyright Treaty

The time is ripe for a specific international treaty that can create greater enforcement and recovery. Treaties like GATT and WIPO's Agreed Statements have successfully linked modern computer technology to the protected works treaties of the past, including the Berne Convention and the Universal Copyright Convention. But this is

179. *SHORT TAKES: Business Software Association of Australia*, EXCHANGE TELECOMMUNICATIONS NEWSLETTER, July 9, 1999, available in LEXIS, Academic Universe Database.

180. A mere 6% drop in software piracy would generate an estimated additional \$797.76 million in sales and would create 7,332 more jobs nationally by the year 2001. Adam Creed, *Software Manufacturers Call for Action on Piracy Down Under*, POST-NEWSWEEK BUSINESS INFORMATION, INC., July 5, 1999, available in LEXIS, Academic Universe Database.

181. Indonesia is another example in that it is considered one of the worst countries in the world for utilizing pirated software. Whereas software sales in the country averaged \$600 million, the loss of state import duty and luxury sales tax to the national economy totals roughly \$200 million per year. See *Computer Software Piracy Cases Decline in Indonesia*, ASIA PULSE PTE LTD., May 28, 1999, available in LEXIS, Academic Universe Database.

182. *Microsoft to Set Up Training Institutes in Pakistan*, ASIA PULSE PTE LTD., Sept. 2, 1999, available in LEXIS, Academic Universe Database.

not enough. These modern treaties are a good foundation for educating governments on the issues surrounding international property software piracy, but they do not prove themselves to be good tools in the enforcement and remedy arenas.

Minimally, GATT should incorporate an intellectual property code, an idea that was previously explored in the Berne Convention Implementation Act.¹⁸³ In this intellectual property code, any nation state that agrees to the terms of GATT and benefits from its trade policy, must also agree to enforcement of certain standards of copyright protection. Those standards would be negotiated by participation in a GATT revision convention. WIPO would also be a strong guide in the development of this new treaty.

A new intellectual property code would be effective in that those nation states choosing to sign the GATT/WIPO revision could be monitored and held to the standards created. Questions like choice of law and distribution issues could then be directly addressed. Additionally, provisions could be added that specifically delineate what governing body would hear cases dealing with copyright infringement. Determining one true medium for arbitration and dispute resolution would be an important part of the new treaty. Suggestions as to what governing body would be most effective in this role would be the WTO¹⁸⁴ or a WIPO body specifically invested with that authority under the United Nations.

Provisions would also have to be established to set standards for nation states that do not choose to ratify the treaty. Certain GATT allotments might be withheld from these countries.¹⁸⁵ This proposed treaty must respect the needs of developed versus developing countries. If a particular developing country simply does not hold the treaty to be in its best interests, then WIPO may be able to assist that country in developing standards and technology to create a firmer ground of equality with more developed countries.

The most difficult piece of this new treaty would be attempting to balance a broad and discretionary local control against a national networked framework of definitions, choice of law, and the like. Upholding a nation's sovereignty while protecting the rights of companies across international boundaries will not be a simple task. Regardless, it is a task that must be attempted in the coming years. Ultimately, the worst decision international bodies can make regarding

183. The Berne Convention Implementation Act, *supra* note 35, at Legislative History.

184. This concept was previously stated *supra*, note 73.

185. The author notes that certain countries may view embargoes such as this an unacceptable use of force and is meant merely as an avenue for exploration. Setting specific legal structures and rules for such a code is beyond the scope of this article.

the future of intellectual property rights would be to do nothing. This is true regardless of whether the nation is capitalist or communist, leading the world or third world.

If nations do not realize their position as the best arena for enforcing protection and remedies, then the world of intellectual property will continue to advance and nations will continue to suffer great losses in work force and corporate gain, detrimentally effecting intellectual property commerce.

