Denver Journal of International Law & Policy

Volume 27
Number 2 *Spring*

Article 6

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. 27 : No. 2 , Article 6.
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DENVER JOURNAL OF INTERNATIONAL LAW AND POLICY

VOLUME 27

1998-1999

Denver Journal

of International Law and Policy

VOLUME 27 NUMBER 2 SPRING-1999

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of International Law and Policy

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POPULATION-ENVIRONMENT LINKAGES IN INTERNATIONAL LAW

DIANA D.M. BABOR*

INTRODUCTION

> I wish the McCaugheys the best of everything for their family. Unfortunately, their children may face adulthood in a world fraught with ecological disaster because of overpopulation. There are so many humans that we are crowding out other species and changing the biosphere of the planet. It is time we all lived responsibly, with our children's future in mind. Otherwise, there may not be much of a world for our children or the septuplets to enjoy.[1]

Since the 1970's, the incidence of artificially-induced multiple births has tripled in North America. Regulations to govern assisted-reproductive technology and the provision of fertility treatments have yet to be adequately articulated in the United States even though half of all multiples born are burdened with life-long health problems.[2] While many recipients of fertility treatment have indeed been "trying for years" to conceive a child, and while ethical concerns over using selective reduction abound, it is rare to hear mention of the greater responsibility needed to limit growth and reduce excessive consumption within developed societies, so as to maintain a viable biosphere.

This article explores population-environment linkages both within developed and developing nations, and considers the consequences of a population growth rate which, as one hectare of arable land is simultaneously lost or destroyed, currently results in eight live births every three seconds.[3] In order to better comprehend the forces governing our

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* LL.M. (1997) in International Environmental Law and International Human Rights, Dalhousie University, Halifax, Nova Scotia, LL.B. (1992) University of Windsor, Windsor, Ontario, B.A. (1988) University of Toronto, Toronto, Ontario. The author expresses gratitude and appreciation to Professor Hugh Kindred, Dr. David VanderZwaag and Dr. Moira McConnell at Dalhousie Law School for their insightful contributions.

1. Letter from Larry Murphy of Provincetown, Mass. to TIME, Dec. 22, 1997, at 4, *available in* 1997 WL 16251406.

2. The Journal: Medical Misadventures (CBC television broadcast, Nov. 19, 1997). According to Dr. John Barrett, forty to forty-five doctors were involved, or on duty, to assist the McCaughey septuplets into life. Id.

3. For a cyber-view of this rate of growth (after the death rate is accounted for) and loss (due to deforestation and erosion) see *The Resource Clock* (visited Nov. 3, 1998)

perceptions, Part I of this article will discuss eight interactive variables which inform decision-making. Part II will examine the existence of legal duties under international law to limit or constrain our level of consumption and our right to freely reproduce, particularly as applicable in states considered free of a population "problem."

PART I

A. *Anthropogenic Repercussions*

> [W]e are deeply concerned that the overall trends for sustainable development are worse today than they were in 1992. . . .Conditions in natural habitats and fragile ecosystems, including mountain ecosystems, are still deteriorating in all regions of the world, resulting in diminishing biological diversity. At the global level, renewable resources, in particular freshwater, forests, topsoil and marine fish stocks, continue to be used at rates beyond their viable rates of regeneration.[4]

As the human family continues to increase in size, a greater output of basic resources and services is required. The fact that every child born has a need for, and a human right to, food, water, shelter, clothing, an education and an ecologically-balanced environment places additional demands on existing infrastructures responsible for providing these services, as well as for sewage, sanitation and pollution control. In developing countries, slowing the population growth offers time for the state to develop services for its inhabitants and to prepare for the needs of future generations, whose options would otherwise be even more constrained.

When slower population growth permits increased economic growth, it can also result in higher consumption. Consumption must be efficient if sustainable goals are to be achieved. Yet at any level of development, expanding populations increase energy use, resource consumption and environmental stress,[5] albeit to different degrees. Stabilization of population growth and levels of consumption must be pursued so as to maintain an ecologically-balanced environment and to keep the environment's carrying capacity within limits.

<http://www.idrc.ca>.

4. *Programme for the Further Implementation of Agenda 21*, U.N. GAOR, 19th Spec. Sess.at paras. 4, 9, U.N. Doc. A/RES/S-19/2, (Sept. 1997) (visited Feb. 15, 1999) <gopher://gopher.un.org/00/ga/recs/RES-S19.2>.

5. UNFPA, POPULATION ISSUES BRIEFING KIT 6 (1994). Current literature on population growth and resource use is often focused on whether or not enough food can be produced. As this is critical for survival, there is an insufficient amount of emphasis placed on how the ecosystem itself can be sustained, which includes innumerable species dependent on habitat for survival, each of which contributes an intrinsically significant function in maintaining ecosystem vitality.

Unsustainable levels of overconsumption and production are primarily found in affluent societies in the North where population growth is not perceived to be a problem. The wealth and status enjoyed by the North has also led to the "indiscriminate pursuit of economic growth in nearly all countries" which "is threatening and undermining the basis for progress by future generations."[6] These wide-scale activities have resulted in indisputable signs of anthropogenic ecosystem damage in, among others, the form of climate change,[7] ecosimplification[8] and freshwater constraints.[9] Although forest preservation is a mitigating force in containing the speed of damage in these foregoing realms, reaction to a proposed global forestry treaty[10] demonstrates that precaution has yet to become the norm.

1. Climate Change

Climate change is considered one of the most serious threats to

6. *Id.*

7. Global warming is almost completely attributable to resource use and waste production by developed nations as well as fossil fuel pollution and ozone-depleting chlorofluorocarbons. *See* Judith E. Jacobsen, *Population, Consumption, and Environmental Degradation: Problems and Solutions*, 6 COLO. J. INT'L ENVTL. L. & POL'Y 255, 258 (1995); UNFPA, POPULATION AND SUSTAINABLE DEVELOPMENT: FIVE YEARS AFTER RIO 27 (1997) [hereinafter AFTER RIO] (noting that while emissions per person have been on a downward trend, population growth has caused total carbon dioxide emissions to rise). "Remarkably, the IPCC does not mention action to slow population growth as a possible strategy to mitigate global warming." *Id. See also* Donald M. Goldberg, *Negotiating the Framework Convention on Climate Change*, 4 TOURO J. TRANSNAT'L L. 149 (1993).

8. Ecosimplification results from lost biodiversity. As noted in AFTER RIO, the Earth is believed to have between 7 to 20 million species of which only 1.75 million have been catalogued. AFTER RIO, *supra* note 7, at 23. Current extinction rates are fifty to a hundred times faster than the natural background rate of extinction and loss estimates over the next 25 years range from 2 to 25 percent of species. *Id.* Destruction comes from poaching and loss of habitat. Africa and Asia have lost two thirds of their original wildlife habitat and losses of 80 percent or more have occurred in Burkina Faso, Burundi, Gambia, Ghana, Liberia, Mauritania, Rwanda, Senegal, Sierra Leone, Bangladesh, India, Sri Lanka and Vietnam. *Id.* Rapid deforestation in the "commons" of countries where women have the burden of seeking fuelwood is frequently attributed to their lack of control over the land and their non-consultation over its use. *Id.* at 22. "Women could be powerful agents of conservation since they directly suffer the consequences of resource management failure." *Id.* at 23.

9. *See id.* at 18-19 (stating that for poor women, water shortages mean extreme hardship as the extra time and energy needed to obtain water increases their risk of malnutrition and subsequent pregnancy-related health concerns for themselves and their offspring). Responsibility for water means women have a profound interest in its supply, as well as the knowledge to make their involvement in community decision-making on land and water issues, crucial. *Id.*

10. *World Notes: Saving the Earth - Later*, MACLEAN'S, July 7, 1997, at 47. This article describes how the week-long UN Rio Plus Five Conference in New York in June 1997 "designed to rekindle the spirit of the 1992 Earth Summit in Rio de Janeiro—largely avoided concrete commitments." *Id.* "Delegates shelved a bid by Canada to start negotiations on a global forestry treaty; talks are now unlikely before 2000." *Id.*

planetary life.[11] Global warming is a consequence of the build-up of greenhouse gases, such as carbon dioxide pollution from the burning of fossil fuels. The Intergovernmental Panel on Climate Change (IPCC) believes that human-induced climate change has caused a rise in global mean temperatures by 0.5 degrees Celsius since the end of the 19th century and that a further rise of 1 to 3.5 degrees Celsius will occur before the end of the next century.[12]

This will result in shifting climate zones, the death of mountain and boreal species, and a 14 to 17 percent loss of tropical rainforest and boreal forest.[13] Sea levels will rise anywhere from 15 to 95 centimeters and will have catastrophic consequences for some countries and island states.[14] Exposure to heat extremes will affect human health, as will the increased range of tropical diseases, parasites and insect vectors.[15]

The recent convention in Kyoto, Japan, where a new Protocol for emissions reduction was negotiated, received mixed reviews as to its effectiveness. Developing nations undergoing rapid industrialization "rebuffed all attempts to bring them into the accord, even on a voluntary basis" and defeated "even a gently worded article that would have permitted developing countries to join the protocol at an unspecified future date."[16] That affluent nations have agreed to effectuate the trade-offs required to meet their commitments heralds an "end to using the lack of scientific certainty as an excuse to do nothing"[17] and a promotion for developing and using new technologies.[18] Indisputably, converting words to action is now compulsory.

2. Ecosimplification

Deforestation is a militating factor affecting the rate of climate change, as trees which absorb carbon dioxide and release oxygen are removed. Commercial logging has been identified as an important cause of world-wide deforestation, and illegal logging, particularly in the Amazon, remains highly problematic. Furthermore, in contrast to a natural forest fire, clear-cutting removes the life-generating biomass trees contribute to the food chain, while the "slash and burn" approach

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11. AFTER RIO, *supra* note 7, at 26.
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Inside the Kyoto Deal*, MACLEAN'S, Dec. 22, 1997, at 22, 24.
17. *Id.* at 25.
18. *See* Danylo Hawaleshka, *Cashing in on Cleaner Air*, MACLEAN'S, Dec. 22, 1997, at 25. Hawaleshka notes how a study for the Canadian Institute for Environmental Law and Policy reported that only ten landfills in Canada capture methane from decaying organic material for combustion into electricity, and that by converting 60 percent of its landfill methane "the country could cut a significant portion of its emissions." *Id.*

to forests releases more carbon dioxide into the atmosphere.[19]

In addition, tropical deforestation is "probably the greatest single threat to the world's biodiversity."[20] Removal of forest cover results in ecosimplification meaning that "[s]pecies are losing their habitat in the unequal competition with humans. We are commandeering wildlife habitat for agriculture, cities, roads, factories, leisure and tourism."[21] Future population growth will only compound this sprawl to the utter detriment of the world's non-human inhabitants.

3. Water Constraints

Another non-renewable component of the ecosystem is usable freshwater, the availability of which has rarely been examined in the context of population growth. "Analysts fail to recognize the critical impacts that increased population pressures on the world's freshwater supply can have on human health, the environment, and international security."[22] Water is an "absolutely limited resource" so that "any increase in population leads automatically to lower availability per person."[23] Current unsustainable water use by urban centers, industries and agriculture result in the discharge of water contaminated with chemicals and heavy metals into the water cycle.[24] Pressures from

19. *See The Nature of Things: The Great Northern Forest* (CBC television broadcast, Apr. 10, 1997).

20. AFTER RIO, *supra* note 7, at 23. *See also* United Nations Population Division for Economic and Social Information and Policy Analysis, *Population and Deforestation in Developing Countries* POPULATION NEWSLETTER, No. 56, Dec. 1992, at 6 ("[T]ropical deforestation has provoked the largest body of current research in the field of population and environment.").

21. AFTER RIO, *supra* note 7, at 22-23. Habitat loss and the rate of deforestation tend to be highest where human population density is highest. *Id.*

22. Pamela LeRoy, *Troubled Waters: Population and Water Scarcity*, 6 COLO. J. INT'L ENVTL. L. & POL'Y 299, 302 (1995). Between 1940 and 1990, the world's population more than doubled, resulting in a simultaneous doubling of per capita water use. The practical result was that the global use of water increased over four times in 50 years, and that given its finite nature, such a quadrupling of use cannot occur again. *Id.* Population growth not only increases water needs, but helps accelerate the environmental disturbances of the water cycle due to greater food and fuel production. *Id.* at 305. Among these disturbances are "deforestation and other destructive land-use practices, the disposal of waste, the use of pesticides and fertilizers, and the release of greenhouse gases that could warm the global climate. These activities limit the amount of water that can be captured and pollute what water is available." *Id.* That water constraints will be compounded by climate change is acknowledged by Malin Falkenmark in the essay, *Landscape as Life Support Provider: Water-Related Limitations*. Malin Falkenmark, *Landscape as Life Support Provider: Water-Related Limitations in* POPULATION - THE COMPLEX REALITY: A REPORT OF THE POPULATION SUMMIT OF THE WORLD'S SCIENTIFIC ACADEMIES 103, 110 (Sir. F. Graham-Smith, F.R.S., ed., 1994) [hereinafter COMPLEX REALITY].

23. AFTER RIO, *supra* note 7, at 17.

24. *See* LeRoy, *supra* note 22, at 303, 313. The overexploitation of groundwater in Bangkok is causing parts of the city to sink at a rate of 14 centimeters a year, leading to cracked pavements, broken sewer and water pipes, seawater intrusion and flooding. Treatment of contaminated groundwater can be prohibitively expensive and time-

growing populations are increasing dependence on underground aquifers as water tables and river levels fall.[25]

Water scarcity begins with supplies falling below 1,000 cubic meters per person per year, and water stress is found in those countries with annual supplies of less than 1700 cubic meters per person. In 1990, 28 countries were in a state of water stress or scarcity, and by 2025, the number "will soar to 50 countries with 3.32 billion inhabitants" affected.[26] Significantly, deforestation reduces the freshwater supply as it results in less local rainfall. In addition, erosion resulting from deforestation reduces the amount of rainwater absorbed and thereby lowers groundwater levels.[27]

If "sustainable development ultimately implies a stationary population,"[28] then current unsustainable environments along with the foregoing changes already in evidence will lead to very mobile populations. Human-induced environmental disasters have already given rise to at least 10 million environmental refugees, composed primarily of women with their children, and "if current trends continue unbroken, there could be major population shifts."[29] Under these circumstances, sustainable development may well come to be appraised as political rhetoric which, so as not to hinder industry, proffered "too little, too late."

B. *Inefficient Per Capita Consumption*

In order to achieve sustainability, several United Nations Declarations have called for a reduction in overconsumption. Chapter 4, Paragraph 3 of Agenda 21 explicitly recognizes that "the major cause of the continued deterioration of the global environment is the unsustainable pattern of consumption and production, particularly in industrialized countries, which is a matter of grave concern, aggravating poverty and

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consuming. *Id.*

25. AFTER RIO, *supra* note 7, at 18.

26. This is according to UNFPA medium projections for population growth as cited in AFTER RIO, where it also states that a shift from the 1990 abundance of 3200 cubic meters per person to acute scarcity is expected in Nigeria by 2050, when "they will be down to 910 each, on the medium population projection." *Id.* Somalia, Kenya, Rwanda, Burundi and Malawi will face extreme scarcity, by 2050, when supplies will be "less than 300 cubic metres per person." *Id.*

27. *Id.* at 22.

28. Herman E. Daly, *Sustainable Development: From Concept and Theory to Operational Principle, in* RESOURCES, ENVIRONMENT, AND POPULATION: PRESENT KNOWLEDGE, FUTURE OPTIONS 25, 37 (Kingsley Davis and Mikhail S. Bernstam eds., 1991) [hereinafter FUTURE OPTIONS]. Daly states that "[s]ustainability is compatible with a large population living at a low level of per capita resource use, or with a small population living at high levels of resource use per capita. For many countries resource consumption levels are below sufficiency, yet ecological carrying capacity has already been exceeded. In such cases population control is a precondition rather than an ultimate consequence of sustainable development." *Id.* at 37.

29. UNFPA, POPULATION AND THE ENVIRONMENT: THE CHALLENGES AHEAD 21 (1991).

imbalances."[30] As Chapter 4 of Agenda 21 is concerned with consumption, the lack of study given to this source of ecological imbalance is acknowledged in Paragraph 6 which states that "[g]rowing recognition of the importance of addressing consumption has also not yet been matched by an understanding of its implications" and "[m]ore needs to be known about the role of consumption in relation to economic growth and population dynamics in order to formulate coherent international and national policies."[31]

To achieve sustainable development and a higher quality of life for all people, Principle 8 of the Rio Declaration suggests that States should reduce and eliminate unsustainable patterns of production and consumption and promote appropriate demographic policies.[32] In addition, Paragraph 1.2 of the Preamble and Principle 6 in the second chapter of the ICPD make reference to "unsustainable patterns of production and consumption."[33] The Report of the Fourth World Conference on Women also carries a reference to the deleterious consequences of such activities.[34]

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30. *United Nations Conference on Environment and Development*, UN Doc.A/CONF.151/26 (1992), 31 I.L.M. 814 [hereinafter Agenda 21]. Paragraph 4.4 states "[m]easures to be undertaken at the international level for the protection and enhancement of the environment must take fully into account the current imbalances in the global patterns of consumption and production." Paragraph 4.5 states:

> Special attention should be paid to the demand for natural resources generated by unsustainable consumption and to the efficient use of those resources consistent with the goal of minimizing depletion and reducing pollution. Although consumption patterns are very high in certain parts of the world, the basic consumer needs of a large section of humanity are not being met. This results in excessive demands and unsustainable lifestyles among the richer segments, which place immense stress on the environment. The poorer segments, meanwhile, are unable to meet food, health care, shelter and educational needs. Changing consumption patterns will require a multipronged strategy focusing on demand, meeting the basic needs of the poor, and reducing wastage and the use of finite resources in the production process.

Id. at ¶ 4.5.

31. *Id.* at para. 4.6. Following the Earth Summit, the belief was expressed that a Consumption Summit should be convened in the form of an International Conference on Population, Consumption and the Environment. Jacobsen, *supra* note 7, at 56.

32. *Declaration on Environment and Development, United Nations Conference on Environment and Development*, UN Doc.A/CONF.151/26/Rev.1, princ. 8 (1992), 31 I.L.M. 874 [hereinafter Rio Declaration].

33. *International Conference on Population and Development* (Cairo, 1994), UN Doc. A/CONF.171/13, Ch. 1, Preamble [hereinafter ICPD]. The relevant sentence in Paragraph 1.2 states in full: "Around the world many of the basic resources on which future generations will depend for their survival and well-being are being depleted and environmental degradation is intensifying, driven by unsustainable patterns of production and consumption, unprecedented growth in population, widespread and persistent poverty, and social and economic inequality." *Id.* at para. 1.2.

34. *The Fourth World Conference on Women*, UN Doc.A./CONF.177/20, at para. 246 (1995), 35 I.L.M. 401 [hereinafter Beijing]. This paragraph reiterates and expands on Paragraph 4.3 of Agenda 21.

The conference provisions on consumption have been described as both clear and direct. However, it is argued that they are so straightforward "in part from a lack of substantive programs and recommendations to give the statements teeth and in part from the varied and vague meanings of 'unsustainable.'[35] The premise of this analysis is that since nations would protect "their sovereign rights to produce and consume as they wish" the provisions would be somehow less than clear and direct if there were substantive recommendations to pursue.[36] In effect, this contention provides affluent nations with an excuse to obfuscate and avoid their obligations to limit their activities.

1. Overconsumption

"Overconsumption by the world's fortunate is an environmental problem unmatched in severity by anything but perhaps population growth."[37]

On the basis of consumption alone, the United States is the most overpopulated nation in the world. The average person in the U.S. consumes almost 20 times as much as a person in India or China and 60 to 70 times more than a person in Bangladesh.[38] Using energy consumption as an indicator of sustainability, a child born in the United States represents twice the environmental impact on life-support systems as one born in Sweden, three times one in Italy, thirteen times one in Brazil, thirty-five times one in India and 140 times one in Bangladesh.[39]

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35. Jacobsen, *supra* note 7, at 258 n.10. "[C]onsumption" is defined as everything populations do to feed, house and clothe themselves including the industrial and commercial activities required to produce the products and services used. *Id.* at 256 n.3. *See also* Digby J. McLaren, *Population Growth - Should We Be Worried?* 17 POPULATION & ENV'T 243, 249 (1996). McLaren defines "sustainability" as the *availability* of life-supporting resources and a capacity to absorb waste, not only now, but in the immediate and long range future, while absorbing another 1 billion consumers every 11 years or so, for the next 20 or 30 years. *Id.* I would suggest that at the present rate of environmental decline, "unsustainable" could be defined by the pejorative meaning of "consumer," as some of its synonyms portend: deplete, dissipate, drain, exhaust, expend, finish up, fritter away, lessen, squander, use up, vanish, waste, wear out, annihiliate, decay, demolish, destroy, lay waste, devastate and ravage. *See* THE NEW COLLINS THESAURUS 123 (10th ed.1984).

36. Jacobsen, *supra* note 7, at 256 n.10.

37. DONALD G. KAUFMAN & CECILIA M. FRANZ, BIOSPHERE 2000: PROTECTING OUR GLOBAL ENVIRONMENT 129 (1993) [hereinafter BIOSPHERE 2000].

38. G.H. Brundtland, Population, Environment and Development, Address at The Rafael M. Salas Memorial Lecture (1993) [hereinafter Brundtland]. In calculating per capita waste, wealthy people generate far more pollution, with the exception of untreated sewage, than do the poor. The 25 million richest Americans generate 11 tons of carbon per capita each year from the burning of fossil fuels, while the world's poorest 500 million release about 0.1 ton per capita. ALAN THEIN DURNING, HOW MUCH IS ENOUGH? THE CONSUMER SOCIETY AND THE FUTURE OF THE EARTH 49-50 (1992), *cited in* Lamont C. Hempel, *Population in Context: A Typology of Environmental Driving Forces*, 18 POPULATION & ENV'T 439, 450 (1997).

39. REPORT OF THE INDEPENDENT COMMISSION ON POPULATION AND QUALITY OF LIFE,

Overall, the United States consumes more than 4.5 billion metric tons of materials annually. With only 5 percent of the world population, the United States nevertheless accounts for approximately 25 percent of global energy use on an annual basis. In 1994, the U.S. used 19.9 million barrels of oil *per day* while the remaining OECD countries *collectively* used 23.8 million barrels per day.[40] Based on per capita energy use alone, an increase in the American population of 125 million is the equivalent of increasing the population of a developing country by 1.25 billion people.[41] The most fundamental indicator of overconsumption by the affluent is also the most conspicuous in history. Any aspiration to consume a diet of the western world is being foreclosed by world population growth.[42]

2. Underconsumption

Defining unsustainable as "inefficient resource use" suggests that overconsumption is only one side of the equation. Underconsumption by the "victims of multiple deprivation" also leads to environmental degradation and is primarily a result of poverty and a lack of technology.[43] The nexus between consumption, poverty and population are considered in Chapter 3 of the ICPD in Paragraph 14. It states, in part "[e]fforts to slow down population growth, to reduce poverty, to achieve economic progress, to improve environmental protection, and to reduce unsustainable consumption and production patterns are mutually reinforcing."[44] The role of the international economic system[45] in main-

CARING FOR THE FUTURE - MAKING THE NEXT DECADES PROVIDE A LIFE WORTH LIVING 52 (1996).

40. *U.S. Population and Sustainable Development*, 22 POPULATION & DEV. REV. 391, 392 (emphasis added) [hereinafter *U.S. Population*].

41. Elizabeth Rohrbough, *On Our Way to Ten Billion Human Beings: A Comment on Sustainability and Population*, 5 COLO. J. INT'L ENVTL. L. & POL'Y 237 (1994), *cited in* Jill Bracken, *Respecting Human Rights in Population Policies: An International Customary Right to Reproductive Choice* 6 IND. INT'L & COMP. L. REV. 197, 204 (1995).

42. *See* Bracken, *supra* note 41, at 204 n.49. She indicates that most American grain is consumed indirectly through meat (as well as soft drinks) and that at United States consumption levels, the "world grain output could only sustain 2.75 billion people, half as many as are alive today." *Id.* At Italian consumption levels (half that of the US) 5.5 billion people could be supported, whereas "at the Indian level, world grain output could sustain 11 billion people." *Id.* Short of harvesting kelp from the sea, or advanced technological breakthroughs, the most favourable short-term solution would be that "the affluence of the *world's* diet must be reduced" *Id.* (actually it is the diet of the affluent of the world which must be reduced) (emphasis added). Bio-tech grain patents are beyond the scope of this article as is a discussion of the technology which brought about the "green revolution" of the 60's and 70's.

43. PAUL HARRISON, THE THIRD REVOLUTION - ENVIRONMENT, POPULATION AND A SUSTAINABLE WORLD 83, 274 (1992). *See also* Jacobsen, *supra* note 7, at 266-67 (stating that environmental damage stems directly from poverty, the options that poverty excludes and the low productivity that flows from it).

44. ICPD, *supra* note 33, at para. 3.14. *See also* Dr. Nafis Sadik, *Reflections on the International Conference on Population and Development and the Efficacy of UN Confer-*

taining "a low technological level" amongst the world's poor, directs attention back to the North as the controlling influence behind both underconsumption and overconsumption.

The desire by non-industrialized countries to mimic the consumption patterns of the world's greatest polluters is a matter for concern.[46] Furthermore, the rapidly growing worldwide gap between rich and poor increases the risks posed to environmental systems by these two extremities of the economic spectrum. "Extreme differences in consumption are inevitable in a world that contains 358 known billionaires whose combined net worth equals the combined annual incomes of the poorest 2.5 billion people."[47]

> [T]he dominant perspective that informs policymakers and citizens alike is that of economics where insatiability is taken as axiomatic, analytically and normatively. In fact, the very notion of progress and the belief in unending growth is premised on the inevitability and desirability of increasing consumption.[48]

As buyer preferences transform yesterday's luxuries into today's social expectations,[49] the environmental externalities which would attach to these products remain unaccounted for, underscoring how such costs are viewed as non-profitable to the production process and to the final sale.[50] Goals to reduce consumption have been mainly rhetorical,

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ences, 6 COLO. J. INT'L ENVTL. L. & POL'Y 249, 250 (1995).

45. HARRISON, *supra* note 43, at 84-85. A more comprehensive overview of the economic factors which bolster the industrialized north is beyond the scope of this article.

46. *See* DURNING, *supra* note 38, at 117-35. This can also lead to traditional societies abandoning their cultures in favor of adopting materialistic values, usually disseminated in mass advertising by global producers.

47. Hempel, *supra* note 38, at 449.

48. *See* Thomas Princen, *Toward a Theory of Restraint*, 18 POPULATION & ENV'T 233, 234 (1997). *See also* McLaren, *supra* note 35, at 248. He describes how most economists ignore the limitations of population growth and consumption because they ignore the eco-sphere "[t]hey think in terms of an infinite world."

49. *See* HARRISON, *supra* note 43, at 275.

50. Since conventional economic accounting does not incorporate the depletion of natural resources or the deleterious emissions generated by any given process or activity, a nation's GNP is not an accurate reflection of economic growth. PAUL R. EHRLICH ET AL, THE STORK AND THE PLOW: THE EQUITY ANSWER TO THE HUMAN DILEMMA 241 (1995). The final price paid by consumers for a product will not include the price of pollution reduction or clean-up charges if the cost of polluting is not accounted for. This has effectively allowed industrialized nations to develop their markets at the expense of the biosphere since these costs are diffuse, spread over time and difficult to calculate. PAUL EHRLICH & ANNE EHRLICH, POPULATION, RESOURCES, ENVIRONMENT: ISSUES IN HUMAN ECOLOGY 285 (1970). The application of the "polluter pays principle" ensures that pollution costs, or externalities, are internalized. *See* Rio Declaration, *supra* note 32, at princ. 16 (stating that "[n]ational authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.").

reflecting how such objectives directly contradict "commercial and employment policies aimed at economic growth for which *increased* consumption is integral."[51] Far less attention has been paid to the forces which impel overconsumption than to the factors leading to overpopulation,[52] particularly since the pollution from this form of inefficient consumption is transboundary and, therefore, less conspicuous.

"It is easier to force an Indian woman to have fewer babies than it is to force Americans to drive fewer cars."[53]

C. The Forces that Drive Us

One study on the "driving forces" involved in environmental destruction identified the eight interactive variables of a causal framework, as: 1) Anthropocentrism: a core value which refers to the preoccupation with human progress and domination at the expense of other species. It also encompasses the widespread domination of women by men, and the ecological consequences that such domination produces; 2)

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51. Princen, *supra* note 48, at 252 (suggesting that in the many societies which equate progress with material consumption, the distance created between production and consumption decisions makes it virtually impossible to relate one's individual decisions to collective and environmental impacts). *But see* Jacobsen, *supra* note 7, at 256 n.3 (listing "consumption policies" such as: "changing technologies used to produce goods so that resources are used more efficiently or not needed at all; economic and regulatory policies to encourage efficiency . . . reduction in the use of primary materials, and reuse, recycling and improving durability of goods; efforts to change cultural and psychological beliefs so that individuals use less; economic, political, and technological changes that improve the material condition of people who live lives of material dearth; and political changes that improve equity of access to resources").

52. *See* Jacobsen, *supra* note 7, at 259. She notes that "[t]his argument, often made by analysts from the South, is echoed by Northern communities of faith, people with concerns for the Third World, and environmentalists, who urge the inclusion of consumption in industrialized countries in the international debate over sustainable development." *Id. See generally* POPULATION, CONSUMPTION, AND THE ENVIRONMENT - RELIGIOUS AND SECULAR RESPONSES (Harold Coward ed., 1995) [hereinafter POPULATION, CONSUMPTION AND THE ENVIRONMENT]; LOURDES ARIZPE ET AL., POPULATION & ENVIRONMENT - RETHINKING THE DEBATE 5 (1994).

53. John Stackhouse, *Quantity of Life*, THE GLOBE AND MAIL, Sept. 3, 1994, at D1; John Stackhouse, *Is the Problem Overconsumption or Overpopulation?*, THE GLOBE AND MAIL, Sept. 1994 at D-3. *See* Nathan Keyfitz & Kerstin Lindahl-Kiessling, *The World Population Debate: Urgency of the Problem, in* COMPLEX REALITY, *supra* note 22, at 43 [hereinafter *Population Debate*]. They discuss how in 1994, approximately 500 million automobiles were being used worldwide, by about 1/5th of the world's population, or 1.1 billion drivers. *Id.* If full development means that 1/5th of the projected 10 billion global inhabitants, or 2.5 billion people, become drivers of fossil fuel burning and terrestrial warming vehicles, the environmental consequences will be inconceivable. *Id. See also* BIOSPHERE 2000, *supra* note 37, at 207 (quoting the Gaia Peace Atlas "Since the Industrial Age the world has increasingly depended on fossil fuels. Modern civilization is actually based on non-renewable resources. This puts a finite limit on the length of time our civilization can exist"). But emission-free vehicles are being tested for mass production, including hydrogen-cell buses and electric cars. Public demand for these vehicles would compel the market to respond to, rather than set, consumer trends.

Contempocentrism: also a core value which involves the human preoccupation with the present, often at the expense of future generations, both human and non-human; 3) Population Growth and Migration: an amplifier, or a principal means by which core values are extended. It involves the rate and magnitude of changes in fertility, mortality and migration; 4) Technology: can be either beneficial or detrimental but is another amplifier of core values which has an enormous impact on the environment; 5) Poverty: a consumptive behavior variable that is a major creator of ecological poverty; 6) Affluence: also a behavior variable, it encourages environmental destruction through overconsumption, a lack of concern for natural resource depletion and "throw away" consumer lifestyles; 7) Market Failures: represent environmental externalities and unpriced opportunity costs, such as acid rain pollution; and the 8) Failure to Have Markets: results in an unacceptable level of environmental damage due to an absence of assigned property rights or a failure to recognize economic value in vital ecological resources and services.[54]

Linkages between behavioral choices and the perception of how these choices will benefit the self can be understood from a more comprehensive review of these concepts. Contempocentrism, defined as "the elevation of individualism over the human community, just as anthropocentrism,[55] represents the elevation of the human community over the rest of nature," results in "net present value maximization" being the "most widely accepted rationale for placing individual self-interest above that of the collective human and biospheric community."[56] A further force considered to impel the consumptive behaviors of the world's middle-class is "the tension between poverty and affluence." This tension is also considered a source for "the political paralysis in environmental policy making."[57]

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54. Hempel, *supra* note 38, at 443. Additionally, Hempel states that the "model reveals the folly of basing environmental improvement strategies on unicausal theories and linear solutions—even demographic ones. It also helps explain why thinking in terms of tradeoffs rather than solutions may be more productive." *Id.* at 459.

55. *See id.* at 445. He indicates the irony that, while self-centered behavior, both individual and as a species, is now the "ultimate threat to our planet" due to amplification by rapid population growth and new technologies, human aggrandizement had important evolutionary survival value. He also discusses how such anthropocentric thinking is also manifest in gender-based differences, often "symbolized in the way nature—"she"—is defined and treated." *Id.* at 446. I would suggest that disparaging the feminine has often been accomplished by equating it with emotion and irrationality. An example of how this approach has been legitimized by modern science is the emphasis on (linear) instinct over any more complex depth of feeling in non-human species. Acknowledgment of such feelings would require accepting not only emotional but also rational thought processes in other mammals, as intelligence in the form of rational thinking, has its foundation in emotive capacities. Having to incorporate "the feminine" is avoided so as not to have to abandon the utterly anthropocentric warning against anthropomorphism, and so as to maintain a reasoning which justifies a strictly utilitarian view of non-human species.

56. *Id.* at 447.

57. *Id.* at 449. An example of political ambivalence given is environmental protection

To correct market failures, consideration has to be given to those most directly affected by today's decisions. "Since future generations are logically denied representation in the market," the economist must achieve "an efficient allocation of resources for present generations, while correcting pricing distortions."[58] Many economists believe that reliance on a free market, despite its premise of continuous growth, is the best mechanism to account for all externalities.[59]

The "missing market" problem is analogized to the "tragedy of the commons" where collectively-used property ends up destroyed.[60] Critics of this analogy indicate that communal property can be sustainably managed and that when land in developing countries becomes privatized it is most often women who are adversely impacted.[61] Nevertheless, the trend now is for economists in the North to use the absence of market structures to account for everything from the decline of local fisheries, due to a lack of private oceanic property rights, to the growing threat to biodiversity, where nature's amenities are seen as "jointly supplied and non-exclusive."[62]

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measures through higher gasoline taxes, which were rejected due to their regressive impact on income distribution. For a specific example on attempts to ensure political accountability in environmental policy-making, *see* Diana D.M. Babor, *Environmental Rights in Ontario: Are Participatory Mechanisms Working?*, COLO. J. INT'L ENVTL. L. & POL'Y 1998 Y.B. 121 (forthcoming in 1999).

58. *Id.* at 452.

59. As Edward Abbey noted "[g]rowth for the sake of growth is the ideology of the cancer cell." BIOSPHERE 2000, *supra* note 37, at 565.

60. Garrett Hardin, *The Tragedy of the Commons* 162 SCIENCE 1243, 1244 (1968). It states, "Ruin is the destination toward which all men rush, each pursuing his own best interest in a society which believes in the freedom of the commons." *But see* Ronald D. Lee, *Comment: The Second Tragedy of the Commons in* FUTURE OPTIONS, *supra* note 28, at 321 n.4 (noting that historically, common property resources were not free-access, but rather, were communally managed).

61. *See* Hempel, *supra* note 38, at 453-54. He notes that studies from anthropology and archaeology show communal property has often been sustainably managed for many centuries on the basis of cultural practices and institutions for self-regulation. Even the medieval commons used in Hardin's analogy "have been found to be far more stable, ecologically, than the rift between individual and collective rationality would seem to suggest. . .[n]evertheless, Hardin's allegory may have increasing relevance in the modern era. The cultural practices and community-based institutions that in the past served to protect common resources are now in decline as a result of population growth, cultural erosion, and external development pressures." *Id.* at 453-54. *But see* Antonio G.M. La Vina, *The Right to a Sound Environment in the Philippines: The Significance of the Minors Oposa Case*, 3 REV. EUR. COMMUNITY INT'L ENVTL L. 246, 250-51 (1994). *See also Policy Statement on Population and Environment, in* WOMEN AND THE ENVIRONMENT 22 (G. Reardon, ed., 1993) (commenting how people, primarily women, have traditionally adapted to and shaped the natural environment through the accumulation of local knowledge, the devaluation of which has increased environmental degradation). *See generally* UN Economic Commission for Africa, African Training and Research Centre for Women, Update No. 17, Nov. 1991, at 10-11; and Recommendations of the Expert Group Meeting on Population and Women, Report of the Secretary-General of the Conference, Substantive Preparations, Dec. 16, 1992, E/CONF.84/PC/6 at 20-21.

62. Hempel, *supra* note 38, at 453, 455-56. The environmental destruction of the

However, the process of assigning market values to the greater biosphere signifies a complete and all-encompassing entrenchment of anthropocentric values. Making animals and plants subject to the laws of the marketplace obviates the need to care for the rest of the ecosystem, because their assigned values would have no connection with their role in a forest or marine ecosystem.[63] The numerous unknown species which are presently disappearing would not be computed as having value to humans. "The real value of the ecosystem is without limit, as it uniquely enables us to stay alive on the planet."[64]

In light of the fact that private ownership is also no guarantee that an ecosystem will not be subject to unsustainable abuse, a substantive right to an ecologically-balanced environment would provide recognition for the life-giving value of the ecosystem. In addition, this right would serve to attenuate anthropocentric and contempocentric motivations by providing for a balance between that of the self and the other, the present and the future, and our rate of consumption and fertility.

D. Affluence and Population

The Rio Declaration acknowledges that industrialized countries are largely responsible for unsustainable activities, as differentiated responsibilities reflect the level of a state's industrial development. Principle 7 sets forth that:

> states shall cooperate in a spirit of global partnership to

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eastern command economies can be explained by the absence of market forces, which "is particularly true in the case of ecosimplification, where the absence of market incentives for protecting habitat or common property appears to have its greatest impact." *Id.* at 456.

63. McLaren, *supra* note 35, at 250. In the border areas of Cambodia, Laos, Vietnam and Thailand, biologists have spent decades, in a region plagued by thirty years of warfare, seeking the elusive kouprey, a wild forest ox of which an estimated few dozen survive today. The kouprey is probably the most endangered big mammal in the world, yet six decades of international effort to study it or even capture it on film has only resulted in the loss of lives due to land mines and armed attacks. Since the likelihood of finding the kouprey remains slight, the World Wildlife's Fund Hanoi office has not allocated its limited funds to prioritize this mystery bovid. Steven Hendrix, *Quest for the Kouprey*, READER'S DIG., Sept. 1996, at 105, as condensed from *International Wildlife*. More illuminating, is the "other priority" given to capturing live koupreys. According to Noel Vietmeyer of the U.S.-based National Academy of Sciences and a specialist in the economic evaluation of tropical species, the kouprey is "probably the most genetically valuable species on Earth" since kouprey cross-breeding could offer a "billion-dollar genetic boost - in terms of disease resistance and general fortitude - to domestic cattle stock" *Id.* at 106. This perception of a species which has been barely seen, in terms of its economic utility to service a minority of human livelihoods, is indicative of how the intrinsic value of nature is continuously coopted by the profit its purely physical properties yield. This is the crux of the problem which we have allowed to develop: the value of nature as a dimension for reverence has been displaced by the belief that it is strictly for our limitless use and exploitation.

64. McLaren, *supra* note 35, at 250.

> conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. 'The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.'[65]

In 1993, the U.S. government formed an advisory body on sustainable development which acknowledged that stabilizing the population without changing consumption patterns and waste production would not be enough. However, it would "make an immensely challenging task more manageable. In the United States, each is necessary; neither alone is sufficient."[66]

Indeed, it is clear that if a reduction in consumption in the North is critical, then "any population growth in a country with high levels of consumption is as severe a crisis as the environmental problems that it intensifies."[67] At present, the United States is the only major industrialized country "experiencing population growth on a significant scale."[68] Fertility in the United States has been rising in recent years and in 1989, the average number of children per woman exceeded 2.0 for the first time in seventeen years.[69]

Despite the recommendations of the ICPD, no industrial nation, other than Japan, concedes to having a stated population "policy." This is particularly true in the United States where population control is as-

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65. Rio Declaration, *supra* note 32, at princ. 7.

66. *U.S. Population, supra* note 40, at 391. The advisory body, named the "President's Council on Sustainable Development," is comprised of about thirty members drawn from "senior levels of the Clinton administration, CEOs of major corporations and heads of environmental groups." *Id.*

67. Jacobsen, *supra* note 7, at 269.

68. *Id.* Jacobsen indicates that, on the basis of data from June 1994, "the United States annually adds nearly two million people to the world's population from natural increase alone." *Id.* Births to unmarried women. . .reached a record high of more than 1.2 million in 1991, up 4 percent from 1990 and 82 percent from 1980. . .The most dramatic increase in non-marital childbearing occurred among relatively older women. One-third of unmarried mothers in 1988 were aged 25 and older, compared with about one-fourth in 1980. Unmarried teens also account for one-third of unmarried births. UNITED STATES OF AMERICA, U.S. NATIONAL REPORT ON POPULATION 21 (1994). *See also U.S. Population, supra* note 40, at 391 (stating that 60 percent of all pregnancies in the US are unintended).

69. *See* Jacobsen, *supra* note 40, at 279. "This recent increase [in fertility], coupled with a rise in immigration, makes the likelihood of population stabilization in the U.S. remote." *Id.* According to the US Census Bureau, the most recent medium range projection estimates a population of 350 million by 2030 and of nearly 400 million by 2050. *Id.* "Based on current trends, efficiency in the use of all resources would have to increase by more than 50% over the next four or five decades [in the United States], just to keep pace with *population growth.*" *U.S. Population, supra* note 40, at 393 (emphasis added).

sociated with negative or racist immigration policies.[70] Consequently, the United States has "no legislation that limits or manages population growth, advocates attempts to determine ideal population size or cultural carrying capacity, supports family planning programs, or promotes education about population issues or human sexuality."[71]

In fact, most industrialized countries, faced with aging populations, "are trying to halt the decline in their fertility rates and some have even decided to actively encourage higher fertility. . .Family policies are the principal means of addressing these objectives."[72] As such policies are aimed specifically at women in the labor market, the procedures by which governments are attempting "to reconcile professional and family life"[73] are not specified, although pro-natalist financial incentives have been offered in some jurisdictions in Europe.

The greater capacity of the affluent to access the legal system to advance and protect their interests and rights further differentiates the scope and manner by which a population policy is formulated and implemented, as between North and South. When a state policy in an industrialized country attempts to limit a freedom or right, it will likely be challenged on constitutional grounds. For example, the "special leave" granted for teachers employed by the South African government upon a birth or adoption is being challenged. That maternity benefits are limited to "the birth or adoption of two children," with only unpaid leave available for the birth or adoption of further children, is being

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70. *See* Rohrbough, *supra* note 41, at 239. She writes "[a]lthough migration does not change world population figures, it does affect the overall consumption of resources and ignores the real problem of overconsumption." *Id.* Comprehensive arguments surrounding immigration policies held by industrialized nations are beyond the scope of this article. For further information, see *U.S. Population*, *supra* note 40, at 397 (noting that one "undervalued strategy" to address immigration into the United States would involve formulating policies in international trade, economics and the environment to redress the economic, political and social conditions which influence an individual's decision to emigrate). However, choice as to when, where and why one ends up migrating does not always enter into the equation. See any and all of the most recent United Nations Declarations and Conventions pertaining to development and/or human rights for similar recommendations.

71. BIOSPHERE 2000, *supra* note 37, at 157. This book asserts that the stance of the United States government is one constituting an unofficial pronatalist policy on the basis of the following: "an income tax structure that provides deductions for all children in a family; a strong movement to limit legal abortions in the United States and to limit or stop funds to international family planning groups in countries with legalized abortion; increased benefits for each child born into a welfare family; a strong belief that the economy is based on continued population growth; and a strong belief that family size should be decided on by the family." *Id.*

72. ICPD, NATIONAL PERSPECTIVES ON POPULATION AND DEVELOPMENT, SYNTHESIS OF 168 NATIONAL REPORTS PREPARED FOR THE ICPD, 65 (1994) [hereinafter NATIONAL REPORTS]. "The majority of industrialized countries do not perceive immigration as a long-term solution to address demographic imbalances caused by fertility decline and population aging. The socio-cultural difficulties of integrating large numbers of immigrants is cited as the main reason for this." *Id.*

73. *Id.*

challenged as a violation of the South African Bill of Rights.[74] If a violation is found, the onus will be on the government to justify the right's limitation as to the importance of its purpose.

E. Summary - Part 1

Were the manifestation of anthropogenic environmental damage solely attributable to emission-producing technologies, a solution would have undoubtedly already been found. Yet, reliance on these technologies extends beyond their function as cornerstones of modern economies and in providing for affluent lifestyles. They act as principal amplifiers of the core values upon which modern economies are founded. Any reduction of their externalities needs to factor in the current and anticipated damage generated by increasing numbers of consumers as a consequence of population growth.

Generally speaking, efforts to change the anthropocentric and contempocentric attitudes in countries "addicted to economic growth"[75] require the creation of a new culture of sustainable consumption. A consideration of how anthropocentrism, in particular, has been made both culturally acceptable and unquestionable could begin with a review of how both legal and non-legal language is used to describe the position of humans in the biosphere.[76]

As well as encouraging the elimination of wasteful lifestyle practices, family planning services engender greater opportunities for women in the industrialized world.[77] However, a decision to legally challenge a limit on the number of children for which the state should provide financial benefits, overlooks both the need for short and long-term fiscal restraint, as well as the accepted "neutrality" of the two-child family as neither pro- nor anti-natalist, since it is the replacement value. Such a concern with "rights" conforms with the belief that there is no population "problem" in developed nations. In turn, such a per-

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74. The "special leave" is also being challenged as only available to female employees; it consists of twelve weeks leave on full pay. Extracted from letter from the Canadian Bar Association, Canada-South Africa Constitutional Litigation and Legal Development Project, dated July 31, 1997.

75. Rohrbough, *supra* note 41, at 238.

76. The Rio Declaration emphasizes that "[h]uman beings are at the centre of concerns for sustainable development." Vol.I, Principal U.N. Doc. A/CONF.151/26 (1992). For the affluent nations, it is a given that humans (as opposed to anything else) would be at the centre of development, whether or not it is sustainable, as it is profitable and humans are the principal beneficiaries. However, were the externalities produced by development incompatible with our core values, then the maintenance of an ecologically-balanced environment would be the centre of concern, and the excesses of development and overconsumption would not be at issue. Clearly, however, where anthropogenic damage is caused by underconsumption, the desperation of poverty requires that humans be the centre of concern, both for the sake of sustainable development and for promoting a non-existent core value of wealth re-distribution.

77. *See U.S. Population*, *supra* note 40, at 391.

ception has facilitated a measure of personal freedom on all counts that has yet to be accounted for.

PART II

A. *Legal Duties to Govern Rights*

The prevailing definition of the responsible manner in which individuals and couples are to exercise their family planning rights is by taking into account the needs of their living and future children and their responsibility towards the community. This responsibility or duty to the community is set forth in Article 29, Paragraph 1 of the Universal Declaration of Human Rights: "[e]veryone has duties to the community in which alone the free and full development of his personality is possible."[78]

Additionally, Article 2 of the 1987 Declaration on the Right to Development emphasizes that "[a]ll human beings have a responsibility for development, individually and collectively" and that individuals must consider "their duties to the community" when exercising their human rights.[79] The inherent conflict between meeting the needs of the collective and the potential infringement on reproductive rights inspires consideration of the duties attached to the rights.

Since individual and collective rights will conflict, it may be preferable to view the "right" and the "duty" as complementary, or two sides of the same coin.[80] In consequence, the "flip side" of the coin, being the fulfillment of the duty and the denial of the right, or adherence to a constraint on its exercise, is not easily agreed to because it can be drastic in its scope.

If a personal duty of constraint in the exercise of a freedom is to gain widespread support, both the individual and the community as a whole need to take active steps to further the rights of successors to an ecologically-balanced environment. Reducing consumption and decreasing the number of future inhabitants (than there otherwise could be) would facilitate the preservation of the environment for the benefit of forthcoming generations.

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78. Universal Declaration of Human Rights, G.A. Res. 217(III), UN GAOR, 3rd Sess., Supp. No. 13, at 71, U.N. Doc. A/810 (1948).

79. The Declaration on the Right to Development, G.A. Res. 41/128, U.N. GAOR, 41st Sess., Supp. No. 53, at 186, U.N. Doc. A/41/53 (1987).

80. UNESCO, HUMAN RIGHTS ASPECTS OF POPULATION PROGRAMMES WITH SPECIAL REFERENCE TO HUMAN RIGHTS LAW 17 (1977). *See also* Luke T. Lee, *Population: The Human Rights Approach*, 6 COLO. J. INT'L ENVTL L. & POL'Y 327, 339 (1995).

1. The Duty to Limit Succession

"We have only to imagine how Europeans and North Americans would respond if they were suddenly asked to have only one child per couple because the birth rate in Africa is higher than in other regions."[81]

It has only been within the last forty years that individual and collective rights regarding population growth began to diverge. Previously, these rights "coincided in the direction of pro-natalism, advancing both the individuals' and society's interest in an increasing population."[82] Given that there is both an individual and societal interest in securing and benefiting from the right to an ecologically-balanced environment, both interests have to again coincide in the direction of decreasing, or at a minimum, stabilizing, population growth.

In this regard, it is necessary to review how the duty which attaches to the right to freely choose family size has been defined. The World Population Plan of Action, formulated in 1974 in Bucharest, stipulated that couples and individuals "take into account the needs of their living and future children, and their responsibilities to the community."[83] Recommendation 30 of the Mexico City Report reiterated this principle, in 1984,[84] as did Paragraph 7.3 of the ICPD, in 1994, which adds that the "promotion and responsible exercise of these rights for all people should be the fundamental basis for government- and community-supported policies and programmes in the area of reproduc-

81. Stackhouse, *supra* note 53 at D-1, D-3 (citing the writing of Marge Berer, a British specialist in reproductive rights, who was "mocking the pressure that the rest of the world is sure to put on developing countries to limit their growth.").

82. Luke T. Lee, *supra* note 80 at 339. *See* S. JOHNSON, WORLD POPULATION - TURNING THE TIDE: THREE DECADES OF PROGRESS 1 (1994). *See also* REPRODUCTIVE HEALTH: A STRATEGY FOR THE 1990'S, 11-12 (1991) (noting that the tension between "individual good" and "common good" "is strikingly apparent in discussions of optimal family size," particularly since these decisions may involve moral judgments and ethical values). In the ICPD, *Report of the Nordic Women Parliamentarians Meeting*, Copenhagen, 3-4 March 1994, [hereinafter *Nordic Women*] it was observed, at 11-12, that "[a]lthough the individual right of each woman to decide on her fertility was considered a laudable goal, it was also suggested that. . .there was a contradiction between this fundamental right and social responsibility." As the Report mainly focused on countries with rapid population growth, the balance between individual rights and social responsibilities was to be made by the state and the apparent contradiction between "promoting individual reproductive rights while at the same time fostering a reduction in the world's population growth rate" was stated to imply "that women want to have large numbers of children, whereas surveys. . .reveal that most of these women would prefer fewer children."

83. United Nations World Population Conference, Bucharest, UN Doc.E/CONF.60/19 (1974), *Report of the United Nations World Population Conference*, Bucharest, 19-30 August 1974, Para. 14(f).

84. International Conference on Population, Mexico City, UN Doc.E/CONF.76/19 (1984). *Report of the International Conference on Population, 1984, Mexico City, 6-14 August 1984*.

tive health, including family planning."[85]

The degree to which this duty is actively undertaken depends not only on whether the knowledge and means to control reproduction are available, but also on how entrenched pro-natalist forces or biases exist within any given culture. Some of these pressures persist in developed societies and include, among others, encouraging women to marry young, to "try for a boy next time," to equating a sizeable family with masculinity[86] and to having a child to obtain or maintain a marital union. "The effect of this pressure can amount to coercion, even or perhaps especially when it comes from within the family" which, in effect, "can coerce women to make reproductive choices which they know to be counter to their interests."[87]

Within developed nations a propensity also exists among young women, as well as their partners, to view the birth of a child as their primary life accomplishment, and as a way to indirectly gain much-needed attention. They may also view the baby as the one being they can love and that will love them in return. Although these factors may be completely beneficial for all involved and may provide the parent with a sense of self-assurance, they have also been partially responsible for a proliferation of single mothers and the perpetuation of an inordinate focus on women's reproductive functions, both in how these mothers view their own personhood and in the gendered values which are subsequently transmitted to the next generation.[88] For the full responsibility of parenthood to be achieved, along with the requisite emotional maturity, a measure of stability and security must begin from within with empowerment.

2. A Right Informed by Responsibility

In considering the motivations which go into reproductive decision-making, some individuals may believe the reasons "are deeply private, and cannot be easily overridden on grounds of their adverse effects on, say, the utility of others."[89] That "unrestricted birthrates may cause

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85. ICPD, *supra* note 29. Paragraph 7.3 continues, in part with: "As part of their commitment, full attention should be given to the promotion of mutually respectful and equitable gender relations and particularly to meeting the educational and service needs of adolescents to enable them to deal in a positive and responsible way with their sexuality." *See also* Diana D.M. Babor, *Population Growth and Reproductive Rights in International Human Rights Law*, 14 CONN. J. INT'L L. 83 (1999).

86. The foregoing are listed in UNFPA, THE STATE OF WORLD POPULATION 1997, THE RIGHT TO CHOOSE: REPRODUCTIVE RIGHTS AND REPRODUCTIVE HEALTH 43 (1997) [hereinafter POPULATION 1997].

87. *Id.*

88. *See* Rebecca J. Cook, *Human Rights and Reproductive Self-Determination*, 44 AM. U. L. REV. 975, 984 (1995) (noting that "[a]n exclusive focus on motherhood is dysfunctional to women in that, if the value of women is perceived to arise solely through motherhood, women acquire status only through pregnancy and childbirth").

89. Sudhir Anand, *Population, Well-being, and Freedom*, *in* POPULATION POLICIES

adverse effects on the well-being and freedom of others—for example, of present and future generations, through environmental degradation" is premised on the view that a large population imposes "externalities" on others.[90] However, others argue that these externalities depend "on a tenuous distinction between two groups of people: those whose well-being is the object of our concern, and those whose presence is assessed purely in terms of what it does for the first group."[91]

Inasmuch as reproductive decision-making is personal, it can only be held to be "deeply personal" when the decision involves the termination of a pregnancy. Otherwise, the decision to have a child cannot be construed as entirely personal, as it is quite social in its consequences.[92] Furthermore, and as is well noted by many feminists, the concept of "freely choosing" is an anomaly for many women, who, subject to any range of social and familial "externalities" in terms of the choices they make, may have a distorted impression as to how "personal" their decisions actually are.[93]

Finally, the suggestion that only one of two groups of people has its well-being impacted by population growth ignores not only the globalized effects of ecosystem degradation, but those "non-people" species at risk of extinction. The group choosing to freely reproduce without regard for any adverse effects and "whose presence is assessed purely in terms of what it does for the first group" has chosen to be so assessed. Furthermore, its presence has little relevance in terms of what it is not doing for any group, including those that pre-date *homo sapiens*.

Another analysis of the duty attached to the right to freely reproduce argues that the use of the phrase "freely and responsibly" is confusing, as "[o]ne is left to wonder just what *responsibly* means, in particular when yoked with the word *freely*."[94] On the basis of the relevant 1974 and 1984 Conference [WPPA] provisions, the right to decide on

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RECONSIDERED - HEALTH, EMPOWERMENT, AND RIGHTS 75, 81 (Gita Sen et al. eds., 1994) [hereinafter POLICIES RECONSIDERED].

90. *Id.* at 82.

91. *Id.*

92. *See* Rita M. Gross, *Buddhist Resources for Issues of Population, Consumption and the Environment*, *in* POPULATION, CONSERVATION AND THE ENVIRONMENT, *supra* note 52, at 157. She writes that "pro-natalists regard reproduction as a private right not subject to public policy, even though they usually insist that the results of their reproduction are a public, even a global, responsibility." *Id.* Given that children involve a great deal of personal sacrifice, particularly for women, it is beneficial if the couple or individual know in advance not only what it takes to have a child, but also why they are choosing to have one.

93. *But see* RUTH DIXON-MUELLER, POPULATION POLICY & WOMEN'S RIGHTS: TRANSFORMING REPRODUCTIVE CHOICE 26 (1993) (writing that "[g]irls and women in every society have devised means, subtle or otherwise, to try to influence the outcome of decisions that concern them or to circumvent the authority of men and elders while appearing to acquiese").

94. Reed Boland et al, *Honoring Human Rights in Population Policies: From Declaration to Action*, *in* POLICIES RECONSIDERED, *supra* note 89, at 93.

the number of children is "a limited right, balanced by significant responsibilities to others," and while "the sentiments behind the theory of responsibility" are considered important, the analysis asks: "[w]ho is to decide whether persons are acting responsibly?"[95]

The WPPA's reply to this query is that the human right to freely reproduce should be consistent with "national goals and values," which, "in effect, undermines the concept of universal reproductive freedom . . . by making individual human rights subordinate to national objectives and values, and thereby insulating national policy from outside scrutiny."[96] Further, although the pre-Cairo conferences "purport to take a neutral stance with respect to overpopulation, most of their specific recommendations are directed toward lowering rates of population growth, not toward ensuring that individuals are free to determine their own fertility."[97]

As to whether there is "a fundamental right to procreate," recognition "that childbearing has consequences for others" is granted, but this does not encompass "the claim that women have a duty to society (or the planet!) to abstain from reproducing."[98] The assertion then made is that "[s]uch a duty *could begin* to exist only when all women are provided sufficient resources for their well-being, viable work alternatives, and a cultural climate of affirmation outside of childbearing so that they no longer depend on children for survival and dignity."[99]

While the foregoing has indisputable significance in developing countries where traditional stereotypical roles of women remain entrenched, and while it can certainly be recognized that a "cultural climate of affirmation" does not fully exist in the developed world, the empowerment process does not stop with the freedom to make choices under conducive conditions. Once made, empowerment decisions become truly established when responsibility rooted in the greater consequences of each choice is taken.

However, as many single mothers in both Canada and the United States can attest, the consequences of their choices differ significantly from those not similarly situated. Often living in hardship, with poor nutrition and poor employment and wage prospects, disincentives to bearing more children have little to do with simply surviving. As few

95. *Id.*

96. *Id.*

97. *Id.*

98. Sonia Correa & Rosalind Petchesky, *Reproductive and Sexual Rights: A Feminist Perspective, in* POLICIES RECONSIDERED, *supra* note 89, at 114.

99. *Id.* (emphasis added). In the rest of the section which follows this paragraph, I have removed certain "all-encompassing" statements from the overall context in which they have been expressed in order to highlight certain underlying themes. The authors of this current citation indicate that "[W]e are suggesting not that reproductive and sexual rights are absolute or that women have the right to reproduce under any circumstances, but that policies to enforce those rights must address existing social conditions and begin to change them." *Id.* at 108.

single fathers have yet to discover, it has everything to do with perceived social roles.

That the duty can only come to exist when *all* women [italics are mine] are in a position of well-being, fails to account for the fact that "well-being" is socially constructed and will vary in its substance and scope to a significant degree. Taken together, the expectation is that states are to provide any possible range of benefits to improve the condition of those who are freely reproducing and to also uphold the right to freely reproduce by refusing to set national goals to accommodate both current and future needs. Realistically, however, such a vision belongs to a world where the "purest" forms of coercion are never unleashed in a war waged over resources, because they are never scarce and the ecosystem never degrades.

As much as the foregoing arguments concerned with women's needs are important for ensuring that the women who shoulder tremendous responsibilities in many impoverished nations are not subject to further indignities, a qualification is in order and a distinction is to be drawn when discussing the many who comprise the developed world and who may have many of their most significant needs met.

3. A Norm of Restraint

There is little dispute that many citizens born in developed nations believe that the larger problems facing the planet originate elsewhere. The very notion that constraints could exist on their freedom, or right, to live at a level of material and social well-being to which they have grown accustomed, is met with fear that their world could disappear. When the prospect of increased immigration to the North is raised, many unflinchingly retort that the borders should simply be closed.[100]

100. I am basing these assertions on conversations with a number of people from a cross-section of occupations and levels of education. The idea that there could be islands of affluence amidst an ocean of poverty alarms them less than the prospect of "losing" their world as they know it. Implicit in this is the thought that the nation they live in could be "overrun by the rest of the world's masses." Little credence would therefore be given to the following message

> [T]here is simply no way for affluent denizens of the North, whose lifestyle preys upon just those beleagured resources and populations of the South, to make any credible case for world-population control, in isolation from the larger context of our own resource use and environmental impact. This discrepancy between the theory and practice of population pundits makes one wonder if the conspiracy of progressive silences on population may not represent the more ethical posture. Indeed, only as we in the North begin in greater numbers to practice our own forms of eco-asceticism, thus reducing our disproportionate dependency upon resources and technology—and continuing to reduce our own populations to make space for the needs of the poor forced by Northern policies to migrate Northward—may we engage the population issue in good faith.

The unwillingness to extend reciprocity evokes a racist and classist view of the world. The "legitimacy" of this view could be said to be grounded in a form of self-centredness that was once the reserve of a scattering of royalty, rather than an entire nation-state.[101] In essence, the universality of human rights, in practice, depends on what side of the border is at issue.

The fact that for each person who has wealth there are several who are impoverished will only be redressed with the acknowledgement that we have made the planet a metaphorical Titanic, our faith premised on the belief that science will solve everything. This global ship we have appropriated may not be able to avert an impending collapse if the speed of our "progress" is not reduced and if the number of future passengers is not stabilized and "brought up" to first class. While reducing consumption is the best immediate solution, the long-term strategy of population stabilization must also be pursued by the affluent, particularly in those states in which a pro-natalist agenda continues to be espoused.

B. *The Right to an Ecologically-Balanced Environment as a Basis for Restraint*

"[Human] nature. . .is what we were put in this world to rise above."[102]

Population growth clearly has never been the sole cause of environmental degradation anywhere.[103] Yet, in light of the scope and speed of environmental decline, the right to an ecologically-balanced environment has much in common with reproductive rights, since both are concerned with ensuring a life of quality.

Within the framework of reproductive rights lies a potential tension between the individual and the common good. Not only can this duty to the community imply that the individual or couple must exercise restraint in determining family size, but this communal element

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Catherine Keller, *A Christian Response to the Population Apocalypse*, *in* POPULATION, CONSUMPTION AND THE ENVIRONMENT, *supra* note 52, at 118.

101. A proclamation frequently made regarding any form of a duty to exercise restraint, being: "why should I reduce my consumption just so those people (referring to the South) can keep having children?" is hopefully an attitude that will die with the most over-consumption-self-oriented group of people ever to pass across the planet at once. I am referring to the baby-boomers of the developed world, whose legacy may not only be all the new and exciting technology, but more significantly, will consist of a blank cheque they have drawn on the state of the planet's ecosystem, which will be passed on to future generations to pay (as Jacques Cousteau himself described it) since taking responsibility now could mean having to forego "a material world" and could involve trade-offs over the provision of jobs, or possible affluence.

102. Katherine Hepburn, *in* AFRICAN QUEEN (Romulus-Horizon 1951) (based on the novel by C.S. Forester).

103. *See* AFTER RIO, *supra* note 7, at 5.

can also be reinforced by utilizing the duties construed within the right to an ecologically-balanced environment. The community to which the individual owes a duty to limit reproduction can be expanded to encompass the greater ecosphere in which the (global) community resides, as the right to an ecologically-balanced environment carries an implicit duty that each person, corporation and government ensure that an ecologically-balanced environment be maintained. Given that a flourishing biosphere is beneficial for all who reside within it, it is incumbent on the planet's not-so-benign predators to exercise the necessary duties to ensure the right will be not only upheld, but also available, for both present and future generations.

Towards this objective, the right to an ecologically-balanced environment provides a window through which to argue that the state must set and meet goals to reduce its own overconsumption. An environmental right is ultimately concerned with both the quality of life and the right to life itself, so there are compelling arguments to be made that our anthropocentric and contempocentric approaches to the ecosphere, by which excess and arrogance prevail over a precautionary approach, require legal constraints. This is particularly significant in affluent states where each additional human amplifies the speed of environmental harm and resource use.

The right can also support the argument that a state must provide the knowledge and means for all of its citizens to control their own fertility. The provision of knowledge must extend beyond the means to access and utilize the reproductive health care system. There must be an emphasis on providing information, within an educational context, on the full range of options available for "creating" a family. Societal services and support must be fully extended to those who opt to adopt, or have only one child, or choose not to have children, or choose pets in lieu of children, or choose to be sterilized without having children, or decide not to have children when a partner has children from a previous marriage.

The state must also direct fertility control towards its male population, particularly as developed nations witness a trend, which has been analogized with polygamy, of children being fathered across multiple marriages and relationships. Masculine responsibility has often been left outside of the discourse on reproduction and needs to be substantively addressed in the form of male contraceptive research and education. Given that every fertile male always has the potential to impregnate a female, but that the potential for females to become pregnant is less certain, the responsibility must also be assumed by the male, who has otherwise been quite free from any such considerations.[104]

Towards the further fulfillment of its duty, the state must also im-

104. *See* NORDIC WOMEN, *supra* note 82, at 12-13; POPULATION 1997, *supra* note 86, at 48-50.

plement a policy which informs people about population-environment linkages, so that the significance for undertaking responsible decision-making becomes apparent.[105] Towards this objective, the state itself must first acknowledge and analyze both the current and future implications of these linkages, as well as those between environment and consumption. Of the national reports on population and development received prior to the ICPD, only 25% of industrialized countries indicated interrelationships between the environment and population size, and between the environment and consumption.[106] The state has a duty not only to recognize the linkage, but to also engage in research to determine local and national carrying-capacities, in which community participation and awareness is emphasized.

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105. In a study on the extent to which these links are expressed by the popular media, a random sample of 150 stories about urban sprawl, endangered species and water shortages found that only one story in ten framed population growth as a source of the problem, and only one story out of the entire sample mentioned population stability among the realm of possible solutions. The study further uncovers that "journalists are aware of the controversial nature of the population issue, and prefer to avoid it if possible. Most interviewees said that a national phenomenon like population growth was beyond the scope of what they could write as local reporters." T. Michael Maher, *How and Why Journalists Avoid the Population-Environment Connection* 18 POPULATION & ENV'T 339, 339 (1997). Maher cites *Interpreting Public Issues*, a public affairs reporting textbook, which, admonishes journalists by noting that, "[a] common journalistic mistake is simply to cover events—real or staged—and ignore underlying issues" and then proceeds to identify population trends as one of the "big trouble spots" and lists world population as the first of its "forefront issues in the '90's." *Id* at 356. citing INTERPRETING PUBLIC ISSUES 320 (1991). *See also* J. MAYONE STYCOS, POPULATION AND THE ENVIRONMENT: POLLS, POLICIES, AND PUBLIC OPINION (1994) (evaluating how surveys sent by the UN to member states on their official position on population issues are structured and answered). For example, the 1988 inquiry was 42 pages long without a single question on the environment. In the 1990 survey, "not one of 38 industrial countries considered its growth too rapid, and as many as seven considered it to be too low." *Id.* Of the 169 government reports to the Earth Summit, the data confirmed "industrial nations' lack of concern about their population growth." *Id.* at 8. A 1994 American national survey indicates that 42% of respondents opposed the US sponsoring programs overseas to help other countries slow population growth and 48% disagreed that it is important to lower birth rates in the US to help save the environment. *Id.* at 13-14. Finally, 68% agreed that people everywhere should feel free to have as many children as they can properly raise. *Id.* In his conclusion, the writer suggests that the "general publics of most nations do not understand population-environment linkages" and that governments "also often ignore them, indicating the need for more research on, and perhaps education of, decisionmakers." *Id.* at 21. As was noted in the *Report of the ESCAP/UNDP Expert Group Meeting on Population, Environment and Sustainable Development*, Jomtien, Thailand, there is a need for more emphasis on community participation, the electronic and print media and formal and non-formal education to inform the public on a regular basis as to the linkage, journalists need to be more proactive, investigative and more involved in agenda setting and in assisting NGOs in problem-solving and that all media should also incorporate educational messages in the dissemination of population and environment issues. *Report of the ESCAP/UNDP Expert Group Meeting on Population, Environment, and Sustainable Development*, U.N. Doc ST/ESCAP/1033, Jomtien, Thailand, May 13-18, 1991., at 24-25.

106. *See* NATIONAL REPORTS, *supra* note 72, at 19.

1. Responses to Reductions in Fertility

The considerations which shape a population policy may not be directly related to the rate of population growth, as much as they may be a secondary outcome of gender-based discriminatory state measures.[107] Among industrialized states with declining fertility rates, concern that social security be garnered for the elderly and that at least some of its population self-perpetuates continues to contribute to pro-natalist initiatives. The steps which a state may take to address these concerns tend to be in direct opposition to its duty to limit growth.

The approach by some states in adopting "egalitarian" family policies which are "aimed at helping women combine working careers with raising families, and distributing the burden of housekeeping and child-raising more equitably between the genders"[108] has been a vital and beneficial social undertaking. However, while the international community acknowledges that "some countries need to make greater efforts, at the work place and at home, to enable women to both manage a career and raise a family," a potentially harmful qualification exists as to the extent to which such efforts should progress. "[S]ince certain aspects of family policy can inadvertently contribute to the breakup of the traditional family structure, care should be extended to minimize such adverse incentives."[109] The provision of sufficient affordable day-care undoubtedly qualifies in some states as an adverse incentive.

That the traditional family structure is inherently pro-natalist, patriarchal, and focused on female reproductive capacities is not perceived to be as disconcerting as the rapid deterioration of the "central, cohesive structure" which the traditional family proffered. That "families used to be the moral and ethical nucleus of societies, with governments playing a relatively neutral role in this regard"[110] fails to consider how

107. An example would be the state agenda to eject women from the work-place following the Second World War, largely through social pressure and an emphasis on their "familial duties." Their return to the domestic sphere helped usher in the baby boom.

108. NATIONAL REPORTS, *supra* note 72, at 17. Sweden's national report on population states as follows:

> Sweden's policy is that couples should be able to have children and combine gainful employment with child-care. In Sweden, about eighty-five per cent of mothers of underage children are employed outside their homes. The number of women that do not bear children at all is small. . .One of the corner-stones of Sweden's family policy is the parental insurance system, which offers both parents the opportunity of caring for their newborn child at home by compensating them economically for their loss of income. The parents themselves decide how to divide the parental leave between them. Another is that child day care facilities meet the demand. . .A third component is financial support for families with children, including relatively generous contributions to single parents.

Id. at 6-7.

109. *Id.* at 23.

110. *Id.*

frequently human rights were and are abused within what was and can often be a dysfunctional private sphere.

2. Discouraging Reproduction

Since most developed states are attempting to ensure that a decline in fertility does not lead to a decline in the size of the population as a whole, an emphasis on duties has yet to materialize as a state policy in any industrialized country. Although such an approach would certainly reduce consumption rates and environmental degradation, this linkage between population, consumption and the environment has yet to be fully considered beyond the contempocentric concerns of government with a rights-oriented polity.

If advocates challenged this pro-natalist positivist agenda by emphasizing the right to an ecologically-balanced environment, it would most likely arise within a nation such as the United States, where increasing population is expected to "exacerbate problems such as air pollution, landfill capacity, urban boom, overcrowded school systems and extinction of species."[111] The degree to which the citizenry will "blame" the nation's immigration policy can best be countered with an emphasis on the need for restraint by all inhabitants.

If disincentives became necessary to "encourage" a duty-oriented approach to reproduction, the degree to which such a population policy would impinge on the exercise of human rights would reflect how responsibilities to the community are perceived and the extent to which they are endorsed by individuals. A suggestion that birth quotas be analogized to laws which restrict the number of spouses, would, it is argued, make the establishment of a two-child family norm compatible with human rights.[112] As this raises issues concerned with enforcement, a preferable means may be the use of financial disincentives. Given the general preoccupation with personal economic security in affluent societies, such a strategy may prove to be the most effective means of communicating that life is indeed an expensive undertaking.

Another suggestion to ensure that a duty-based approach becomes the norm is that of an income-based tax on births. This process would internalize the environmental costs of childbearing, as the affluent "consume a disproportionate share of the environmental birthright,"[113] and would provide funds which could be transferred to poor families, or to poor nations, to facilitate improved reproductive health care or to re-

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111. Omar Saleem, *Be Fruitful, and Multiply, and Replenish the Earth, and Subdue It: Third World Population Growth and the Environment*, 8 GEO. INT'L ENVTL. L. REV. 1, 3 n.7. Even the city of London England is running out of space to bury its dead, and is attempting to "recycle" graves over a century old. *See* CBC *Evening News* (CBC television broadcast, Aug. 24, 1997).

112. *See* Luke T. Lee, *supra* note 80, at 333.

113. Ronald D. Lee, *supra* note 60, at 319.

habilitate degraded environments. In this way, no particular population size or level of fertility would be imposed by central authorities and the preferences of the people would ultimately be reflected as the system evolves.

As well, unlike the current situation, "in which we are ineluctably driven to an environmental standard lower than we would choose for our descendants if we were able," the tradeoffs "implicitly chosen between numbers and environmental quality of life" would belong to those whose choices have made it.[114] A fee on procreation would also reflect a recognition that just as the species which create an ecologically-balanced environment are having to pay (literally with their lives) for existing in "our territory," so too should we pay for the right to encroach on theirs.

The issue of money for improving standards in service delivery for reproductive health is well-documented. Although the Amsterdam Declaration on a Better Life for Future Generations which was adopted in 1989 at the International Conference on Population in the Twenty-first Century, called upon governments to double total global expenditures in population programs in order to meet the needs of millions by the year 2000, in 1997, money still remained an issue.[115] The total worldwide yearly cost of better reproductive health care is approaching $17 billion, or "less than one week of world expenditure on armaments."[116]

3. Empowering Individual Duties

Advocates and theorists of human rights have invested their abilities in defending the "claims-to that human rights contain, but have devoted much less effort to developing accounts of claims-against," as this "deals with the production rather than the consumption side of rights, the side where people bear burdens rather than receive liberties, protections, or benefits."[117] Given the power of the driving forces which underlie environmental destruction, it is valuable to consider that irresponsible reproduction has the potency to place human rights at risk, particularly, the right to life.

As "human rights are invariably asserted and defended in relation to power. . .be it political, economic, social, military, media-based, scientific, technological or even spiritual," it bears remembering that not only are human rights designed to limit power but they also counterbalance a utilitarian view with an ethical requirement for limits; "in a world where power centres are shifting, our concern for human rights

114. *Id.* at 319-20.

115. *See* UNFPA, POPULATION ISSUES BRIEFING KIT 20 (1994).

116. POPULATION 1997, *supra* note 86, at 3.

117. James W. Nickel, *How Human Rights Generate Duties to Protect and Provide,* 15 HUM. RTS Q. 77, 79 (1993).

should involve us in a constant search for sources of domination."[118]

That the power to reproduce must be constrained within a human rights framework, on the basis of an ethical requirement towards current and future generations, requires a widespread understanding of population-environment linkages. For the dissemination of this information to have any significant influence it must counter the anthropocentric forces which undermine the prospects for a sustainable and balanced ecology. The right to an ecologically-balanced environment has the ability to balance such human-centered ethics, where human beings "alone have intrinsic worth and dignity," with the very foundation upon which all rights depend, being the life-support system.[119]

"[T]he concepts presented here are contested by many citizens in the affluent world and especially among politicians with a mandate at risk."[120] It is nevertheless critical that the political message convey the necessity for change and limitations. Just as a concerted voluntary effort which subscribes duties to both the community and the environment obviates a concern with coercion, so too would a right to an ecologically-balanced environment be extraneous had this century witnessed a far more decisive effort to alleviate poverty, improve women's status and reduce untenable levels of production and consumption.[121]

C. *Human Rights and Sustainability*

Two factors illustrate how the right to an ecologically-balanced environment can be balanced against the right to freely reproduce. First, since both rights are concerned with quality of life, the interests of future generations are discernible within them. By striving to maintain a

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118 Interregional Meeting organized by the Council of Europe in advance of the World Conference on Human Rights, *Human Rights at the Dawn of the 21st* Century, 6 Palais de l'Europe, Strasbourg, Jan. 28-30, 1993 (Council of Europe Press, 1993), as stated by Alexis de Tocqueville.

119. Herschel Elliott, *The Absurdity of a Human-Centred Ethics,* 17 POPULATION & ENV'T 427, 428 (1996).

120. *Population Debate, supra,* note 53, at 45-46. (quoting K. Boulding "Those who are concerned with the future of the planet in its totality have to ask themselves: What are the sources of power in the human species directed towards. . .It is not enough to preach we must do this, we must do that. . .We do need to study very carefully. . .the structure of power in human race over the future, which involves not only particular decisions but also the overall images of the world in the minds of the decision makers. . .And in the solution of these problems—if there is one—we will undoubtedly have to make some use of threat power—taxation, regulations and so on—and some use of economic power. But the major element unquestionably will be integrative power, based first on widespread knowledge that we all live on the same fragile planet. . .to which we owe a common loyalty and affection. Unless this view is very widespread, legitimacy will not be granted to those frequently painful processes which may be necessary to prevent catastrophe.").

121. *See* NATIONAL REPORTS, *supra* note 72, at 19. The Australian national report indicated that "small populations with high consumption patterns actually alter the environment more than large populations with low consumption levels." *Id.*

balanced ecosystem and by seeing each new life as representing forthcoming progeny, who will also require an ecologically-balanced environment, both current and future interests are encompassed. Second, since there is no linear solution to what is essentially a multi-faceted predicament, any balancing to be achieved will require trade-offs and "new paradigms, not just new policies, technologies or markets."[122] In a proposal well-suited to industrialized nations, the question posed is whether "population control is the best starting place for policy action" or whether it should be viewed as a "desired consequence of other actions on the road to environmental sustainability." Such actions would include setting up consumption "speed limits" and development "toll booths" in the interim.[123]

Furthermore, as much as population "is the headline. . .the real story may be hidden in the core values, consumption patterns, technologies, and market designs that influence and are influenced by population growth."[124] In light of this, the "greatest need—arguably more pressing than the need for zero or negative population growth—is for a compelling vision of sustainability" that helps to promote sustainable communities.[125]

While recognizing that population growth is "a looming threat to social and environmental sustainability," the proposal warns that this driving force is too easily taken out of context and "framed as a problem for which nationalism, racism, and economic protectionism find expression as part of the solution." Population policies which encourage such expression "are far more likely to foster polarization than stabilization."[126]

Whether a human rights based approach may also foster such polarization depends upon how its objectives are pursued. Universal reproductive health care is as important to the maintenance of an ecologically-balanced environment as is a reduction in affluent consumption. Persuading a society to observe limits in how it pursues its economic well-being or chooses to freely reproduce requires a fuller understanding of the interdependence of issues related to such choices.[127] Otherwise, a regulatory law may or may not be observed, whether or not coercive measures are engaged.

In addition, given that thought-processes, and therefore choices, are defined by language, the duties which reside "within" human rights

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122. Hempel, *supra* note 38, at 459.

123. *Id.* at 458.

124. *Id.*

125. *Id.*

126. *Id.* at 458-59.

127. *See id.* at 459. Population issues are said to be interdependent with those of ethics, biology, politics, economics and community and that further research is needed to understand how population-environment tradeoffs will operate "under different cultural orientations, forms of governance, levels of education, and standards of living." *Id.*

would benefit from a change in terminology, to something such as the "Responsible Human Right for Ecological Balance" or "Responsible Reproductive Rights." The duties which complement these rights can be, and are, easily overlooked, both by policy-makers and rights' advocates. For an eco-centered vision to evolve, a norm of responsibility must become manifest in a paradigm of stewardship and "ecological economics." Constraints on the role of women across all societies must be lifted so as to provide choices beyond one of parenthood. Ultimately, the core values which have allowed humanity to survive over the millenia must be re-evaluated in the current context, particularly by those best-situated to do so, being the affluent "denizens of the north."

"[P]eople without resources do not have choices, and people without choices cannot be asked to take responsibility."[128]

CONCLUSION

The current rate of environmental depletion along with growing numbers of human beings compels attention to whether there is a responsibility governing human reproductive choices. While developing nations advocate a reduction in family size, many industrialized countries persist in utilizing an informal pro-natalist approach. Faced with declining fertility and aging populations, many of the more affluent states indirectly encourage reproduction while failing to take adequate steps to reduce overconsumption. Given that inefficient per capita consumption in the North causes as much, if not more, environmental degradation than the overpopulation of the South, the Northern nations must reduce both fertility and consumption levels simultaneously.[129]

Towards this objective, the linkage between population, consumption and the environment must be underscored and its unabated consequences for forthcoming generations must be disseminated. Greater opportunities for women outside the home must continue to be encouraged along with the elimination of wasteful lifestyle practices. Core attributes, such as anthropocentrism and contempocentrism, must be recognized as driving forces which can only be surmounted with a concerted and deliberate effort, particularly by the popular media.

As human rights are concerned with ensuring a life of quality, a

128. Jael Silliman, *Ethics, Family Planning, Status of Women, and the Environment, in* POPULATION, CONSUMPTION AND THE ENVIRONMENT, *supra* note 52, at 257 (quoting Marge Berer, *Population and Family Planning Policies: Women-Centred Perspectives, in* REPRODUCTIVE HEALTH MATTERS 10 (May 1993).

129. The goal of reducing population growth as "a problem of global scope" and as one to be addressed within affluent states was recognized at the outset of concerns with overpopulation. *See* Richard A. Falk, *World Population and International Law*, 63 AM. J. INT'L L. 514, 520 (1969). This notion has since appeared to receive far less articulation. *See also*, Note, *Legal Analysis and Population Control: The Problem of Coercion*, 84 HARV. L. REV. 1856, 1857, 1892 (1971) (highlighting the differentiation between the right to procreate and the right to decide on family size).

balance could be struck with a norm which emphasizes duties to society, for both the state and the individual.

> Remove the metaphysical partitioning of the imaginary state-frontiers from the face of the Earth and what is to be seen? The human species multiplying, rapidly. The human species transforming the whole Earth into an object of labour. . . using the energy of the Sun and the energy contained in the Earth to transform the whole Earth into an object of use. . .to make the whole Earth into an object of property. The human species. . .transforming the whole Earth, everything on it and in it, into an object of trade.[130]

The interdependence of human rights, like that of all living species, needs to be respected to surmount trends in current power structures. A shift from the rights of the individual or corporation to duties to the larger community will facilitate a balancing process. Without a clear vision of what constitutes responsible behavior, attitudes will never be transformed. Without such a transformation, the biosphere itself is likely to be transformed, with unforeseeable and life-threatening consequences.

Although obligations may not have concomitant "rights," for every right there is a concomitant duty, both of which can be conceptualized as being complementary, or, as two sides of the same coin.[131] As a right is "not merely a claim to some freedom or benefit; it is also a claim against certain parties to act so as to make that freedom or benefit available,"[132] an equal weight must be placed on the duties which give rise to the rights.

The reciprocity of rights and duties must be brought into balance, if balance is to be restored and maintained within ecosystems. The need to recognize "the emptiness of the gesture of 'guaranteeing' rights which are physically impossible of fulfillment" without a recognition of concomitant duties heralded a call over twenty-five years ago for a Universal Declaration of Human Responsibilities and Duties.[133] Noting an "historical avalanche of words on rights without duties" the writings of Mazzini remain pertinent: ". . .all your rights are summed up in one: *the right to be absolutely unfettered and to be aided within certain limits, in the fulfilment of your duties*."[134] In light of numerical growth and

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130. *See* PHILLIP ALLOTT, EUNOMIA - NEW ORDER FOR A NEW WORLD 365 (1990).

131. *See* UNESCO, HUMAN RIGHTS ASPECTS OF POPULATION PROGRAMMES 16 (1977).

132. James W. Nickel, *The Human Right to a Safe Environment: Philosophical Perspectives on Its Scope and Justification*, 18 YALE J. INT'L L. 281, 286 (1993).

133. JACK PARSONS, POPULATION VERSUS LIBERTY 135 (1971).

134. *Id.* at 137 (quoting MAZZINI, THE DUTIES OF MAN 68 (1907)). In comparing the moralities of duty and aspiration, the latter is said to be exemplified by the Good Life, as set forth in Greek philosophy, which advocates the attainment of excellence and the "fullest realization of human powers." However, the Greeks "never worked out anything resembling the modern notion of a legal right" as their emphasis tended to be placed on

exponential ecological decline, action on our duties is now a basic requirement.

proper conduct. *Id.* at 5, n.3. In consequence, "where the morality of aspiration starts at the top of human achievement, the morality of duty starts at the bottom. It lays down the basic rules without which an ordered society is impossible, or without which an ordered society directed toward certain specific goals must fail of its mark." As such, the morality of duty does not condemn humans for "failing to embrace opportunities for the fullest realization of their powers" but rather, "it condemns them for failing to respect the basic requirements of social living." LON FULLER, THE MORALITY OF LAW 5 (1964).

BEYOND SELF-DEFENSE: UNITED NATIONS PEACEKEEPING OPERATIONS & THE USE OF FORCE

KATHERINE E. COX*

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* Presidential Fellow, Association of the Bar of the City of New York; LL.M. 1998, Columbia University School of Law; LL.B. (Hons.) 1994, University of Adelaide, Australia; B.A. 1990, Flinders University of South Australia, Australia. I would like to thank Professor Lori Fisler Damrosch of Columbia University Law School for her helpful comments on this paper, and Ms. Leila Benkirane, who supervised me during my internship at the United Nations, and provided me with an insight into the practical and legal aspects of United Nations peacekeeping operations.

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I. INTRODUCTION

Since the end of the Cold War, the role of United Nations (UN) operations in the area of international peace and security has increasingly become a topical issue for the different nations of the world. In particular, the use of force by, and in support of, peacekeeping has raised questions concerning the future role of UN peacekeeping operations in the resolution of international and internal conflict. During the Cold War there were two accepted forms of United Nations operations: peacekeeping and peace-enforcement. Since the end of the Cold War, however, despite increasing difficulties faced by UN peacekeeping operations, no accepted mode of action beyond these two operations has emerged. This has become problematic as the UN has consistently chosen to use peacekeeping forces as its primary tool in its effort to restore peace and security; despite the fact that peacekeeping, in itself, is not always an effective means to achieve these ends.

Why did peacekeeping come to be used in situations that increasingly necessitated the use of coercive force? Primarily because peacekeeping provided a legal and 'palatable' form of intervention in intrastate conflicts, which have erupted with greater frequency in recent times. The use of UN peacekeepers to intervene and resolve conflict was acceptable to Member States and met with their growing demands and expectations that action be taken to contain State fragmentation and resolve humanitarian crises. Due to their acceptability, such forces were authorized and implemented. The circumstances into which the UN intervened, however, were often volatile and not conducive to effective peacekeeping: situations where, for example, the consent of the warring factions could only be obtained conditionally or where there was no governmental authority in existence with whom the UN could negotiate and work. The Security Council authorized the use of force by and in support of some of these UN peacekeeping operations to enable their mandates to be achieved. Ultimately this has meant that UN peacekeeping has moved beyond the three main legal principles upon

which it was originally based, notably the principles of consent, impartiality and non-use of force except in self-defense. Arguably, peacekeeping has outstripped its original doctrinal justifications and as a result now flounders without guidelines and with ill-defined purpose.

The use of force by and in support of UN peacekeeping operations has narrowed the gap that previously existed between peacekeeping and coercive peace-enforcement. Yet the use of force in such instances is controversial, primarily because there is no universally accepted agreement as to how and when force should be used. This gives rise to many legal issues. For example, how broad is a peacekeeper's inherent right to self-defense? When does force used in 'self-defense' become an enforcement measure? When does peacekeeping become coercive peace-enforcement? One way to address these questions is to clarify the legal issues that have emerged due to these developments. Their clarification is not only of theoretical interest, it is of great practical importance. Determining the legal basis for the use of force enables a conceptual framework to be built up regarding its use. A sound legal understanding of this issue would provide the basis for comprehensive policies to be formulated concerning the way in which force is used by UN peacekeepers. It will help address the current problems facing United Nations peacekeeping by ensuring that Security Council resolutions are translated into clear and effective rules of engagement, which will be adhered to by troops in the field.

Not surprisingly, if a peacekeeping operation's mandate is not clear, its rules of engagement will not be clear. Lack of clarity in a mandate or its legal basis invariably gives rise to problems in interpreting or implementing the objectives of the operation. Thus, the criteria for using force are important to define. Sound reasons are needed to explain and justify why force may be used in one situation and not in another. Furthermore, such criteria must be accepted by all the parties involved in the peacekeeping operation — the parties involved in the conflict and the countries who have donated troops. By using legal reasoning to justify the use of force, a consensus among Member States is more likely to emerge as to when and how force should be used by the United Nations. The future credibility of the United Nations depends on successful peacekeeping operations. Operations that have clearly defined mandates and legally obtainable objectives are more likely to succeed than those that do not. Clearly therefore, it is most important to concentrate on resolving the legal difficulties underpinning these operations.

This paper focuses on the extent to which UN peacekeeping operations can use force in self-defense. Clearly this is just one of the areas regarding peacekeeping and the use of force which needs to be clari-

fied.[1] It is an area that warrants particular attention, however, due to the fact that self-defense is the one 'legitimate' way in which peacekeepers can use force.[2] The first part of this paper gives an overview of UN peacekeeping operations and the legal principles governing these operations. Part two examines the history and development of the use of force by UN peacekeeping operations. In particular, the idea that self-defense, in the context of peacekeeping, may include using force 'in defense of one's mandate' is examined. Part three details some recent examples of Security Council resolutions which authorized, either explicitly or implicitly, the use of force in a way that arguably expands this concept of self-defense even further. Finally, I discuss the legal and practical implications this development has for the future of peacekeeping.

This paper focuses on the use of force *by* peacekeeping forces, as opposed to the use of force *in support of* peacekeeping forces. The reason for this limitation is not only space constraints, but the fact that the issues raised by these different uses of force are in fact quite distinct and are not necessarily ideally dealt with together. The use of force as an enforcement measure under Chapter VII of the Charter is legal where the Security Council has found a threat to international peace and security and has authorized the use of force.[3] In the context of a peacekeeping operation the use of force raises different issues. Whilst it may be argued that it is legal for the Security Council to authorize the use of force by UN peacekeeping operations under Chapter VII, this flies in the face of one of the fundamental legal principles governing peacekeeping operations: the principle of non-use of force. If it is accepted that peacekeeping operations can only use force in self-defense, as is generally agreed, one must question whether the concept can be stretched to include more forceful measures, the likes of which have been authorized in recent times. This paper seeks to answer some of these questions.

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1. Another area, for example, might be to what degree the use of force by Member States in support of peacekeeping operations is compatible with the underlying principles of peacekeeping.

2. As distinguished from a "lawful" use of force authorized under Chapter VII of the UN Charter. This is due to the fact that one of the principles of traditional peacekeeping was that force only be used in self-defense. U.N. CHARTER arts. 42-43. See discussion below concerning the legal principles governing United Nations peacekeeping operations.

3. Article 42 of the U.N. Charter reads:

> Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace or security. Such action may include demonstrations, blockade, and other operations by air, sea or land forces of Members of the United Nations.

U.N. CHARTER art. 42.

II. AN OVERVIEW OF UNITED NATIONS PEACEKEEPING OPERATIONS

The purpose of this section is to give a broad overview and some background to UN peacekeeping operations, their legal underpinnings and core characteristics. No attempt is made to give a detailed critique of the subject matter. Indeed, there is a vast array of scholarly writings available on the topic, which highlight the complex and controversial nature of these operations.[4] For the purposes of this paper, however, a few general comments about the nature of peacekeeping operations, are appropriate.

A. Definition of "United Nations Peacekeeping Operations"

No two UN peacekeeping operations are alike.[5] Each operation is distinguished by the environment in which it operates and the extent to which it is authorized to carry out various peacekeeping functions. Furthermore, each operation builds upon the experience of past operations. Thus by definition UN peacekeeping operations are evolutionary in nature. For the purposes of delineating the scope and character of such operations, however, it is possible to make some general observations about their distinguishing features and thereby formulate a broad definition of the concept.

Peacekeeping operations are an invention of the United Nations. They were developed in response to the political realities of the Cold War, brought about by the need to address conflicts which occurred after entry into force of the UN Charter and for which the mechanisms provided for in Chapters VI and VII of the Charter could not be used.[6]

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4. *See, e.g.*, D.W. BOWETT, UNITED NATIONS FORCES: A LEGAL STUDY (1964); Dan Ciobanu, *The Power of the Security Council to Organize Peace-Keeping Operations, in* UNITED NATIONS PEACEKEEPING: LEGAL ESSAYS (A. Cassese ed., 1978); John W. Halderman, *Legal Basis for United Nations Forces*, 56 AMER. J. INT'L L. 971 (1962); Rosalyn Higgins, *A General Assessment of United Nations Peace-Keeping, in* UNITED NATIONS PEACEKEEPING: LEGAL ESSAYS (A. Cassese ed., 1978); Georg Schwarzenberger, *Problems of a United Nations Force, in* 12 CURRENT LEGAL PROBLEMS 247 (George W. Keeton & Georg Schwarzenberger eds., 1959).

5. Indeed, Bowett lists nine different categories of peacekeeping being (1) cease-fire, truces and armistice functions entrusted to "observer" groups; (2) frontier control; (3) interpositionary functions (undertaken to "secure a cessation of hostilities"); (3) defense and security of UN zones or areas placed under UN control; (5) the maintenance of law and order in a State; (6) plebiscite supervision (undertaken in order to "determine the status of a territory disputed between two sovereign States"); (7) assistance and relief for national disasters (undertaken in order to provide humanitarian relief); (8) prevention of international crimes; and (9) disarmament functions: *See* BOWETT, *supra* note 4, at 268-74. Schachter lists eight different categories along similar lines. Oscar Schachter, *Authorized Uses of Force by the United Nations and Regional Organizations, in* LAW AND FORCE IN THE NEW INTERNATIONAL ORDER 65, 80 (Lori Fisler Damrosch & David J. Scheffer eds., 1991).

6. For a discussion of the development of peacekeeping and the early operations, see:

The means provided for in Chapter VI, concerning the pacific settlement of disputes, were inadequate. The means provided for in Chapter VII, concerning the enforcement measures, could not be agreed upon by Members of the Security Council due essentially to the profound ideological differences that prevailed during the Cold War. Peacekeeping emerged as a mode of international intervention other than those provided for in Chapters VI and VII of the Charter.

Peacekeeping operations have been defined broadly as:

> [O]peration[s] involving military personnel, but without enforcement powers, undertaken by the United Nations to help maintain or restore international peace and security in areas of conflict. These operations are voluntary and are based on consent and cooperation. While they involve the use of military personnel, they achieve their objectives not by force of arms, thus contrasting them with the 'enforcement action' of the United Nations under Article 42.[7]

Generally speaking, peacekeeping operations consist of either: (1) unarmed observer missions; or (2) forces which have the function of sustaining peacemaking efforts by helping to create conditions in which negotiation between warring parties can take place.[8] The latter type of operation is typically armed and may use force in limited circumstances that are discussed below. Given that the theme of this paper concerns the use of force by peacekeeping operations, peacekeeping operations are defined here to cover the latter type of operation only.

BOWETT, *supra* note 4; UNITED NATIONS, BLUE HELMETS: A REVIEW OF UNITED NATIONS PEACE-KEEPING, U.N. Doc. DPI/1800, U.N. Sales No. E.96.I.14 (3d ed. 1996) [hereinafter BLUE HELMETS I]; 1 ROSALYN HIGGINS, UNITED NATIONS PEACEKEEPING, THE MIDDLE EAST 1946-1967: DOCUMENTS AND COMMENTARY (1969); 2 ROSALYN HIGGINS, UNITED NATIONS PEACEKEEPING, ASIA 1946-1967: DOCUMENTS AND COMMENTARY (1970); 3 ROSALYN HIGGINS, UNITED NATIONS PEACEKEEPING, AFRICA 1946-1967: DOCUMENTS AND COMMENTARY (1980); 4 ROSALYN HIGGINS, UNITED NATIONS PEACEKEEPING, EUROPE 1946-1979: DOCUMENTS AND COMMENTARY (1981); Marrack Goulding, *The Evolution of United Nations Peace-Keeping*, 69 INT'L AFF. 451 (1993).

7. UNITED NATIONS, THE BLUE HELMETS: A REVIEW OF UNITED NATIONS PEACE-KEEPING at 4, U.N. Sales No. E.90.I.18 (2d ed. 1990) [hereinafter BLUE HELMETS II].

8. *See* Jon E. Fink, *From Peacekeeping to Peace Enforcement: The Blurring of the Mandate for the Use of Force in Maintaining International Peace and Security*, 19 MD. J. INT'L L. & TRADE 1, 10 (1995); Goulding, *supra* note 6, at 457. Note, however, that peacekeeping operations can be divided up into many more categories. For example, both Bowett and Schachter list many different categories of peacekeeping. *See supra* note 5. Given that each peacekeeping operation tends to be designed for the unique situation into which it must operate, it is not surprising that many different categories exist.

B. The Legal Principles Governing United Nations Peacekeeping Operations

As the concept of peacekeeping evolved, UN peacekeeping operations developed core legal principles that became fundamental to their operation. These principles are contained in various legal documents concerning peacekeeping operations, such as the Status of Forces Agreements (SOFAs) and rules of engagement.[9] They embody the essence of peacekeeping and permeate all aspects of an operation.[10] The three main legal principles underlying peacekeeping are: (1) consent of all parties concerned and the competent organ of the UN, usually the Security Council;[11] (2) impartiality; and (3) non-use of force except in self-defense.

These principles developed over time and are based on sound legal and practical reasoning. For example, Article 2(7) of the UN Charter prohibits the United Nations from intervening in the domestic affairs of a Member State except where Chapter VII enforcement measures are involved.[12] Thus, a UN peacekeeping force can only intervene into the domestic affairs of a State if the State concerned has consented to that intervention and to the peacekeeping operation as a whole.[13] Similarly,

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9. *See infra* note 32 and accompanying text discussing rules of engagement.

10. When a peacekeeping operation is set up, various agreements are drawn up between the United Nations and the Host State (Status-of-Forces Agreement) and between the United Nations and contributing State(s). Model agreements of this nature have been approved of by the General Assembly. *See Comprehensive Review of the Whole Question of Peace-Keeping Operations in All Their Aspects: Model of Status of Forces Agreement for Peace-Keeping Operations: Report of the Secretary-General*, U.N. GAOR, 45th Sess., Agenda Item 76, U.N. Doc. A/45/594 (1990); *Comprehensive Review of the Whole Question of Peace-Keeping Operations in All Their Aspects: Model Agreement Between the United Nations and Member States Contributing Personnel and Equipment to United Nations Peace-Keeping Operations: Report of the Secretary-General*, U.N. GAOR, 46th Sess., Item 74 of the Preliminary List, U.N. Doc. A/46/185 (1991).

11. Peacekeeping operations, unlike enforcement measures, can be authorized by the General Assembly (GA), but the GA has only done this on two occasions: UNEF 1 (United Nations Emergency Force) which was established to secure the withdrawal of troops from Egyptian territory and to serve as a buffer between Egypt and Israel; and UNSF (United Nations Security Force) which was created to maintain peace and security in the West Irian territory, *UN Peacekeeping History*, 1 INT'L PEACEKEEPING 1, 9 (1994).

12. Article 2, paragraph 7 reads as follows:

> Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

U.N. CHARTER art. 2, para. 7.

13. Although it is worth noting that previously the majority of peacekeeping opera-

if the UN is to effectively "keep the peace," it must be impartial and unbiased in its operations. It is obvious that it would be extremely difficult, if not impossible, for the UN to engage in coercive force and still be regarded as a neutral body. For this reason the use of force by UN peacekeeping forces has been limited to that used in self-defense.

In more recent times a "second generation" of peacekeeping has evolved.[14] These operations, occurring principally since the end of the Cold War, have increasingly involved civilian personnel and have been given more complex and challenging mandates, such as helping to promote human rights and national reconciliation and organizing and monitoring elections.[15] Whilst the fundamental characteristics of these peacekeeping operations have not changed from those of earlier operations as enumerated above, there is no doubt that all three of the main legal principles underlying peacekeeping have been strained by the new demands placed upon these operations. For example, it has become increasingly difficult to gain the consent and cooperation of all parties involved in UN peacekeeping operations. This has necessitated, at times, an increased use of force by peacekeepers in carrying out UN mandates. The perceived impartiality of operations has similarly become more difficult to maintain for this reason.

However, the legal principles upon which peacekeeping was founded and evolved must be taken seriously. In particular (given the focus of this paper) it is important to emphasize that the UN has been very unwilling to go "beyond self-defense as the touchstone of the right to use force" with respect to peacekeeping operations.[16] Indeed, the Secretary-General and the Members of the United Nations "considered

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tions have involved interstate disputes as opposed to intrastate disputes. It is only more recently that peacekeeping operations have been involved in disputes contained within a single State. *See* STEVEN R. RATNER, THE NEW UN PEACEKEEPING: BUILDING PEACE IN LANDS OF CONFLICT AFTER THE COLD WAR 23 (1995).

14. Boutros-Ghali acknowledges this development in his introduction to the United Nations publication, THE BLUE HELMETS. *See* BLUE HELMETS I, *supra* note 6, at 5. Ratner similarly discusses these developments in his book. RATNER, *supra* note 13. *See also* NEW DIMENSIONS OF PEACEKEEPING (Daniel Warner ed., 1995); Mats R. Berdal, *The Security Council, Peacekeeping and Internal Conflict After the Cold War*, 7 DUKE J. COMP. & INT'L L. 71 (1996); Kelly A. Childers, *United Nations Peacekeeping Forces in the Balkan Wars and the Changing Role of Peacekeeping Forces in the Post-Cold War World*, 8 TEMP. INT'L & COMP. L.J. 117 (1994); Fink, *supra* note 8, at 1; Roy S. Lee, *United Nations Peacekeeping: Development and Prospects*, 28 CORNELL INT'L L.J. 619 (1995); Ruth Wedgwood, *The Evolution of United Nations Peacekeeping*, 28 CORNELL INT'L L.J. 631 (1995).

15. BLUE HELMETS I, *supra* note 6, at 3. Ratner describes the new breadth of responsibility of UN peacekeepers as having fallen into ten categories: (1) military matters, (2) elections, (3) human rights, (4) national reconciliation, (5) law and order, (6) refugees, (7) humanitarian relief, (8) governmental administration, (9) economic reconstruction, and (10) relationships with outside actors. He describes the depth of responsibility as covering (1) monitoring, (2) supervision, (3) control, (4) conduct, (5) technical assistance, and (6) public information. RATNER, *supra* note 13, at 42-43.

16. Schachter, *supra* note 5, at 84.

it essential from a political and legal standpoint to distinguish peacekeeping from enforcement by *restricting the use of force to self-defense.*"[17] This point cannot be over-stressed as it indicates why conceptually and in practice, the UN has been reluctant to move away from the non-use of force by peacekeeping operations, and towards a more forceful kind of peace-making operation (as distinguished from peace-enforcement). A more thorough examination of the use of force by UN peacekeeping forces is discussed below.[18]

C. The Constitutional Basis of United Nations Peacekeeping Operations

The constitutional basis of United Nations peacekeeping operations is the broad mandate of Article 1 of the Charter, under which one of the purposes of the United Nations is to maintain international peace and security.[19] There is considerable debate amongst commentators as to where the UN gets its more specific mandate within the Charter,[20] although there is now little doubt that the UN does have the power to authorize such operations.[21] This was not always the case. Initially, some States protested the establishment of such operations. They argued that because peacekeeping operations were not specifically provided for in the UN Charter it was beyond the power of the Security Council to establish them.[22] On these grounds, and due to disputes over the constitutional basis within the Charter for such actions, certain States (including the former USSR and France) refused to pay their

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17. *Id.* (emphasis added).

18. See discussion below on the use of force in self-defense and the use of force in defense of one's mandate.

19. Article 1(1) reads as follows:

> The Purposes of the United Nations are: (1) To maintain international peace and security, and to that end: to 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, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.

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

20. One issue, for example, is whether the legal basis to establish such operations is found under Chapter VI of the Charter or under the various articles of Chapter VII. There are numerous articles and books discussing this issue. *See, e.g.*, BOWETT, *supra* note 4; Higgins, *supra* note 4; Halderman, *supra* note 4; Schwarzenberger, *supra* note 4; Finn Seyersted, *Can the United Nations Establish Military Forces and Perform Other Acts Without Specific Basis in the Charter?* 37 BRIT. Y.B. INT'L L. 351 (1961), *reprinted in* 12 ÖSTERREICHISCHE ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT 188 (1962); Louis B. Sohn, *The Authority of the United Nations to Establish and Maintain a Permanent United Nations Force*, 52 AMER. J. INT'L L. 229 (1958).

21. *See* HILAIRE MCCOUBREY & NIGEL WHITE, THE BLUE HELMETS: LEGAL REGULATIONS OF UNITED NATIONS MILITARY OPERATIONS 50-55 (1996); RATNER, *supra* note 13 at 58; Schachter, *supra* note 5, at 82.

22. *See* Schachter, *supra* note 5, at 80.

share of the early peacekeeping bills. These States argued that such actions were not "expenses of the Organization" within the meaning of Article 17(2) of the Charter.[23] The matter went to the International Court of Justice (ICJ) in the *Certain Expenses of the United Nations Case*, in which the Court confirmed *obiter* the constitutionality of the UN peacekeeping operations UNEF I and ONUC.[24] The ICJ stated that: "[W]hen the Organization takes action which warrants the assertion that it was appropriate for the fulfilment [sic] of one of the stated purposes of the United Nations, the presumption is that such an action is not ultra vires the Organisation."[25]

The ICJ stressed that although peacekeeping operations were not to be regarded as "enforcement measures" within the domain of Chapter VII of the Charter,[26] there was no doubt that because the Security Council had those enforcement powers it was within the power of the Security Council to implement less forceful measures.[27] However, whilst it was made clear that the Security Council had the legal capacity to establish peacekeeping operations, no opinion was given as to where the constitutional sources of such operations lay.[28]

However, insofar as UN peacekeeping forces are entitled to use force in self-defense they cannot be regarded as purely pacific means of dispute settlement under Chapter VI. It is for this reason that Chapter VII is usually thought to provide the general legal basis for UN peacekeeping operations, although such operations are not Chapter VII enforcement measures and should not be regarded as such. Considerable debate still exists as to which Articles of Chapter VII have actually been used to authorize the various operations.[29] As it is not essential to determine the exact legal basis for UN peacekeeping operations for the purpose of this paper, I will not enter into a detailed discussion. It is enough to say that the legality of UN peacekeeping under Chapter VII

23. Article 17(2) states that "[T]he expenses of the Organization shall be borne by the Members as apportioned by the General Assembly." U.N. CHARTER art. 17, para. 2.

24. Certain Expenses of the United Nations Case, 1962 I.C.J. 151, 167. *See infra* notes 36, 37, and 40 and accompanying text for background information on UNEF I and ONUC.

25. Certain Expenses Case, 1962 I.C.J. at 168.

26. The I.C.J. stated that the "operations known as UNEF and ONUC were not enforcement actions within the compass of Chapter VII. . . ." *Id.* at 166.

27. *Id.* at 167. The idea presumably being that the power to implement forceful measures encompasses the power to implement less forceful measures. This principle, ("qui peut le plus peut le moins" which is loosely translated as the "greater encompasses the lesser") is acknowledged by Georges Fischer. *See* Georges Fischer, *Article 42, in* LA CHARTE DES NATIONS UNIES 705 (Jean-Pierre Cot & Alain Pellet eds., 1985).

28. Certain Expenses Case, 1962 I.C.J. at 166-67.

29. The five main Articles which have been put forward as providing the possible legal basis for peacekeeping operations under Chapter VII of the Charter are Articles 39, 40, 41, 42 & 48(1) and various combinations thereof. For a discussion on possible constitutional bases for peacekeeping operations, see *supra* note 20.

is generally acknowledged, even if the precise source of that legality cannot be agreed upon. On this point, however, it is worth noting that peacekeeping operations have been described as falling conceptually between Chapter VI and Chapter VII of the Charter and, accordingly, have been referred to as Chapter "Six and a Half" operations.[30] This is due to the fact that peacekeeping operations have traditionally involved the use of military personnel (*i.e.* they have gone beyond a purely diplomatic settlement of disputes outlined in Chapter VI of the Charter) but not Chapter VII enforcement measures. Although this is a symbolic analysis, it is nonetheless a legal fiction. A peacekeeping operation cannot find its constitutional basis in a non-existent Article of the Charter.

III. THE HISTORY AND DEVELOPMENT OF THE USE OF FORCE BY UNITED NATIONS PEACEKEEPING OPERATIONS

As described above, one of the three main legal principles of peacekeeping is that force is only to be used in self-defense. Indeed, the right of UN peacekeeping operations to exercise force in self-defense is one of the authorized legal categories for the use of force by the United Nations and may be thought of as an 'inherent right' of the peacekeepers.[31] There is considerable practice that supports this view and the right to self-defense has been consistently provided for in the rules of engagement established for each peacekeeping operation since their inception.[32] Evidently, under the rules of engagement, instructions on the use of force in self-defense in a peacekeeping operation may vary considerably from those designed to suit a Chapter VII enforcement operation.[33] This leads one to ask what constitutes self-defense within the

30. Dag Hammarskjold, former United Nations Secretary-General, described peacekeeping as being authorized by Chapter "Six and a Half." *See* BLUE HELMETS II, *supra* note 7, at 5.

31. Schachter lists six legal categories for the use of force by the United Nations, which he describes as: (1) Armed force as an enforcement measure taken by the Security Council under Chapter VII, particularly Article 42; (2) Collective self-defense in accordance with Article 51; (3) Individual self-defense under Article 51; (4) Enforcement measures under regional arrangements or by regional agencies under Article 53; (5) Peacekeeping forces of the United Nations authorized by the Security Council or General Assembly and deployed in agreement with the States concerned; and (6) Joint action by the five permanent Members pursuant to Article 106 of the Charter. *See* Schachter, *supra* note 5, at 65.

32. When the Security Council authorizes a UN operation to use force, the way in which force may be exercised is set out in the rules of engagement. The rules of engagement "specify the circumstances in which armed force may be used by a military unit and its permissible extent and degree." *See* MCCOUBREY & WHITE, *supra* note 21, at 146.

33. Indeed, the importance of the rules of engagement should not be underestimated. Rowe has stated, "In reality the mandate given by the Security Council is no real indication of how much force has been authorized by the Council for those engaged in enforcing it. Rather, it is the rules of engagement which set out the degree of force that may be

realm of a UN peacekeeping operation? Certainly it differs from its usual legal meaning.[34] The concept of self-defense in the context of peacekeeping evolved over time and in response to the changing needs of peacekeepers in different operations. Initially, a narrow approach was taken: force could only be used in defense of the peacekeeping operation itself and strictly in response to an armed attack ('personal self-defense'). Gradually, a much broader view evolved: force could be used 'in defense of one's mandate.' In other words, force could be used to 'defend' the objects and purposes of the peacekeeping operation. The evolution of self-defense in the context of peacekeeping and the scope of this broader approach is discussed in more detail below.

A. Use of Force in Self-defense ('Personal Self-Defense')

In the first armed UN peacekeeping operation, UNEF 1,[35] peacekeepers were instructed never to initiate the use of force, although they could respond to armed attacks with force and could resist attempts to make them withdraw from their positions.[36] In his report on UNEF I, Dag Hammarskjold wrote:

> [T]he rule is applied that men engaged in the operation may never take the initiative in the use of armed force, but are entitled to respond with force to an attack with arms, including attempts to use force to make them withdraw from positions which they occupy under orders from the Commander . . . The basic element involved is clearly the prohibition against any *initiative in the use of armed force.*[37]

This definition of self-defense was narrow and yet adequate for the UNEF I operation because the UN troops involved in UNEF I were maintaining a cease-fire on a front line between two orderly armed forces. Furthermore, there was only a small civilian population living in the area.[38] Thus, the amount of force which UNEF I was authorized to use was sufficient for the purposes of fulfilling its mandate.

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used." Peter Rowe, *The United Nations Rules of Engagement and the British Soldier in Bosnia*, INT'L & COMP. L.Q. 946, 947 (1994).

34. Schachter, *supra* note 5, at 84.

35. United Nations Emergency Force I.

36. UNEF I operated from November 1956 - June 1967. Its function was to "secure and supervise the cessation of hostilities, including the withdrawal of the armed forces . . . from Egyptian territory, and after the withdrawal, to serve as a buffer between Egyptian and Israeli forces." UNITED NATIONS, UN PEACEKEEPING BOOKLET 9 (1996) [hereinafter UN PEACEKEEPING BOOKLET].

37. *United Nations Emergency Force, Summary Study of the Experience Derived From the Establishment and Operation of the Force: Report of the Secretary General*, UN GAOR, 13th Sess., Agenda Item 65(c) ¶ 179, U.N. Doc A/3943 (1958) (emphasis added).

38. Marrack Goulding, *The Use of Force by the United Nations*, *in* MOUNTBATTEN-TATA MEMORIAL LECTURE AT THE UNIVERSITY OF SOUTHAMPTON 8 (1995).

The same was not true of ONUC in the Congo, where circumstances eventually compelled the UN to authorize the peacekeeping operation to use more extensive force.[39] ONUC was deployed in the summer of 1960 to essentially assist the Government of the Congo in carrying out tasks related to the maintenance of law and order. Initially, the establishment of the force was based upon the principles of UNEF I, including the principle that there should be no initiative in the use of armed force by UN troops. This is made clear in the *First Report of the Secretary-General on the Implementation of Security Council Resolution S/4387 of 14 July 1960*[40] in which Hammarskjold reiterated his earlier comments made in the UNEF I Report regarding the limits on the use of force by UN troops. In this report he again emphasized the prohibition of any initiative by UN forces in the use of armed force.[41]

The original mandate of the operation emphasized the restoration of law and order in the Congo.[42] Soon after the deployment of ONUC, opposition and secessionist movements in the Congo brought about disorder and violence and the peacekeeping operation started to face difficulties. It became evident that ONUC could not achieve its objective of halting the civil war whilst it was limited to the use of force within the confines of 'personal self-defense.'[43] If ONUC were to act effectively it would need to be able to exercise a more expanded use of force. Under

39. United Nations Operation in the Congo. ONUC operated between July 1960 - June 1964. Its initial function was to "ensure the withdrawal of Belgian forces, to assist the Government in maintaining law and order and to provide technical assistance." Later this function was modified to include "maintaining the territorial integrity and political independence of the Congo, preventing the occurrence of civil war and securing the removal from the Congo of all foreign military, paramilitary and advisory personnel not under the UN command and all mercenaries." UN PEACEKEEPING BOOKLET, *supra* note 36, at 19.

40. *First Report by the Secretary General on the Implementation of Security Council Resolution S/4387 of 14 July 1960, United Nations Emergency Force, Summary Study of the Experienced Derived From the Establishment and Operation of the Force: Report of the Secretary-General,* U.N. SCOR, U.N. Doc. S/4389 (1960).

41. He stated as follows:

> In my initial statement I recalled the rule applied in previous United Nations operations to the effect that the military units would be entitled to act only in self-defence. In amplification of this statement I would like to quote the following passage from the report to which I referred. '[M]en engaged in the operation may never take the initiative in the use of armed force, but are entitled to respond with force to an attack with arms, including attempts to use force to make them withdraw from positions which they occupy under orders from the Commander', acting under the authority of the Security Council and within the scope of its resolution. 'The basic element involved is clearly the prohibition against any *initiative* in the use of armed force.

Id. ¶15 (emphasis in original).

42. S.C. Res. 143, U.N. SCOR, 873d mtg., U.N. Doc. S/4387 (1960).

43. BOWETT, *supra* note 4, at 201.

the circumstances the Security Council revised the mandate of ONUC to enable it to use force as a last resort to prevent civil war in the Congo.[44] It is hard not to view this authorization for the use of force as going beyond self-defense. As Bowett has stated, "[I]t is difficult to avoid the conclusion that the Security Council by this Resolution [S/RES/161(1961)] abandoned a strict reliance on the principle of self-defence."[45] However it is interesting that the Secretary-General continued to express the opinion that troops should only engage in defensive action, or they would risk becoming a party to the conflict.[46] Bowett regards this statement as "clinging to the 'self-defence' concept."[47]

In many ways the UN's experience in the Congo was a premonition of the difficulties that came with the evolution of the more complex second generation of peacekeeping operations. Although it is generally agreed that ONUC was a peacekeeping operation, there is no doubt that it involved some enforcement elements.[48] In the operation's aftermath,

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44. In Security Council Resolution 161, paragraph 1, the Security Council urged, "that the United Nations take immediately all appropriate measures to prevent the occurrence of civil war in the Congo, including arrangements for cease-fires, the halting of all military operations, the prevention of clashes, and *the use of force*, if necessary, in the last resort." S.C. Res. 161, U.N. SCOR, 942d mtg. ¶ 1, U.N. Doc. S/4741 (1961) (emphasis added). In Security Council Resolution 169, paragraph 4, the Security Council authorized the Secretary-General "to take vigorous action, including *the use of the requisite measure of force*, if necessary, for the immediate apprehension, detention pending legal action and/or deportation of all foreign military and paramilitary personnel and political advisers not under the UN Command, and mercenaries. . ." S.C. Res. 169, U.N. SCOR, 982d mtg. ¶ 4, U.N. Doc. S/5002 (1961) (emphasis added).

45. BOWETT, *supra* note 4, at 201-02.

46. *See Report of the Secretary-General on Certain Steps Taken in Regard to the Implementation of the Security Council Resolution Adopted on 21 February 1961*, U.N. SCOR, 942d mtg., U.N. Doc. S/4752, Annex 7 (1961).

47. BOWETT, *supra* note 4, at 202.

48. There has been dispute about whether or not ONUC was actually a peacekeeping operation because it was couched in language of Chapter VII of the Charter and authorized the use of force. The consensus is that ONUC was not an "enforcement action." This was the determination of the ICJ in the Certain Expenses Case. Certain Expenses of the United Nations Case (Art. 17, Para. 2 of the Charter), 1962 I.C.J. 151, at 177. Certainly, the purposes for which ONUC was created "were essentially different from those for which, at San Francisco, forces used under Article 42 were contemplated." *See* BOWETT, *supra* note 4, at 176. The United Nations force in the Congo was present with the consent of the government of Congo and the measures authorized by the Security Council were specifically aimed at implementing the Security Council peacekeeping mandate. Furthermore, as Higgins points out, "even though the circumstances in which ONUC was permitted to use force was [sic] enlarged, the action was still not a sanction against the Congo[, and] there is ample evidence that the UN still regarded itself as bound by the domestic jurisdiction requirements. . . ." For example, the Article 2(7) restraint operated so that intervention into the internal affairs of a State was not permissible without the consent of that State. 3 HIGGINS, *supra* note 6, at 58. Most commentators express the view that the constitutional basis of ONUC lay in Article 40, Chapter VII of the Charter. This was the view of the Secretary-General and has been described as the "official" view of

and as a result of the UN's experiences in the Congo, the narrow definition of self-defense was revised. It was thought that a broader definition of self-defense would make peacekeeping operations more viable and would enable the United Nations to effectively carry out peacekeeping mandates without the need to resort to 'enforcement measures.' Thus ONUC, while not the definitive peacekeeping operation of the Cold War period due to its expansive use of force, played a notable role in the development of the use of force within the realm of peacekeeping.[49]

B. Use of Force in Defense of One's Mandate

When the UN peacekeeping operation was set up in Cyprus the situation with regards to the use of force in self-defense was more clearly defined by the Secretary-General.[50] In an *Aide-Memoire of the Secretary-General Concerning Some Questions Relating to the Function and Operation of the United Nations Peacekeeping Force in Cyprus, 10 April 1964*[51] the Secretary-General outlined an expanded definition of self-defense. The traditional principles were confirmed (for example, the principle that troops should never take the initiative in the use of armed force) but additional elements were included in the definition.[52]

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the United Nations. *See* BOWETT, *supra* note 4, at 177; 3 HIGGINS, *supra* note 6, at 54-60; Schachter, *supra* note 5, at 82.

49. Fink has written, "The concept of self-defense, as well as the principles of non-intervention and sovereignty, were loosely defined and greatly modified in the Congo operation." *See* Fink, *supra* note 8, at 15.

50. The United Nations Peace-Keeping Force in Cyprus (UNFICYP) has operated from 1964 to the present. Its initial mandate was to "prevent a recurrence of fighting between Greek Cypriot and Turkish Cypriot communities and to contribute to the maintenance and restoration of law and order and a return to normal conditions." Since 1974 its mandate has been expanded and UNFICYP has "supervised the cease-fire and maintained a buffer zone." UN PEACEKEEPING BOOKLET, *supra* note 36, at 17-18.

51. *Note by the Secretary-General*, U.N. SCOR, U.N. Doc. S/5653 (1964).

52. *Id.* ¶¶ 17(c), 18 (c). The full text of the *Principles of Self-Defence* read as follows:

> 16. Troops of UNFICYP shall not take the initiative in the use of armed force. The use of armed force is permissible only in self-defence. The expression "self-defence" includes:
>
> (a) The defence of United Nations posts, premises and vehicles under armed attack;
>
> (b) The support of other personnel of UNFICYP under armed attack.
>
> 17. No action is to be taken by the troops of UNFICYP which is likely to bring them in to direct conflict with either community in Cyprus, except in the following circumstances:
>
> (a) Where members of the Force are compelled to act in self-defence;
>
> (b) Where the safety of the force or of members of it is in jeopardy;
>
> (c) Where specific arrangements accepted by both communities have been or in the opinion of the commander on the spot are about to be, violated, thus risking a recurrence of fighting or endangering law and order.
>
> 18. When acting in self-defence, the principle of minimum force shall al-

Thus while troops were not to take the initiative in the use of armed force, they could use force in "self-defense" where:

> specific arrangements accepted by both communities have been or . . . are about to be violated, thus risking a recurrence of fighting or endangering law and order . . . [or where there were] attempts by force to prevent them from carrying out their responsibilities as ordered by their commanders.[53]

The most significant expansion to be noted here, and one that definitively moves way from the idea that self-defense only includes the defense of the peacekeeping force itself, is the premise that peacekeepers could use force in response to attempts by force to prevent them from carrying out their responsibilities or where agreements agreed to by both sides were not honored. Interestingly, it seems that force could even be used in 'anticipatory self-defense' where such agreements were about to be violated.

This interpretation of self-defense, although expressed more generally, was reapplied in 1973 when UNEF II was established.[54] In the *Report of the Secretary-General on the Implementation of Security Council 340 (1973)*, Kurt Waldheim, the then Secretary-General, wrote

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> ways be applied, and armed force will be used only when all peaceful means of persuasion have failed. The decision as to when force may be used under these circumstances rests with the commander on the spot, whose main concern will be to distinguish between an incident which does not require fire to be opened and those situations in which troops may be authorized to use force. Examples in which troops may be so authorized are:
>
> (a) Attempts by force to compel them to withdraw from a position which they occupy under orders from their commanders, or to infiltrate and envelop such positions as are deemed necessary by their commanders for them to hold, thus jeopardizing their safety;
> (b) Attempts by force to disarm them;
> (c) Attempts by force to prevent them from carrying out their responsibilities as ordered by their commanders;
> (d) Violation by force of United Nations premises and attempts to arrest or abduct United Nations personnel, civil or military.
>
> 19. Should it be necessary to resort to the use of arms, advance warning will be given whenever possible. Automatic weapons are not to be used except in extreme emergency and fire will continue only as long as is necessary to achieve its immediate aim.

Id. ¶¶ 16-19.

53. *Id.* ¶¶ 17(c)–18 (c).

54. United Nations Emergency Force II. UNEF II operated from October 1973 to July 1979. Its function was to "supervise the cease-fire between Egyptian and Israeli forces and, following the conclusion of agreements. . . [and] to supervise the redeployment of Egyptian and Israeli forces and to man and control the buffer zones established under those agreements." UN PEACEKEEPING BOOKLET, *supra* note 36, at 10. *See also* Goulding, *supra* note 38, at 9; Adam Roberts, *From San Francisco to Sarajevo: The UN and the Use of Force*, 37 SURVIVAL 7 (1995).

that self-defense included "resistance to attempts by forceful means to prevent it from discharging its duties under the mandate of the Security Council."[55] In other words, self-defense included situations in which peacekeepers needed to use force to fulfil their mandate. This is a significantly broadened definition of self-defense when compared to the definition that applied in UNEF I, and may be regarded as covering all subsequent UN peacekeeping operations.[56] Indeed, Boutros-Ghali made it clear in 1993, that at least at that point in time, "existing rules of engagement allow [United Nations soldiers to open fire] if armed persons attempt by force to prevent them from carrying out their orders."[57]

C. Conclusion

As discussed above, one of the legal principles of peacekeeping is that the use of force is restricted to that used in self-defense. The fact that this is a legal principle which the UN considers to be binding upon itself can be gauged from the way it responded to difficulties encountered whilst operating within this self-imposed limit. Instead of doing away with the principle, it remained, as Schachter has described, the "touchstone" of peacekeeping and the use of force was justified by adopting an expanded and somewhat artificial definition of self-defense.[58] The actual scope of this expanded notion of 'self-defense,' and the extent to which it applies, and has applied, in various peacekeeping operations, is not clear. If self-defense is interpreted broadly to mean 'in defense of one's mandate' in all operations, it would presumably mean that if any operation is hindered (by the use of force) from carrying out any part of its mandate, its inherent right to 'self-defense' entitles it to use force in order to fulfil its duties. The ability of a peacekeeping operation to use force would then largely depend on how broad its mandate was. The broader the mandate, the more occasions in which the peacekeeping operation might find itself not only needing to use force but also legally 'permitted' to do so.

However, interpreting self-defense in this manner, comes perilously close to enforcement measures. Such an approach leads one to ask to what extent force can be used in self-defense to fulfil a mandate and still remain consistent with the principles of consent and impartiality underlying peacekeeping operations? The answer lies in the fact that in practice and for many years, commanders in the field have very rarely

55. *Report of the Secretary-General on the Implementation of Security Council Resolution 340 (1973)*, U.N. SCOR ¶ 4(d), U.N. Doc S/11052/Rev. 1 (1973). UNEF II was set up on the basis of Security Council resolution 340 of October 25, 1973.

56. Goulding, *supra* note 38, at 9; Roberts, *supra* note 54, at 14.

57. Boutros Boutros-Ghali, *Empowering the United Nations*, 71 FOREIGN AFF. 89, 91. (1992)

58. Schachter, *supra* note 5, at 84.

applied the expanded definition of self-defense.[59] Instead, negotiation and persuasion have been used. In reality the use of force in the context of peacekeeping is a perilous activity which does not rest easily along side the concepts of consent and impartiality. The reluctance to use force in self-defense by commanders in the field is essentially intended to secure the impartiality of peacekeepers and ensure the continued cooperation of the parties concerned. Thus, while theoretically the concept of self-defense was broadened, in practice the expanded doctrine has remained, at least until more recent times, largely unused.

Clearly, UN peacekeeping operations have an inherent right to use force in self-defense; at least in so far as they have a right to use force to protect themselves and seemingly to defend at least some aspects of their mandate. The issue remains, however, what is the scope of self-defense in the context of peacekeeping? To what degree can force be used in defense of one's mandate? Is the use of force limited to what is necessary and proportionate? Where does anticipatory self-defense fit into the picture? Do some uses of force in 'self-defense' need to be explicitly authorized by the Security Council or risk being considered an illegal use of force? Some of the recent resolutions authorizing the use of force have been couched in terms of "self-defense," indicating that at least in some instances, the Security Council still takes the view that force must be explicitly authorized, even if it is in 'self-defense.' In contrast, there are other resolutions that tend to indicate that no such authorization is necessary. In this regard, the Security Council has been inconsistent, or at least given confusing signals, with respect to the extent to which the use of force by peacekeeping operations is possible. After an examination of recent UN peacekeeping operations, I will discuss some possible answers to the above questions and also reflect on whether or not such a use of force, whilst possibly legitimate, is desirable.

IV. BEYOND SELF-DEFENSE: AN EXAMINATION OF RECENT USES OF FORCE BY UNITED NATIONS PEACEKEEPING OPERATIONS

Since the end of the Cold War the number of peacekeeping operations authorized by the Security Council has outstripped the previous operations not only in number but also in complexity and size.[60] Many of the peacekeeping operations established since 1989 have gone beyond the traditional peacekeeping role of monitoring cease-fires and controlling buffer zones between belligerent States. Although peacekeeping operations continue to carry out such tasks, they have been entrusted additionally with mandates as varied as the monitoring of troop with-

59. Roberts, *supra* note 54, at 14.

60. During the Cold War there were 15 peacekeeping operations. Since 1989 there have been 26 established. *See* BLUE HELMETS I, *supra* note 6, at 3.

drawals, elections and human rights violations.[61] Peacekeeping forces have also provided assistance in the resettlement of refugees and displaced persons, the rebuilding of political and administrative structures and the protection of deliveries of humanitarian relief supplies. Certain peacekeeping operations, such as those deployed in Cambodia, Mozambique, and Angola, required an integrated program in which most of the above mentioned tasks were included.[62]

During the Cold War, the concept of self-defense, as elaborated above, remained static and force was not widely used in practice by UN peacekeeping forces.[63] Since then, as peacekeeping itself became more complicated and difficult, peacekeepers have been authorized to use force more liberally and have increasingly resorted to the use of force. Both the authorization and use of force has come about for several reasons: first, due to the number of attacks against civilian and military personnel engaged in peacekeeping operations; secondly, in order to more effectively carry out difficult mandates; and thirdly, due to more complex conflict situations in which peacekeepers are engaged. Given the limited scope of this paper, it is not possible, or desirable, to undertake a detailed examination of all the peacekeeping operations that have taken place since 1989. However, such an analysis is not necessary for the purpose of illustrating the increasing tendency of the Security Council to authorize the use of force by peacekeepers and in so doing to give them more "muscle."[64] In order to illustrate this trend I will give examples of recent Security Council resolutions which explicitly authorize peacekeepers to use force. I will also argue that the use of force may have been implicitly sanctioned in other Security Council resolutions. This can be shown by examining the language of these resolutions and related United Nations reports.

It should be understood that this study is complicated by the fact that in recent times the Security Council has "authorized Member States to use all necessary means to achieve specific goals in operations in Somalia, Rwanda, and Haiti, separate from United Nations peacekeeping missions."[65] This kind of support was also authorized in

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61. Ratner describes second generation peacekeeping in the following way: (1) Second generation operations aim primarily at assisting a State or group of States in executing an agreed political solution to a conflict; (2) Second generation peacekeeping operations are limited to an exclusively military mandate, but can have a substantial or predominantly nonmilitary mandate and composition; (3) Second generation peacekeeping has complex agendas; (4) The new peacekeeping is as likely to respond to an ostensibly internal conflict as an interstate conflict; (5) Second generation operations involve numerous types of actors; (6) The new peacekeeping is a fluid phenomenon. *See* RATNER, *supra* note 13, at 21-24.

62. *See* BLUE HELMETS I, *supra* note 6.

63. Except in the case of the Congo.

64. Goulding, *supra* note 6, at 461

65. BLUE HELMETS I, *supra* note 6, at 6.

the former Yugoslavia, in the UNPROFOR, UNCRO and UNTAES peacekeeping operations.[66] Such measures, for the purpose of this paper, are characterized as enforcement measures and are not within its scope.[67] Instead, this paper focuses on examples where the peacekeeping force itself was authorized to use force. It is acknowledged, however, that it is becoming harder to distinguish, legally speaking, between peacekeeping and enforcement measures.[68] Indeed, considerable controversy exists in some instances as to how to characterize particular operations. UNOSOM II,[69] for example, is alternatively described as a peacekeeping operation,[70] or as the first "peace-enforcement operation authorized and commanded by the United Nations."[71] This confusion as to characterization is borne in mind in undertaking this analysis.

Finally, it is important to emphasize the common theme that runs through the peacekeeping operations discussed below, as it is this theme which underlies the expanded use of force by peacekeepers. The use of force, whether its specific purpose be to ensure freedom of movement or protect a safe area, is primarily geared towards the ultimate goal of alleviating human suffering. In this respect, I argue, that a significant expansion of the use of force by peacekeepers has occurred. Force, in these instances, has been used for the protection of civilians and the protection of humanitarian activities. This use of force goes beyond self-defense, in even the broader sense of the meaning, because although it might be termed as being in 'defense of a mandate', the mandate now involves the protection of third parties, as distinct from the protection of peacekeepers themselves (albeit in pursuit of their duties). In the context of UNPROFOR, Marrack Goulding has stated that this

66. United Nations Protection Force, United Nations Confidence Restoration Operation in Croatia & United Nations Transitional Administration for Eastern Slavonia, Baranja, and Western Sirmium respectively. *See* S.C. Res. 1037, U.N. SCOR, 3619th mtg. ¶ 14, U.N. Doc. S/RES/1037 (1996) (UNTAES); S.C. Res. 981, U.N. SCOR, 3512th mtg. ¶ 6, U.N. Doc. S/RES/981 (1995) (UNCRO); S.C. Res. 836, U.N. SCOR, 3228th mtg. ¶ 10, U.N. Doc. S/RES/836 (1993) (created safe areas which Member States could protect through air power); S.C. Res. 781, U.N. SCOR, 3122d mtg., U.N. Doc. S/RES/781 (1992) *revised by* S.C. Res. 816, U.N. SCOR, 3191st mtg., U.N. Doc. S/RES/816 (1993) (created no-fly zone and gave Member States authority to use all necessary measures to enforce the ban).

67. I use the term "enforcement measures" to encompass measures outlined in Article 42 of the Charter which can be exercised once the Security Council has determined the existence of a threat to the peace, breach of the peace or act of aggression, *i.e.*, a more active and aggressive use of force than that involved in peacekeeping. Thus, enforcement measures are not undertaken with the consent of the State involved (in fact such measures are used 'against' the State) and the use of such force is offensive as opposed to defensive. *See* U.N. CHARTER art. 42.

68. For a discussion on this point see Fink, *supra* note 8.

69. United Nations Operation in Somalia II.

70. UNOSOM II is included in the U.N.'s review of United Nations peace-keaping. *See* BLUE HELMETS I, *supra* note 6.

71. UNITED NATIONS, THE UNITED NATIONS AND SOMALIA 1992-1996 at 43, U.N. Sales No. E.96.I.8 (1996) [hereinafter UNITED NATIONS AND SOMALIA].

use of force, under the "fig leaf of 'self-defence'", was incompatible with the operation's peacekeeping role.[72] It is for this reason that such an expansion of the concept of self-defense should be considered carefully before being adopted.

In the examination below I will trace the development of this broader interpretation of self-defense. I have divided the analysis into three categories: force authorized to deliver humanitarian assistance and relief, force authorized to secure the freedom of movement of UN personnel and force authorized to protect safe areas and protected sites and populations. These are not watertight categories and, as will become evident, there are frequent overlaps between the first two in particular.[73] It is also worth noting that events in the former Yugoslavia dominate this analysis. Indeed, it has been said that the "performance of UNPROFOR in former Yugoslavia will doubtlessly form a prototype for successor peacekeeping forces assigned with a mission that involves the use of force beyond self-defense."[74]

A. Force Authorized to Ensure Delivery of Humanitarian Assistance & Relief: UNOSOM II, UNPROFOR, UNCRO & UNAMIR

The UN's involvement in the Somalia is long and complicated: it consisted of three operations (and phases) being UNOSOM I, UNITAF and UNOSOM II. UNOSOM I can be regarded as essentially a traditional peacekeeping operation that failed primarily because the situation into which in went was not conducive to peacekeeping. UNITAF, a US-led multinational operation, followed UNOSOM. Its mandate, under Chapter VII of the Charter, was to use force to establish a secure environment for humanitarian relief operations.[75] Upon restoration of peace (albeit of a precarious nature) in southern and central Somalia, a second peacekeeping operation, UNOSOM II, took over operational responsibility for the area. This operation is sometimes described as a peacekeeping force, and yet was "deployed without the consent of the parties, [and had] the right to use all necessary measures to carry out its mandate – including the right to the use of force."[76] Such use of force was authorized because UNITAF's task of establishing a secure environment in all of Somalia was "far from complete" when UNOSOM

72. Goulding, *supra* note 38. Marrack Goulding is the Under-Secretary-General for Political Affairs of the United Nations.

73. Indeed, Goulding merely divides the new uses of force into two categories: force authorized to protect civilians; and force authorized to protect humanitarian activities. *See id.*

74. Fink, *supra* note 8, at 31.

75. S.C. Res. 794, U.N. SCOR, 3145th mtg., U.N. Doc. S/RES/794 (1992).

76. Serge Lalande, *Somalia: Major Issues for Future UN Peacekeeping*, *in* NEW DIMENSIONS OF PEACEKEEPING 69, 77 (Daniel Warner ed., 1995).

II took over.[77] In this respect, UNOSOM II must be regarded as an enforcement measure, albeit under the control and command of the United Nations. While, for this reason, UNOSOM II does not truly fit within the scope of this paper, it is worth mentioning the operation because it forged a path for the use of force to deliver humanitarian assistance. The mandate of UNOSOM II was to "take appropriate action, including enforcement measures, to establish throughout Somalia a secure environment for humanitarian assistance."[78] Although UNOSOM II had many other purposes and duties,[79] this was the driving force behind the operation.

This theme has been picked up in subsequent peacekeeping operations. The role of UNPROFOR in delivering humanitarian relief was confirmed in numerous Security Council resolutions.[80] Although the use of force was not explicitly authorized for this purpose in these resolutions, it is interesting to note that the Secretary-General was of the opinion that force could be used. In September 1992 the Secretary-General stated that, *in the context of ensuring the delivery of humanitarian aid and protecting humanitarian convoys*, "self-defence is deemed to include situations in which armed persons attempt by force to prevent United Nations troops from carrying out their mandate."[81] Clearly the Secretary-General was of the opinion that self-defense could include situations involving the protection of third parties. The fact, however, that the operation was later explicitly authorized to use force to secure their freedom of movement in resolution 871 (primarily to en-

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77. UNITED NATIONS AND SOMALIA, *supra* note 71, at 42.

78. S.C. Res. 794, *supra* note 75. *See also* S.C. Res. 814, U.N. SCOR, 3188th mtg., U.N. Doc. S/RES/814 (1993) (establishing UNOSOM II); BLUE HELMETS I, *supra* note 6, at 722.

79. These duties included, through disarmament and reconciliation, the restoration of peace, stability, law and order. Its main responsibilities included monitoring the cessation of hostilities, preventing resumption of violence, seizing unauthorized small arms, maintaining security at ports, airports and lines of communication required for delivery of humanitarian assistance, continuing mine clearing and assisting in repatriation of refugees in Somalia. *See* S.C. Res. 814, *supra* note 78; *Further Report of the Secretary-General Submitted in Pursuance of Paragraphs 18 and 19 of Resolution 794* (1993), U.N. SCOR, 48th Sess., Addendum 1, U.N. Doc. S/25354/Add.1 (1993); *Further Report of the Secretary-General Submitted in Pursuance of Paragraphs 18 and 19 of Resolution 794* (1993), U.N. SCOR, 48th Sess., Addendum 2, U.N. Doc. S/25354/Add.2 (1993) (proposing that the mandate of UNOSOM II cover the whole country and include enforcement powers under Chapter VII of the Charter).

80. *See* S.C. Res. 776, U.N. SCOR, 47th Sess., 3114th mtg., U.N. Doc. S/RES/776 (1992); S.C. Res. 770, U.N. SCOR, 47th Sess., 3106th mtg., U.N. Doc. S/RES/770 (1992); S.C. Res. 764, U.N. SCOR, 47th Sess., 3093 mtg., U.N. Doc. S/RES/764 (1992); S.C. Res. 761, U.N. SCOR, 3087 mtg., U.N. Doc. S/RES/761 (1992); S.C. Res. 749, U.N. SCOR, 47th Sess., 3066th mtg., U.N. Doc. S/RES/749 (1992); S.C. Res. 743, U.N. SCOR, 47th Sess., 3055th mtg., U.N. Doc. S/RES/743 (1992).

81. *Report of the Secretary-General on the Situation in Bosnia and Herzegovina*, U.N. SCOR, 47th Sess. ¶ 9, U.N. Doc. S/24540 (1992).

sure delivery of humanitarian assistance) seems to indicate that the Security Council did not regard UNPROFOR as being able to use such extensive force without explicit authorization.[82] This interpretation is supported by a later resolution which similarly explicitly authorized the use of force *in self-defense* in the safe areas, in the event of any obstruction in or around the areas which interfered with the freedom of movement of protected humanitarian convoys.[83]

UNCRO's mandate also included "facilitating the delivery of international humanitarian assistance" and other humanitarian tasks.[84] Although the use of force was not explicitly authorized in Resolution 981, the resolution under which UNCRO was established, the operation's mandate included "facilitating the implementation of all relevant Security Council resolutions."[85] In the *Report of the Secretary-General Submitted Pursuant to Paragraph 4 of Security Council Resolution 981 (1995)* the Secretary-General stated clearly that the resolutions referred to in resolution 981 included "those relevant to the functioning of UNCRO (freedom of movement, security, self-defense, including close air support)."[86] This implies that force could be used in 'self-defense' where it was necessary to ensure freedom of movement and the delivery of humanitarian aid. As part of the implementation of UNCRO's mandate was to protect and escort humanitarian convoys,[87] and given that the use of force in self-defense to ensure freedom of movement had previously been explicitly authorized, it is plausible to argue that force could be used in self-defense to protect humanitarian convoys and ensure assistance was delivered.[88]

In Rwanda, the Security Council "recognized" that the United Nations Mission for Rwanda (UNAMIR) might need to take action in self-defense "against persons or groups who threaten[ed] . . . the means of delivery and distribution of humanitarian relief."[89] Interestingly, there was no explicit authorization to use force in this regard and no reference made to Chapter VII. This implies that, in this instance, the Security Council did not believe it was necessary to explicitly authorize such

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82. See discussion below on the use of force to secure freedom of movement of UN personnel.

83. S.C. Res. 836, *supra* note 66 ¶ 9. See discussion below on the use of force to secure freedom of movement of UN personnel.

84. S.C. Res. 981, *supra* note 66 ¶ 3(c), (e). United Nations Confidence Restoration Operation in Croatia (UNCRO) was one of the three peacekeeping operations which replaced UNPROFOR.

85. *Id.* ¶ 3(c).

86. *Report of the Secretary-General Submitted Pursuant to Paragraph 4 of Security Council Resolution 981 (1995)*, U.N. SCOR, 50th Sess. ¶ 18, U.N. Doc. S/1995/320 (1995).

87. *Id.* ¶ 24(c).

88. S.C. Res. 871, U.N. SCOR, 48th Sess., 3286th mtg., U.N. Doc. S/RES/871 (1993).

89. *See* S.C. Res. 925, U.N. SCOR, 49th Sess., 3388th mtg. ¶ 5, U.N. Doc. S/RES/925 (1994); S.C. Res. 918, U.N. SCOR, 49th Sess., 3377th mtg. ¶ 4, U.N. Doc. S/RES/918 (1994).

a use of force. This interpretation is supported by the *Report of the Secretary-General on the Situation in Rwanda*. In this report it was made clear that UNAMIR was expected to provide security assistance to humanitarian organizations in their programs for distribution of relief supplies.[90] Although the rules of engagement were not to envisage enforcement action, it was acknowledged that UNAMIR might have to take action in self-defense against persons who threatened the means of delivery and the distribution of humanitarian relief.[91] As before, no explicit mention is made of the use of force in this report, however, because 'rules of engagement,' by definition, cover the use force it is clear that forceful measures were contemplated. Furthermore, the Secretary-General was of the opinion that for UNAMIR to successfully execute its mandate it had to be "composed of a credible, *well-armed* and highly mobile force" indicating that the operation had to be suitably armed for such a role.[92]

B. Force Authorized to Secure the Freedom of Movement of UN Personnel: UNPROFOR, UNCRO & UNTAES

Freedom of movement is deemed to be essential to the functioning of all peacekeeping operations and is generally provided for in the Status of Forces Agreements establishing an operation.[93] The right to use force in self-defense to defend one's freedom of movement has existed since ONUC. Bowett has stated that:

> In simple terms, it may be said that ONUC was entitled to assert its freedom of movement and to resort to self-defence against any action constituting a denial of freedom of movement: this would not have meant abandoning the principle, then operative, that ONUC could not take the initiative in military action.[94]

Schachter has likewise recognized that a "significant extension of self-defense resulted from granting the ONUC freedom of movement throughout the country."[95] UNPROFOR, however, was the first peacekeeping operation to be explicitly authorized to use force in *self-defense* to ensure freedom of movement and some commentators regard this authorization as significantly expanding the concept.[96]

90. *Report of the Secretary-General on the Situation in Rwanda*, U.N. SCOR, 49th Sess., ¶ 12, U.N. Doc. S/1994/565 (1994).

91. *Id.* ¶ 15.

92. *Id.* ¶ 16 (emphasis added).

93. Bowett states that "the right to freedom of movement should be acknowledged by the host State as early as possible [and] recognized in the basic agreement, but the details of the right should be worked out in the SOFA." *See* BOWETT, *supra* note 4, at 434.

94. *Id.* at 204.

95. Schachter, *supra* note 5, at 85.

96. Certainly Fink is of the view that "the peacekeeper's mandate to use force for self-defense in Bosnia is greatly expanded by their authority to secure 'free movement,'

What distinguishes the use of force to secure freedom of movement in recent operations from past operations is that recently it has been closely linked to the delivery of humanitarian aid. Not surprisingly then, there is a fair degree of overlap between the force authorized to secure free movement and that authorized to ensure delivery of aid. The main difference between the two is that force here is being used to secure the freedom of movement of UN personnel, as opposed to humanitarian convoys. For example, in order to carry out their humanitarian objectives, UNPROFOR was authorized under Chapter VII of the Charter, "in carrying out its mandate in the Republic of Croatia, *acting in self-defence*, to take the necessary measures, including the use force, to ensure its security and freedom of movement."[97] This new resolution was passed primarily to enable the operation to ensure that humanitarian assistance was provided in compliance with earlier Security Council resolutions.[98] Arguably, this explicit authorization indicates that the Security Council was in some way expanding the operation's original self-defense mandate.[99] The Security Council's determination to ensure the freedom of movement of UN personnel was reaffirmed in many subsequent Security Council resolutions.[100]

The trend allowing peacekeepers to use more forceful measures to secure their freedom of movement in order to deliver humanitarian aid, was implicitly followed in two subsequent former-Yugoslavia operations. In Security Council Resolution 981, in which UNCRO was established,[101] the Security Council reaffirmed its "determination to ensure the security and freedom of movement of the personnel of United Nations [p]eace-keeping operations in the territory of the former Yugoslavia."[102] The peacekeeping operation was established under Chapter VII

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thereby facilitating the delivery of humanitarian aid." *See* Fink, *supra* note 8, at 37.

97. S.C. Res. 871, *supra* note 88 ¶ 9 (emphasis added). Fink likens the mandate of the peacekeepers in Bosnia to that of the ONUC peacekeepers in the Congo. Fink, *supra* note 8, at 31.

98. S.C. Res. 836, *supra* note 66 ¶ 9.

99. The language of this authorization followed that used in the earlier Security Council Resolution 836, which had authorized peacekeepers to use force in self-defense to ensure their freedom of movement within certain 'safe areas.' See discussion below concerning the authorized use of force to protect 'safe areas' and 'protected sites and populations.'

100. *See generally* S.C. Res. 1026, U.N. SCOR, 3601st mtg., U.N. Doc. S/RES/1026 (1995); S.C. Res. 998, U.N. SCOR, 3543d mtg., U.N. Doc. S/RES/998 (1995); S.C. Res. 987, U.N. SCOR, 3521st mtg., U.N. Doc. S/RES/987 (1995); S.C. Res. 982, U.N. SCOR, 3512th mtg., U.N. Doc. S/RES/982 (1995); S.C. Res. 947, U.N. SCOR, 3434th mtg., U.N. Doc. S/RES/947 (1994); S.C. Res. 941, U.N. SCOR, 3428th mtg., U.N. Doc. S/RES/941 (1994); S.C. Res. 914, U.N. SCOR, 3369th mtg., U.N. Doc. S/RES/914 (1994).

101. United Nations Confidence Restoration Operation in Croatia.

102. S.C. Res. 981, *supra* note 66. This determination was reaffirmed in Security Council Resolutions 990, 994, 1009, and 1025. *See* S.C. Res. 1025, U.N. SCOR, 3600th mtg., U.N. Doc. S/RES/1025 (1995); S.C. Res. 1009, U.N. SCOR, 3563d mtg., U.N. Doc. S/RES/1009 (1995); S.C. Res. 994, U.N. SCOR, 3537th mtg., U.N. Doc. S/RES/994 (1995);

of the Charter. As stated above, in the Secretary's report on the operation he made it clear that the previous resolutions relevant to the functioning of UNCRO applied to the operation. This included resolutions relating to freedom of movement and self-defense.[103] As UNPROFOR had previously been authorized to use force in self-defense to secure freedom of movement in Croatia, there seems to be no reason why UNCRO would not also be covered by this authorization.

The operation that took over from UNCRO, UNTAES, was established under Security Council Resolution 1037.[104] In this resolution the Security Council again stated that it was "determined to ensure the security and freedom of movement of the personnel of the United Nations peace-keeping operation in the Republic of Croatia."[105] As with UNCRO, the peacekeeping operation was established under Chapter VII of the Charter. Although the use of force is not explicitly authorized in this operation it was made clear by the Secretary-General in his *Report Pursuant to Security Council Resolution 1025 (1995)*, that the operation implemented should be able to use force, at least in self-defense. He stated, in advising the UN on the type of force to be implemented, that:

> The force deployed must. . . have a mandate under Chapter VII of the Charter, must have the capacity to take the necessary action to maintain peace and security, must be sufficiently credible to deter attack from any side and must be capable of defending itself. Anything less than a well-armed division-sized force would only risk repeating the failures of the recent past.[106]

It is not clear what the scope of this use of force is and whether or to what extent it included the use of force to ensure freedom of movement. The absence of an explicit authorization allowing force to be used in this manner indicates, however, that unlike the UNPROFOR and UNCRO operations, the scope of the right to self-defense with regards to UNCRO should be interpreted more narrowly. There does not appear to be any reason, however, why force could not be used to secure movement required to carry out its mandated tasks, such as facilitating the return of refugees.[107]

S.C. Res. 990, U.N. SCOR, 3527th mtg., U.N. Doc. S/RES/990 (1995).

103. *Report of the Secretary-General Submitted Pursuant to Paragraph 4 of Security Council Resolution 981* (1995), *supra* note 86 ¶18.

104. United Nations Transitional Administration for Eastern Slavonia, Baranja and Western Sirmium.

105. S.C. Res. 1037, *supra* note 66.

106. *Report of the Secretary-General Pursuant to Security Council Resolution 1025*, U.N. SCOR ¶ 22, U.N. Doc. S/1995/1028 (1995).

107. S.C. Res. 1037, *supra* note 66 ¶ 11(d).

C. Force Authorized to Protect 'Safe Areas' & 'Protected Sites & Populations:' UNPROFOR & UNAMIR

In 1993, the critical situation in Bosnia and Herzegovina led the Security Council to adopt two resolutions under Chapter VII creating six 'safe areas' primarily aimed at protecting the civilian populations in those areas. Under Security Council Resolution 836 of 4 June 1993, the Security Council decided to ensure full respect for these areas.[108] For this purpose the Council extended the mandate of UNPROFOR to enable it to deter attacks made against the areas. It further authorized UNPROFOR:

> *[A]cting in self-defence*, to take the necessary measures, including the use of force, in reply to bombardments against the safe areas, in reply to bombardments against the safe areas by any of the parties or to armed incursion into them or in the event of any deliberate obstruction in or around those areas to the freedom of movement of UNPROFOR or of protected humanitarian convoys.[109]

The Security Council also authorized Member States, acting nationally or through regional organizations or arrangements, to take through the use of air power in and around the safe areas and in close coordination with the Secretary-General and UNPROFOR, all necessary measures to support UNPROFOR in the performance of its mandate.[110] Subsequently NATO enforced the use of air power authorized by the Security Council for "close air support" to protect UNPROFOR personnel and for "air strikes" to enforce respect for the safe areas. However, it is clear that UNPROFOR, in its own right as a peacekeeping operation, was authorized to use force in self-defense.

A parallel can be drawn in Rwanda where 'protected sites' were to be established, patrolled and monitored by UNAMIR. In Resolution 918, the Security Council recognized that "UNAMIR may be required to take action in self-defence against persons or groups who threaten *protected sites and populations*."[111] Interestingly, as described above, no reference is made to Chapter VII or the use of force in this context. It is possible to argue that the "action" described does not include the use of force, however, this seems unlikely. More likely is that the Security Council did not believe it was required to explicitly authorize such a use of force. As discussed above, support for this interpretation can be

108. Established under Security Council Resolutionw 819 and 824. *See* S.C. Res. 824, U.N. SCOR, 3208th mtg., U.N. Doc. S/RES/824 (1993); S.C. Res. 819, U.N.SCOR, 3199th mtg., U.N. Doc. S/RES/ 819 (1993).

109. S.C. Res. 836, *supra* note 66 ¶ 9 (emphasis added).

110. *Id.* ¶ 10.

111. *See* S.C. Res. 918, *supra* note 66 ¶ 4; S.C. Res. 925, *supra* note 89 ¶ 5 (emphasis added).

found in the Secretary-General's report on Rwanda.[112] He stated that the rules of engagement would not cover enforcement measures, but acknowledged that UNAMIR might have to take action in self-defense to protect sites and populations.[113] There is no reason why the use of force would not be included in this "action."

Later, in a letter from the Secretary-General addressed to the President of the Security Council, in which he reports on the breakdown of the peace process in Rwanda,[114] the Secretary-General recommends that a French-commanded multinational operation take place in Rwanda under Chapter VII of the Charter. Interestingly, in this letter he states that:

> [I]t would be necessary for it to request the Governments concerned to commit themselves to maintain their troops in Rwanda until UNAMIR is brought up to the necessary strength to take over from the multinational force and the latter has created conditions in which a *peace-keeping force operating under Chapter VI of the Charter* would have the capacity to carry out its mandate.[115]

This indicates clearly that the Secretary-General did not regard any use of force in self-defense by UNAMIR as requiring authorization under Chapter VII of the UN Charter. In fact he seems to regard UNAMIR as an operation falling squarely within Chapter VI of the Charter.

D. Conclusion

As discussed above, there is clear evidence that 'self-defense' has been, or is in the process of being, expanded to include the defense of third parties: namely, civilian populations and humanitarian convoys. Force has also been authorized to ensure the freedom of movement of UN personnel. Although on its face this does not appear to be an expansion of the concept of self-defense, the purpose for which such force is authorized in fact brings this use of force within the rubric of protecting humanitarian activities, and thus indirectly third parties. This expanded use of force can be traced from the explicit authorizations for the use of force in self-defense in UNPROFOR, to the implicit acknowledgment that such force may be used in self-defense in UNAMIR. It is not clear, with regards to future operations, what kind of authorization or acknowledgement would be required (if any) to enable an operation to legitimately use force in this manner.

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112. *Report of the Secretary-General on the Situation in Rwanda, supra* note 90.

113. *Id.* ¶ 15.

114. *Letter Dated 19 June From the Secretary-General Addressed to the President of the Security Council*, U.N. SCOR, U.N. Doc. S/1994/728 (1994).

115. *Id.* ¶ 12 (emphasis added).

It is true that the uses of force outlined above can all be described as being in 'defense of a mandate'. The use of force to secure freedom of movement was to enable humanitarian aid to be delivered,[116] the use of force to protect safe areas was to enable the civilian population to be protected,[117] and the use of force to protect humanitarian convoys fulfilled, in an even more direct way, the mandate to provide humanitarian relief.[118] Indeed, it is not clear why the Security Council regarded it as necessary to explicitly authorize the use of such force in 'self-defense' in the first place, given that such force would have presumably could have come within the already established inherent right to 'defend one's mandate.' Whether the Security Council did so because it felt legally bound to, or whether it did so merely because it wanted to make it unequivocally clear that peacekeeping operations could use such force, is not evident. France, for example, was of the opinion that bringing the UNPROFOR operation under Chapter VII, was in itself enough to strengthen the peacekeeping's operation traditional right to self-defense, without the need for explicit authorization.[119]

Ultimately it is not clear on what basis force can and cannot be used by peacekeeping operations. Nor is it clear how far the concept of self-defense can be pushed. At the moment it is apparently limitless, able to encompass even the defense of others so long as a legitimate mandate is being pursued. This, in effect, means that the use of force is dependent on an operation's mandate, not on any clear and fixed rules as to how force may and may not be used. The confusion and vagueness that results from this approach must prevail in all operations where clear authorization for the use of force is not set. The main problem with this is that too much is left to chance. Troops are left to apply force haphazardly, with authority to use that force being drawn, not from a mandate, or any concept of an inherent right to defend third parties, but through guesswork and reading between the lines. This is not a desirable state of affairs: it leads to misunderstandings and possible recriminations. Furthermore, while such use of force may come within the concept of 'defending one's mandate,' that is not to say that it should. There are many implications to allowing a peacekeeping operation to use more forceful measures in carrying out its mandate. Some of these are discussed below.

116. In Bosnia-Herzegovina and Croatia for example.

117. In Bosnia-Herzegovina and Rwanda for example.

118. In Somalia, Bosnia-Herzegovina, Croatia, and Rwanda for example.

119. *Provisional Verbatim Record of the Three Thousand One Hundred and Seventy Fourth Meeting*, U.N. SCOR, 3174th mtg., at 13-15, U.N. Doc. S/PV.3174 (1993) (remarks of Ambassador Merimée of France).

V. WHAT ARE THE IMPLICATIONS OF THE EXPANDED USE OF FORCE BY UNITED NATIONS PEACEKEEPING OPERATIONS?

Creating this kind of grey area between peace-keeping and peace enforcement can give rise to considerable dangers. In political, legal and military terms, and in terms of the survival of one's own troops, there is all the difference in the world between being deployed with the consent and cooperation of the parties to help them carry out an agreement they have reached and, on the other hand, being deployed without their consent and with powers to use force to compel them to accept the decisions of the Security Council.[120]

As the above passage indicates, there are many implications involved in having a peacekeeping operation that can exercise a more extensive amount of force than was traditionally the case. The problems that arise have two root causes. First, the use of force is unpredictable because there is no understanding regarding the basis on which force is used by peacekeeping operations or how force can and cannot be used. Secondly, the use of force undermines the fundamental principles of peacekeeping and confuses the concepts of peacekeeping and peace-enforcement. As Fink has stated, the "blurring of peacekeeping 'guiding principles' and peace-enforcement standards for use of force . . . jeopardizes the safety of the peacekeepers and hampers the effectiveness of their mission."[121] Thus there are two issues that need to be dealt with by the international community. First, when and how force is used by peacekeeping operations needs to be clarified. It appears that the United Nations has recognized this need and is currently undertaking the complex project of revising guidelines for rules of engagement for future peacekeeping operations. This is being done in light of the fact that the use of force in peacekeeping operations and 'Chapter VII operations' is no longer distinct and separate. However, these guidelines are unlikely to be completed for quite some time.[122]

Secondly, the international community needs to determine whether it is in fact desirable to 'blur' the notions of peacekeeping and peace-enforcement. Certainly once a peacekeeping operation uses force beyond that required for self-defense, the line between defensive and offensive force becomes harder to distinguish. Indeed, if a peacekeeping operation has a broad mandate, it is possible to argue that any force used is exercised in defense of the operation's purpose. Yet it is not hard to see how far removed this is from acting in strict self-defense.

120. Goulding, *supra* note 6, at 461.

121. Fink, *supra* note 8, at 31.

122. I have been given this information by a senior legal officer in the Office of the Legal Counsel, United Nations Secretariat, New York. I was also told that the current model rules of engagement, the mission specific rules of engagement and the revised rules of engagement are confidential.

For example, it is possible to argue that UNOSOM II was a peacekeeping operation acting in defense of its widely drawn mandate, rather than an 'enforcement measure.' Clearly, almost any forceful action taken by a UN operation can be described as a 'peacekeeping operation defending its mandate' if the mandate is wide enough. The danger with this approach is that "once you allow a peacekeeping force to use force in defence of its purposes instead of simply in defence of its personnel, the action becomes an enforcement action."[123] This is even truer if force is used in defense of third parties. Because peacekeeping operations and enforcement actions are so different, the legal significance of merging the two operations should not be underestimated.[124] Some of the problems and implications that have emerged due to the unpredictability and confusion regarding the use of force by peacekeepers are discussed below.

A. Legal Implications

The most fundamental problem with authorizing peacekeepers to use force is that the use of force is not compatible with consent and impartiality. This problem has legal and practical implications. If force is authorized in order to allow peacekeepers to implement part of their mandate, ultimately it tends to jeopardize other parts of the mandate, which rely upon the consent and cooperation of the parties. Although technically such force would only be used to support a peacekeeping mandate under threat, the practical reality is that the use of such force could not be carried out without endangering the peacekeeping operation as a whole. As the Secretary-General put it in his supplement to the *Agenda for Peace*: "To blur the distinction between the two [peacekeeping operations and enforcement measures] can undermine the viability of the peacekeeping operation and endanger its personnel."[125] Ironically, therefore, a mandate designed to protect such personnel under the banner of "self-defense" may ultimately do more harm than good.

Aside from the legal difficulty of distinguishing between peacekeeping and peace-enforcement operations, there are other legal issues which arise in this context. One such issue derives from the need to have a clear legal understanding as to the nature of peacekeeping. Ralph Zacklin, Director and Deputy to the Under-Secretary-General, Office of the Legal Counsel of the United Nations, has explained,

123. MCCOUBREY & WHITE, *supra* note 21, at 87.

124. Some of the practical implications of merging the two operations are outlined below.

125. *Supplement to An Agenda for Peace: Position Paper of the Secretary-General on the Occassion of the Fiftieth Anniversary of the United Nations*, U.N. GAOR ¶ 35, U.N. Doc. A/50/60 – S/1995/1 (1995).

> Insistence on clarifying the nature of meaning of peacekeeping is not merely a lawyer's obsession with clarity and legal definition; it is necessary because the legal character and nature of the operation has a direct bearing on the legal issues which arise and their resolution.[126]

As emphasized in the introduction to this paper, lack of clarity in an operation's mandate will give rise to legal difficulties when drafting peacekeeping agreements between the parties (such as SOFAs) and giving advice on the interpretation and implementation of such agreements. More specifically, with regards to the use of force, if it is not clear what authority there is for the use of force, difficult questions arise about what the acceptable levels and uses of force are. As stated above, it is the rules of engagement that govern the use of force in the field.[127] If the mandate of the Security Council is not clear, then the rules of engagement cannot accurately reflect the degree of force that has been authorized by the Council. The importance of specifying the authority for the use of force in order that it can be articulated in the rules of engagement is crucial to establishing an operation with a clear, purposeful, and attainable mandate.[128]

Other more probing issues arise in this context: for example, can the peacekeepers use force in "anticipatory" self-defense when the use of force against them while carrying out their mandate is foreseeable? Do the customary requirements of necessity and proportionality apply to an expanded form of self-defense in the context of peacekeeping?[129] These questions should not be left unresolved only to be 'answered' by chance through future uses of force in the field. As sound reasons are needed to explain and justify why force may be used in one situation and not in another it is preferable to clarify the instances in which force can be used before, rather than after, the event. Furthermore, it is better to use legal reasoning to justify the use of force, rather than appealing to ad hoc and random arguments in any given situation. Such legal reasoning is more likely to enable a consensus among Member States to develop with regards to the use of force. As the future credibility of the United Nations depends on successful peacekeeping operations the utmost attention must be given to these legal issues, and the sooner the better.

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126. Ralph Zacklin, *Managing Peacekeeping from a Legal Perspective*, *in* NEW DIMENSIONS OF PEACEKEEPING 159, 159 (Daniel Warner, ed. 1995).

127. MCCOUBREY & WHITE, *supra* note 21, at 146-47.

128. Fink, *supra* note 8, at 46.

129. Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1635-38 (1984).

B. Political and Military Implications

While expanding the concept of self-defense to include a more offensive use of force may be legitimate and cannot be regarded as illegal or intrinsically 'bad,' such an expansion may lead to great political and military difficulties when conducting operations. This is particularly so if the differences between peacekeeping and peace-enforcement become blurred. Some of these problems are outlined below.[130]

It may be harder to get a host State or States to consent to a peacekeeping operation if the "operation is perceived as liable to be transformed into a peace-enforcement operation against one party which initially accepted the deployment."[131] Thus, peacekeeping may, as a result, become an increasingly ineffective and useless tool of the UN, with peace-enforcement left as the primary measure of resolving conflict in the world. If this were to happen the UN would arguably find itself less able to resolve disputes via conciliatory means.

It may be harder to get States to contribute troops to peacekeeping operations if they may be involved in the use of coercive force. This may be due to constitutional reasons. For example, neutral countries or countries with constitutional limitations on getting involved in foreign military involvement, may find it difficult to reconcile involvement in such a force with their constitutional values or limitations.[132] Alternatively States may be reluctant to contribute troops for political reasons. Clearly, there is a huge political difference between becoming involved in a peacekeeping operation with the consent of a host State and working with the cooperation of the parties as opposed to taking sides in a conflict and imposing Security Council resolutions by the use of force. States will have to pay much greater regard to their domestic and foreign policies before deciding to become involved in operations that may entail forceful measures. This is primarily because a State could only justify risking the lives of its military personnel if it had a significant national interest in the conflict.

It follows then, that in an enforcement operation States with a vested interest in the matter are more likely to get involved than neutral States. Thus, not only are peacekeeping operations that use force less likely to retain the consent and impartiality of the parties (principles they traditionally espoused), but they may no longer attract the neutral States that they want and need for an operation to be viewed as

130. *See also* Lalande, *supra* note 76; Connie Peck, *Summary of Colloquium on New Dimensions of Peacekeeping*, *in* NEW DIMENSIONS OF PEACEKEEPING 181 (Daniel Warner ed., 1995).

131. Lalande, *supra* note 76, at 78.

132. Neutral countries include Austria, Switzerland, Finland or Sweden. Countries with constitutional limitations on foreign military involvement include Japan and Germany.

impartial by the host State. The national make-up of operations may inadvertently aggravate the conflict, where for example it is a dispute based on ethnic or religious grounds.

In military terms there is a vast difference between a peacekeeping operation and peace-enforcement measures. This is particularly true of the military conduct and command structure of the operation and how it is equipped. For example, the way in which force can be used and the rules of engagement vary greatly according to the type of operation that is undertaken. Furthermore, a peacekeeping operation may be authorized to use force but, in reality, not be equipped to do so. Thus if it does try to use force it may leave itself exposed to more forceful attacks to which it cannot reply. Leaving the use of force to Member States who can 'support' the peacekeeping operation using 'all necessary measures' is unlikely to resolve the problem. Peacekeepers are still more likely bear the brunt of any forceful retaliation.[133]

The relations between all the parties in peacekeeping operations, as opposed to the relations in an enforcement operation, are different. In a peacekeeping operation everyone works together in a conciliatory atmosphere of cooperation. In peace-enforcement all parties are adversaries and the mission is in a position of authority. It is not realistic to expect that a peacekeeping operation based on consent and impartiality would be able to retain those qualities if force was used against parties in a conflict. The very basis upon which peacekeeping is founded is undermined by allowing an expansive use of force to take place.

On a more theoretical level, conflicting concepts of peacekeeping and peace-enforcement may "lead to confusion, uncertainty and ambiguity in the minds of policy makers currently designing the shape of their countries' involvement in future peacekeeping operations."[134] For example, policies may be designed which limit a country's involvement in future peacekeeping operations because of concern about what kind of operations are being instigated by the UN. A good example of this is in the U.S. where, in response to the events in Somalia, President Clinton issued a Presidential Decision Directive which severely limited the future role of U.S. troops in peacekeeping operations.[135]

A more ethereal effect of the lack of a clear-cut distinction between a peacekeeping operation and peace-enforcement is that it makes it ex-

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133. Goulding, *supra* note 38, at 10.

134. Lalande, *supra* note 76, at 80.

135. *See Statement by the Press Secretary on Reforming Multilateral Peace Operations*, 30 WEEKLY COMP. PRES. DOC. 998 (May 5, 1994). The United States will now only participate where there have been grave threats to international peace and security, major disasters which require relief, or gross violations of human rights. U.S. troops would most likely be under U.S. command. *See* Fink, *supra* note 8, at 46; Steven J. Lepper, *The Legal Status of Military Personnel in United Nations Peace Operations: One Delegate's Analysis*, 18 HOUS. J. INT'L L. 359, 366 (1996).

tremely difficult for the press and the general public at large, to comprehend the role, nature and purposes of future UN peacekeeping operations. The importance of this problem should not be underestimated. Public opinion, which is sharply influenced by the press, may be decisive in determining whether action is taken in a humanitarian crisis and in determining whether a State gets involved or not.

VI. CONCLUSION

The erosion of the fundamental principles of peacekeeping occurs when force is authorized to such a degree that it can be used to protect third parties and carry out any part of a broad mandate. Such use of force threatens the basis of successful peacekeeping and does not necessarily lead to better results. While the concept of self-defense has been deemed to include 'defense of one's mandate', the continued expansion of this concept, in order to give peace-keepers even greater enforcement powers, is not a good idea for the legal, political and military reasons described above. It is time for the United Nations to accept that it must "either maintain a neutral role with consent of parties to the conflict in future peacekeeping operations, or be prepared to encounter increasing threats to the safety of its peacekeepers and be ready to exercise a level of force beyond the traditional legal meaning of self-defense."[136] In other words, it must choose between peacekeeping and peace-enforcement as its two major methods of conflict resolution.

However, if recent uses of force (as discussed in this paper) are to be regarded as a legitimate expansion of the concept of self-defense, it is essential that the legal basis for such force and the extent to which it can be used, be definitively clarified. It is in the interest of everyone, the UN, the host and contributing States, the troops who risk their lives, and the public at large, that the extent to which peacekeeping troops may become involved in a conflict is made clear. It is only with this kind of clarification that an extensive use of force by a peacekeeping body will remain, in any sense, palatable with the goals and purposes of peacekeeping. The fundamental principles of peacekeeping were developed and based on sound legal and practical reasoning. They should not be done away with without serious reflection about what the possible consequences might be.

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136. Fink, *supra* note 8, at 45.

CONSTITUTIONALISM UNDER CHINESE RULE: HONG KONG AFTER THE HANDOVER

MICHAEL C. DAVIS*

I. INTRODUCTION

With nearly two years having passed since the founding of the Hong Kong Special Administrative Region (HKSAR) it is a good time to assess Hong Kong's constitutional and human rights prospects. The 1984 Sino-British Joint Declaration set Hong Kong aside for a unique Chinese experiment with the fundamentals of modern liberal constitutional government.[1] In the 1984 agreement providing for the return of Hong Kong to China, Hong Kong was promised democracy, human rights and the rule of law, along with a "high degree of autonomy" under China's "one country, two systems" formula.[2] With the July 1997 handover, after thirteen years of preparation, the final phase of executing this agreement commenced. The people of Hong Kong and the world are watching to see if China's solemn commitments to set up a regime of liberal human rights and democracy within an authoritarian national system are carried out. While the transfer of sovereignty in Hong Kong on July 1, 1997 went relatively smoothly, tension between real power, reflected in China's perceived national imperatives, and the aspirations of liberal constitutionalism and autonomy remain and will shape the Hong Kong constitutional experiment. This tension is examined in the current essay.

The Hong Kong project highlights the demanding task of con-

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* Professor of Law, Chinese University of Hong Kong (mcdavis@cuhk.edu.hk). A special thanks to Thomas Eldert for his excellent research assistance. A further thanks for the benefit of comments given in regard to earlier versions of this article presented as a plenary talk at the World Congress of the International Political Science Association, Seoul, South Korea, August 1997 and for a round-table panel at the Annual Meeting of the Association of Asian Studies, Washington, DC, March, 1998.

1. Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, Sept. 26, 1984, 23 I.L.M. 1371 , UK—PRC [hereinafter Joint Declaration]. The promises of the Joint Declaration were stipulated in Article 3 (12) to be included in the HKSAR's constitution, the Basic Law. *Id.* at 1372.

2. *Id.* at 1371; People's Republic of China: the Basic Law of the Hong Kong Special Administrative Region of the Peoples' Republic of China, Apr. 4, 1990, 29 I.L.M. 1511, 1529 [hereinafter Basic Law].

structing an adequate regime to secure autonomy and liberal human rights in a hostile national environment. In this regard, it is important to note that the nature of that national environment has changed from that envisioned in the Joint Declaration. The original design of the Joint Declaration seemed fundamentally concerned with the theoretically worthy task of separating a local liberal capitalist system from a Marxist national system. The advent of the free market in China means this project now may simply distinguish an authoritarian capitalist system on the mainland from an aspiring liberal capitalist or even soft-authoritarian one in Hong Kong.

The success of Hong Kong's model will have enormous implications for both Hong Kong and China. A successful Hong Kong, under the commitments in the Sino-British Joint Declaration, would alone be a sufficient basis for this demanding constitutional effort. However, it is important to remember that this success will not only work to China's economic benefit, but may also afford a laboratory for China's ongoing political reform process. The Joint Declaration will certainly raise the high water mark for securing the benefits of human rights, liberty and democracy in Chinese society. Hong Kong's money and its rule of law, as well as its political and social values, are already traveling across the very porous Sino-Hong Kong border. Viewed internationally, Hong Kong is a major player in the global economic order and will be watched by its many trading partners. They will be watching to see if Hong Kong is a truly autonomous open community, which can be relied upon in the conduct of external relations. This is the high hope of the Hong Kong promise and of Hong Kong's service to China.

This essay consists of three substantial parts. The first part addresses the basic constitutional order and its evolving commitments. After concluding that the Sino-British Joint Declaration includes a commitment to liberal constitutionalism, this part assesses the health of three key liberal constitutional elements, including sections on democracy, human rights and the rule of law. Both the Hong Kong Basic Law and subsequent transition and post-handover policies and practices are addressed. The remaining parts of this essay offer analysis of two key areas of concern, or what might be considered the main challenges facing Hong Kong in the implementation of its promised liberal constitutional order. These include the emergence of a competing political model evident in a "Singaporean" vision for Hong Kong, and the challenges associated with autonomy. The first of these relates to an economic paradigm, offered in competition to the liberal one discussed herein, that may animate current government policies and undermine this constitutional commitment. The final part analyzes the constitutional politics of autonomy, both in terms of Hong Kong's domestic relationship with China and its international personality.

II. THE BASIC CONSTITUTIONAL AND HUMAN RIGHTS COMMITMENTS

The 1984 Sino-British Joint Declaration, in addition to providing for the return of Hong Kong to China in 1997, essentially promised Hong Kong a future with a liberal constitutional order and a high degree of autonomy under the Basic Law.[3] As a general proposition, the basic structural elements of liberal constitutionalism are thought to include (1) democracy with multi-party competition, (2) liberal human rights protection, including freedom of speech, and (3) the rule of law, including adherence to principles of legality.[4] With the exception of some limitations on the level of democracy, the Joint Declaration promises all of these elements. In 1984, it was understood that anything less would fail to secure adequate confidence in Hong Kong's future. At that time a substantial portion of Hong Kong's people had escaped from the brutality of totalitarian communism, and the Chinese leaders themselves had just escaped the national trauma of the Cultural Revolution. While the Joint Declaration is general in character, it leaves little interpretive space for vitiating the liberal capitalist intentions of its drafters.[5] While the Chinese leaders may have been naive about the political implications of the great social experiments embodied in their open policy at home and in their Hong Kong policy, they left little ambiguity as to the nature of their Hong Kong commitment. Their commitment was for liberal constitutional government. Respecting democracy, the Joint Declaration promises that the Chief executive is to be chosen by "elections or consultations" held locally and that the legislature is to be chosen by "elections."[6] Regarding human rights, the Joint Declaration lists the full panoply of liberal rights, of which more than half relate to freedom of expression.[7] It also guarantees the application of the international human rights covenants.[8] The rule of law is expressly secured by the continued application of the common law, the independence and finality of the local courts, the supremacy of the Basic Law (which is stipulated to include the content of the Joint Declaration), and the right to challenge executive actions in the courts, which presumably includes the right to challenge the actions legal basis under the Basic Law.[9] By implication, this promised nothing less than a full system of constitutional judicial review to enforce a substantial bill of

3. Joint Declaration, *supra* note 1, at 1371-75.
4. *See* ROBERT A. DAHL, DEMOCRACY & ITS CRITICS 223 (1989).
5. *See generally* Joint Declaration, *supra* note 1.
6. *See id.* at para. 3(4) & Annex I, art. I.
7. *See id.* at para. 3(5) & Annex I, art. XIII.
8. *Id.*
9. *Id.* at para. 3(3), (5), (12), & Annex I, arts. I-III, XIII.

rights. In tandem with a degree of democracy and a high degree of autonomy, the Joint Declaration committed China to liberal constitutional government in Hong Kong.

The HKSAR Basic Law, enacted in 1990, lives up to these commitments in many respects but falls ambiguously short in others.[10] As a constitutional document, the Basic Law is the product of an extraordinary five year drafting process.[11] After multiple drafts and endless discussions a constitutional road map for the future HKSAR took shape. While these discussions, engaged a wide range of ideas, Chinese officials did seek to constrain the outcome. They were cautious about democratic development from the start.[12] But at the final stage, before approving the final Basic Law in April 1990, the 1989 Tiananmen demonstrations in Beijing and the enormous supporting demonstrations in Hong Kong left their mark. Although many key provisions were already finalized in the February 1989 final draft[13] and remained unaffected by Tiananmen, the 1989 demonstrations in Hong Kong shifted the paradigm of China's Hong Kong policy from protecting Hong Kong from China to the other way around.

China's basic political instincts to maximize control and this "Tiananmen effect" combined to produce the conservative Hong Kong policy evident in the final Basic Law and China's transition practices. Both in the Basic Law and in subsequent transition policies, a degree of erosion from the Joint Declaration commitments has occurred. The following sections consider each of the key liberal constitutional components discussed above as they have emerged in the Basic Law, the transition process, and the post-handover politics of the first couple years of Chinese rule.

A. Democracy

The erosion of the Joint Declaration commitments is especially evident with regard to democracy, where the Tiananmen effect was most pronounced. The relevant provisions respecting democracy were not finalized in the first draft of the Basic Law published in 1988.[14] The

10. Basic Law, *supra* note 2, at 1520-50.

11. This process included China's appointment of a 180-member Basic Law Consultative Committee (all Hong Kong residents), and a 58-member Basic Law Drafting Committee (of which 23 members were Hong Kong residents). *Id* at 1511.

12. *See* MICHAEL C. DAVIS, CONSTITUTIONAL CONFRONTATION IN HONG KONG, ISSUES AND IMPLICATIONS OF THE BASIC LAW, 28-29 (1989) [hereinafter CONSTITUTIONAL CONFRONTATION].

13. *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China* (Draft)) [hereinafter Draft Basic Law], reprinted in DAVIS, CONSTITUTIONAL CONFRONTATION, supra note 12, at 175-215.

14. DAVIS, *supra* note 12, at 28-29.

1989 Draft Basic Law then adopted a very conservative model.[15] After the 1989 demonstrations, as Chinese leaders worried about Hong Kong becoming a base of subversion, they sought to tighten the noose on democracy, insisting on retaining this very conservative evolutionary model in the final Basic Law.[16] This model, respecting the election of the first post-handover Legislative Council, allows the sixty-member body to have only twenty directly-elected geographical seats, ten Selection Committee seats and thirty functional constituency seats (from various professional and commercial sectors).[17] It is noteworthy that this figure was worked out with the British as part of a convergence plan to allow for the pre-handover Legislative Council to have only eighteen such directly elected geographical seats in 1991 and twenty in 1995. With convergence, it was anticipated that those elected in 1995 would remain in office through 1997 until 1999.[18] For the second and third term, under the Basic Law, there will be an evolutionary process expanding the number of directly elected geographical seats to thirty (along with thirty functional seats) by 2004.[19] For the period after 2007 a two-thirds contingent of the Legislative Council and the Chief Executive can amend the Basic Law providing for greater democracy in election of the Legislative Council.[20] The Chief Executive, after the first appointment, is to be selected by an 800 member Election Committee.[21] The Basic Law declares that the "ultimate aim is . . . universal suffrage."[22] By the late drafting stage as the leading democrats were eliminated from the post-Tiananmen process finalizing the Basic Law, this conservative model was adopted with little resistance.[23]

15. *See* Draft Basic Law, *supra* note 13, at Annexes I and II.

16. Basic Law, *supra* note 2, at Annexes I and II.

17. Basic Law, *supra* note 2, at Annex II; Decision of the National People's Congress on the Method for the Formation of the First Government and the First Legislative Council of the Hong Kong Special Administrative Region, adopted at the Third Session of the Seventh National People's Congress on 4 April 1990, 1550-51 [hereinafter First Government Decision].

18. *Id.*

19. Basic Law, *supra* note 2, at Annexes I and II.

20. Basic Law, *supra* note 2, at Annex II.

21. *Id.* at Annex I. The process for electing the Election Committee, largely through functional constituencies, insures that conservative business and pro-China forces will hold the controlling vote.

22. *Id.* at arts. 45, 68.

23. Martin C. M. Lee and Szeto Wah, the two leading democratic activists of the 1980s, served on both the Basic Law drafting and consultative committees. After leading more than a million demonstrators under the banner of the Alliance in Support of the Democratic Patriotic Movement in China in 1989, after the June 4, 1989 Beijing massacre, they withdrew from these Basic Law committees. They attempted to resume their positions when the temporarily suspended drafting process resumed in late 1989 but they were refused entry. *See Chronology of Major Events in* PRECARIOUS BALANCE: HONG KONG BETWEEN CHINA AND BRITAIN, 1842-1992 209-211 (Ming K. Chan ed., 1994) [hereinafter Chronology].

Any hope that democratic forces can use their foothold to expand democracy is also tightly controlled by other provisions in the Basic Law. Not only is there the two-thirds vote requirement to institute full universal suffrage after 2007, but there are a plethora of other constraints on democracy.[24] As the Legislative Council is to take the lead in democratization, these constraints mostly relate to legislative powers.[25] For example, for local legislative action members of the Legislative Council are required to get the Chief Executive's approval before they can introduce bills involving expenditure or government policy.[26] Additionally, amendments to government bills and motions or bills introduced by individual members of the Legislative Council require majority approval by each of two different groups of legislators: thirty from functional constituencies and thirty made up of members directly elected from geographical constituencies, and those chosen by the Election Committee.[27] As if this obstacle course for democratic initiative were not enough, the government argued, in challenging the newly enacted Rules of Procedure of the first post-handover elected Legislative Council, that even amendments to government bills, proposed by legislators, require the Chief Executive's approval.[28] The chance of avoiding these constraints through amendment of the Basic Law is also blocked. The power to amend the Basic Law is vested in the National People's Congress (NPC).[29] Even the submission of local proposals for amendments requires a two-thirds vote in the Legislative Council, the consent of two-thirds of the local NPC deputies, and the approval of the Chief Executive.[30]

After promulgating the Basic Law in 1990, China's policy of resisting democracy persisted in the 1990s processes of transition and in post-handover politics. By the early 1990s, influenced by the initiation of direct election for eighteen geographical seats to the Legislative Council in 1991, Hong Kong, under colonial rule, began to develop a democratic political system, with numerous political parties across a broad spectrum, an informed public and a vibrant press attuned to political coverage.[31] In October 1992 the then new Hong Kong Governor, Chris Patten, put forth a controversial proposal for the last British

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24. Basic Law, *supra* note 2, at art. 74 and Annex II.

25. *Id.*

26. Basic Law, *supra* note 2, at art. 74.

27. *Id.* at Annex II.

28. Angela Li, *Justice Chief to Challenge Bill in Court; 'To Apply a Judicial Review Shows Disrespect for the Legislature's Unanimous Decision'*, S. CHINA MORNING POST, July 8, 1998, at 6; Margaret Ng, *Restrictions Will Clip Legco's Wings*, S. CHINA MORNING POST, July 17, 1998, at 17.

29. Basic Law, *supra* note 2, at art. 159.

30. *Id.*

31. It is noteworthy that, Martin Lee and Szeto Wah, after leading the protest in 1989, went on to form and lead the political parties (now the Democratic Party) which won the most popular votes in the elections at various levels held in the 1990s.

Hong Kong election in 1995.[32] This proposal aimed to further strengthen the foundation for democratic political development by maximizing the space allowed by the Basic Law electoral ratio.[33] His proposal allowed for nine appointed seats from the 1991 Legislative Council to be replaced by broad-based functional constituencies that included all working voters.[34] It further provided that the Selection Committee, anticipated in the Basic Law, for selecting ten seats in the first post-handover Legislative Council, be made up of directly elected members of the district and regional boards.[35] This substantially broadened the franchise for two-thirds of the seats in the Legislative Council.

Chinese officials attacked this proposal aggressively.[36] They seemed set to exclude certain elected democrats, who had been active in the 1989 demonstrations, from the 1997 through-train.[37] After failing to resolve the ensuing impasse through seventeen rounds of negotiations, both sides decided to go it alone.[38] The Patten proposal was enacted and followed in the 1995 election, setting the high point, to date,

32. The Right Honorable Governor Christopher Patten, Our Next Five Years, The Agenda for Hong Kong, Address at the Opening of the 1992/93 Session of the Legislative Council (Oct. 7, 1992).

33. *Id.*

34. *Id.*

35. His proposal expanded elections and eliminated appointed seats to various sub-Legislative Council district boards and regional councils. These elected bodies then made up his Selection Committee for the selection of ten legislators, as specified in China's transition legislation. By matching China's basic formula Patten hoped his full Legislative Council would ride on the through-train to serve beyond the 1997 handover. There was an interesting development after the handover, in addition to eliminating the Board members prominent electoral role in the Legislative Council, China's Hong Kong government re-introduced into Hong Kong Government some appointed seats to district boards and even abolished one level of councils. Angela Li, *Five Walk Out as Appointed Seats Secure Approval*, S. CHINA MORNING POST, Mar. 11, 1999, at 6.

36. *See* Representative Government in Hong Kong (Hong Kong: Government Printer, 1994)(reproducing the text of the White Paper presented to Parliament by the Secretary of State for Foreign and Commonwealth Affairs by Command of Her Majesty on 24 February 1994) (representing the British account of the negotiations and their breakdown) [hereinafter Representative Government in Hong Kong]; *UK Accused of Breaching Trust By Leaking Confidential Details*, S. CHINA MORNING POST, Mar. 1, 1994, at 12-13 (containing China's report on the breakdown of negotiations).

37. Democratic party members Martin Lee and Szeto Wah were excluded from the Basic Law drafting and consultative committees. Both had led the 1989 demonstrations in Hong Kong and were founders of the alliance in support of the Patriotic Democratic Movement In China, which China has branded as subversive. *Chronology, supra* note 23, at 208-10. In the course of the 1993 Sino-British negotiations over elections, Chinese officials repeatedly proposed a review formula that would allow them to exclude both Mr. Lee and Mr. Szeto from the through-train. *See* Representative Government in Hong Kong, *supra* note 36; *UK Accused of Breaching the Trust by Leaking Confidential Details, supra* note 36.

38. Representative Government in Hong Kong, *supra* note 36; Linda Choy, *Calls to Release Minutes for Fair Analysis*, S. CHINA MORNING POST, Mar. 1, 1994, at 4.

for democracy in Hong Kong.[39]

Objecting to the British Hong Kong actions, China started to roll back these democratic developments.[40] China created a "second stove" by appointing its' supporters to a large number of transition bodies.[41] These appointed bodies included several local advisory groups, and ultimately, for the transition process, a Preliminary Working Committee and its successor, the Preparatory Committee.[42] The Preparatory Committee was charged with several transition functions, including the selection of a 400 member Selection Committee.[43] This Selection Committee then chose both the first Chief Executive and a Provisional Legislature.[44] The appointed Provisional Legislature, took office on July 1, 1997 and remained in power until April of 1998. The Provisional Legislature was never mentioned in the Basic Law or the transition legislation, concurrently enacted by the National People's Congress (NPC), which specifies the electoral make-up of the first HKSAR Legislative Council.[45] Though it survived a judicial challenge raised immediately after the handover, the Provisional Legislature appeared to clearly violate the NPC transition legislation's specific electoral requirements and the more general requirement that the legislature be chosen through elections, specified in both the Basic Law and the Joint Declaration.[46]

During its one year tenure, the Provisional Legislature enacted the electoral law, under which the current Legislative Council was elected

39. *See Jubilant Democrats Eye Legco*, S. CHINA MORNING POST, Mar. 7, 1995, at 1. Fung Wai-Kong and Lok Wong, *Democrats Dominate Legco*, S. CHINA MORNING POST, Sept. 19, 1995, at 1.

40. Representative Government in Hong Kong, *supra* note 36; *UK Accused of Breaching the Trust by Leaking Confidential Details*, *supra* note 36.

41. *Beijing Names New Advisers*, S. CHINA MORNING POST, Apr. 26, 1999, at 1.

42. Chris Yeung, *Players in the Power Game*, S. CHINA MORNING POST, Dec. 2, 1995, at 17.

43. *Id.*

44. *Incumbent and Legco Losers Win Selection Fight; Qian's Pointer to Smooth Transition in Martin Lee's 'darkest day' since '89, While Governor Sickens*, S. CHINA MORNING POST, Dec. 22, 1996, at 1; Chris Yeung, *The Obligations of Office*, S. CHINA MORNING POST, Dec. 14, 1998, at 21; Chris Yeung & Linda Choy, *Tung Leads The Way; 'We are Finally Masters of Our Own House . . . We Must Put Aside Our Differences and Find Common Ground to Build Hong Kong Together'*, S. CHINA MORNING POST, Dec. 12, 1996, at 1.

45. First Government Decision, *supra* note 18.

46. Since the court held that the Basic Law preserved the law in question, being challenged by a criminal defendant, without need of the Reunification Ordinance, the ruling upholding the legality of the Provisional Legislature was orbiter dicta. HKSAR v. Ma Wai Kwan David & Ors, Court of Appeal, No. 1, 1997 330-31. *See also* Cliff Buddle, *Handover Body Facing New Court Test; Appeal Judges Ready to Review Landmark Ruling on Validity of Provisional Legislature*, S. CHINA MORNING POST, Mar. 6, 1998, at 8; Cliff Buddle, *Same Judges to Hear New Challenge to Legislature*, S. CHINA MORNING POST, Feb. 19, 1998, at 5; Margaret Ng, *Decision that Resonates*, S. CHINA MORNING POST, Aug. 8, 1997, at 19.

on May 24, 1998.[47] The electoral method for this election was an extremely conservative version of the post-handover model specified in the Basic Law, and the NPC Decision respecting the first government, consisting of thirty functional constituency seats, ten Selection Committee seats and twenty directly elected geographical seats.[48] This conservative quality was evident in the narrowing of the nine functional constituencies that Chris Patten's model had broadened to include all working voters; functional constituencies were considerably narrowed, such that only 230,000 voters from elite sectors made up the potential size of the functional constituencies.[49] The Selection Committee, to fill ten seats, required that the 400 members be selected by approximately 140,000 functional constituency voters, plus other designated local and national political figures.[50] The twenty directly elected geographical seats were structured through a proportional representation scheme to limit the role of the democratic camp in the Legislative Council.[51] The directly elected seats were formerly based on one seat, one vote districts where the candidate with the most votes prevailed.[52] The new model provides for three to five seat districts with one vote per voter, and then employs a complex formula to distribute the seats to ensure some seats for less popular candidates.[53] The end result is a government made up of an appointed Chief Executive and a Legislative Council where an elite minority of about 230,000 individual and corporate voters select two thirds of the legislators.[54] In this model the electoral process seems to have considerably drifted from the Joint Declaration's liberal promises.

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47. Legis. Council Ordinance, CAP 542 (Sept. 28, 1997).

48. *Id.* at arts. 19, 21 and 23.

49. Linda Choy & Chris Yeung, *Uneven Response as Voter Drive Ends*, S. CHINA MORNING POST, Jan. 17, 1998, at 1. Registration of 2.77 million geographical voters (70% of those eligible) and 148,000 functional individual and group voters (about 60% of those eligible) occurred. No Kwai-Yan, *290,000 New Voters Register in Campaign*, S. CHINA MORNING POST, Jan. 18, 1998, at 4.

50. *Week-long Nominations for Poll Body Set to Begin*, S. CHINA MORNING POST, Mar. 9, 1998, at 6.

51. Quinton Chan & Linda Choy, *'List Voting' Lets Candidates Run as Independents*, S. CHINA MORNING POST, July 9, 1997, at 8; *Greater Uncertainty for Key Candidates*, S. CHINA MORNING POST, Mar. 2, 1998, at 6.

52. Margaret Ng, *Democrats the Losers in Tung's Game Plan*, S. CHINA MORNING POST, Sept. 19, 1997, at 29; Fung Wai-Kong, *Pro-China Party Leader Calls for Proportional Representation*, S. CHINA MORNING POST, Feb. 17, 1997, at 1.

53. In addition to favoring less popular pro-China candidates, this system has had the effect of pitting pro-democracy candidates, both from different parties and within the same party, against each other. *Historic Poll a Fight Among Friends Revamped Multi-Seat Battlegrounds Pit Allies Against Each Other in Scramble for Votes*, S. CHINA MORNING POST, Feb. 23, 1998, at 6.

54. The use of corporate votes in functional constituencies has been cited as a potential source of abuse of this functional system, with some in the Real Estate and Construction sector being accused of setting up shelf companies which become corporate voters. Gren Manuel, *Tycoons Buy Extra Ballots*, S. CHINA MORNING POST, Feb. 22, 1998, at 2.

The design of this model seemed clearly aimed at keeping the democratic camp in the minority; it successfully accomplished its' mission. With a relatively high voter turnout of fifty-three percent, the various democrats, including members of three parties and some independents, were given over sixty percent of the vote at the May 24, 1998 Legislative Council elections.[55] Despite this resounding victory, democrats were able to secure only one-third (twenty) of the sixty seats in the Legislative Council.[56] Given that the ten Selection Committee seats were a virtual give-away to the pro-China camp, and that ten functional seats were awarded uncontested (nine to pro-business candidates and one to a democrat), one might conclude that conservative and pro-China politicians were practically given, through this conservative electoral model, as many seats as democrats won through their landslide victory.[57] After their victory, the democrats' attempt to secure passage of a Legislative Council motion for a quicker pace of democratization was predictably scuttled by split voting and other Basic law requirements.[58]

All of this offers little optimism for democratization efforts. The democrats are effectively left with only the moral force of their argument directed at highly resistant national and local governments, the latter of which faces consequent legitimacy problems. Some have urged that in the context of this legitimacy gap, and China's resistance to liberalizing the formula for its so-called executive led local HKSAR government, it is wise to institute a ministerial system, thereby engaging elected legislators in the government.[59] Given the moderate nature of the democratic camp in Hong Kong this might work, though it is doubtful that democrats will accept it as a substitute for democratization. In the face of very moderate and responsible democrats the current confrontational approach by the government seems unwarranted.[60] One

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55. *Record Turnout Poised to Give Democrats Sweeping Victory*, S. CHINA MORNING POST, May 25, 1998, at 1.

56. *Lessons of the Poll*, S. CHINA MORNING POST, May 26, 1998, at 18.

57. Jimmy Cheung & Joice Pang, *Ten Take Office in Polls Walkover*, S. CHINA MORNING POST, Apr. 25, 1998, at 1.

58. Chris Yeung, *Democracy Debate Scuttled by Sparring*, S. CHINA MORNING POST, July 16, 1998, at 4. It is noteworthy that one leading democrat has even proposed that the Chief Executive call a constitutional convention to address the demand for an increased pace of democracy, a demand that seems unlikely to gain an affirmative response. No Kwai-Yan, *Call for Forum on Pace of Democracy*, S. CHINA MORNING POST, July 10, 1998, at 6.

59. C.K. Lau, *A Search for Harmony*, S. CHINA MORNING POST, May 25, 1998, at 19; Siu-kai Lau, *Ministers in the Making*, S. CHINA MORNING POST, Apr. 3, 1998, at 25. The current system employs various high-ranking civil servants to run government departments and an Executive Council, made up of private sector appointees that advises the Chief Executive. Such a ministerial system might become a kind of bandage to lend legitimacy to the government in the absence of substantial democratization.

60. The moderate quality of the democratic camp is evident even in their willingness to participate in this biased electoral system. Beyond that, their moderateness was demonstrated after their election when they joined hands with conservative forces to form a

can only hope that when political difficulties arise the wall of resistance to democracy does not result in increased political conflict.

B. The Human Rights Structure

Considering human rights on a constitutional level, the rights chapter in the Basic Law, on its face, appears adequate because it includes various rights specified in the Joint Declaration, and specifies that any restrictions on rights are subject to the requirements of the international human rights covenants.[61] This chapter, along with provisions respecting interpretation and review, was finalized in the February 1989 draft of the Basic Law, and was thus not a product of the Tiananmen effect. It was the product of substantial debate and revision of earlier, less satisfactory drafts. Where rights took a hit in the Basic Law were in provisions beyond the rights chapter allowing for application of national law in cases of emergency or where the central government determines there is "turmoil" in the region and in provisions which require the enactment of local laws against "sedition" and "subversion."[62] These provisions had the imprint of Tiananmen. With an adequate rights chapter and such ambiguous terms in other sections, rights protection will ultimately depend on interpretation in the processes of enacting and enforcing laws, especially in the exercise of review power.[63]

Looking beyond the Basic Law, when considering the current evolving human rights regime in Hong Kong, one discovers a surprising vitality, though a plethora of threats.[64] The vitality is a product of rich public discourse and is evident in both cases and in the legislative proc-

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united position on a six-point proposal to address the effects of the Asian economic crisis in Hong Kong. Chris Yeung & Jimmy Cheung, *Coalition, Donald Tsang Set for Showdown*, S. CHINA MORNING POST, June 6, 1998, at 6.

61. Basic Law, *supra* note 2, at arts. 24-42.

62. *Id.* at arts 18, 23.

63. Any mainland role in delineating the boundaries of Hong Kong's rights protections is of concern. The mainland Chinese rights regime, is ideologically opposed to the liberal one promised Hong Kong. It is said to have the following characteristics: 1) rights are juxtaposed with duties; 2) rights are not considered inherent in humanhood but are treated as the creation of the state; 3) welfare rights are emphasized over political rights; and 4) instead of rights being a limit on the state, the state's interest are a limit on rights. *See generally* R. RANDLE EDWARDS ET AL., HUMAN RIGHTS IN CONTEMPORARY CHINA (1986). (stating that the contradiction in the respective systems is the basis for the "one country, two systems" model for Hong Kong).

64. Under the Hong Kong Bill of Rights Ordinance enacted in 1991, the level of human rights litigation has been substantial. Hong Kong Bill of Rights Ordinance, No. 59 (June 8, 1991) *reprinted in* 30 I.L.M. 1310 (1991). *See generally* Johannes Chan, *The Hong Kong bill of Rights 1991-1995: A Statistical Overview in* HONG KONG'S BILL OF RIGHTS: TWO YEARS BEFORE 1997 (George Edwards & Johannes Chan, eds. 1995)(discussing various aspects of the Hong Kong Bill of Rights and the Basic Law).

ess.[65] In many respects, the 1984 Joint Declaration, and later, the tragic events at Tiananmen, stimulated a great deal of self-reflection about human rights in Hong Kong's political culture.[66] With the handover on the horizon, there was a degree of urgency, and Hong Kong's people rose to the occasion. Though there were many menacing actions by Chinese officials before the handover, and recent retrograde steps by appointed Hong Kong officials, Hong Kong's evolving rights tradition may survive such pressures. Certainly if vitality is a measure of the survivability of this rights tradition, there is room for hope.

The international character of the emerging rights regime is its' most striking quality.[67] Hong Kong is at a veritable crossroads of international human rights forces. China stimulated much of this energy by including substantial human rights guarantees, the international human rights covenants, and maintenance of the common law in the Joint Declaration.[68] Because of this, the 1991 Bill of Rights Ordinance (which remains in force after the handover, minus certain key provisions) copies almost verbatim the International Covenant on Civil and Political Rights (ICCPR).[69] When the Bill of Rights Ordinance was enacted, the colonial constitution, the Letters Patent, was amended to include the ICCPR.[70] Under this rights regime the courts were called upon in the last five years of colonial rule to exercise substantial constitutional judicial review power.[71] Here again, the international character of the rights regime was enhanced by frequent judicial reference to overseas common law and European Union precedent.[72] After the enactment of the Bill of Rights Ordinance the government, and the increasingly democratic Legislative Council, in the last years of colonial rule, reformed many non-conforming colonial laws to better protect human rights.[73] Many of these reforms were especially important to secure

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65. *See id.*

66. *Id. See also* HUMAN RIGHTS IN HONG KONG 1-2 (Raymond Wacks, ed., 1992).

67. *See generally* Michael C. Davis, *Adopting International Standards of Human Rights in Hong Kong, in* HUMAN RIGHTS AND CHINESE VALUES: LEGAL, PHILOSOPHICAL, AND POLITICAL PERSPECTIVES 168 (Michael C. Davis, ed., 1995) (discussing the impact of international standards, practices and values on human rights legislation).

68. Joint Declaration, *supra* note 1, art. 3(5) and Annex I, art. XIII.

69. Hong Kong Bill of Rights Ordinance, No. 59 (1991) *reprinted in* 30 I.L.M. 1310 (1991); International Covenant on Civil and Political Rights, 6 I.L.M. 368 (1967).

70. Hong Kong Letters Patent, No. 2 1991, *reprinted in* PUBLIC LAW AND HUMAN RIGHTS: A HONG KONG SOURCEBOOK 19 (Andrew Byrnes and Johannes Chan eds., 1993).

71. *See* Chan, *supra* note 64.

72. *See* R v. Sin Yau Ming [1992] 1 H.K.C.L.R. 127, at 141-42 (CA) (specifying at length the various foreign sources to be considered, including other common law jurisdictions and the European Union cases under the European Convention on Human Rights).

73. The amended laws included the: 1) Societies Ordinance (1992); 2) Television Ordinance (1993); 3) Broadcast Ordinance (1993); 4) Public Order Ordinance (1995); and 5) Emergency Regulations Ordinance (1995). *See* Lawyers Committee for Human Rights, 1995 Critique, 235-36 (1996).

equal protection and freedom of speech.[74]

This reform process engendered a rather positive political environment for human rights protection, with substantial media coverage and legislative consultation over proposed bills. During the last years of colonial rule the largest local threat to rights development was the rather conservative character of the evolving human rights jurisprudence and the ominous open hostility of several members of the then highest local court, the Court of Appeals, to the Bill of Rights Ordinance.[75] In spite of this, there was a surprising vitality both in political discussion and in the courts.[76] In some respects, the court's conservative character may have served to reduce Chinese official hostility to the rights regime. Subsequent to the handover, the Chinese government announced it would continue to file reports on behalf of Hong Kong under the international human rights covenants. Though it appears that the local producers of these reports will follow a policy of keeping them secret and not consulting with the Hong Kong public until after they have been reviewed by officials in Beijing.[77]

There is, however, considerable cause for pessimism about human rights, evident in developments following the final handover process. The initial flurry of activity relating to interpretation and implementation of human rights under the HKSAR regime has been disheartening. The initial actions arose out of the Basic Law stipulation in Article 160

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74. Several laws were passed or amended in this period to address the issue of discrimination against women, including a 1994 ordinance allowing the inheritance of land by women in the new territories, the 1995 sex discrimination ordinance, the 1995 equal opportunities ordinance, and extension of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) to Hong Kong. Lawyers Committee for Human Rights, 1996 Critique, at 260-61. Despite these steps forward, more comprehensive equal opportunity law proposals suggested by then legislator Anna Wu, were rejected by the government. *See* Anna Wu, *Why Hong Kong Should Have Equal Opportunities Legislation and a Human Rights Commission, in* HUMAN RIGHTS AND CHINESE VALUES 185-202 (Michael C. Davis, ed., 1995).

75. In a 1995 survey of Hong Kong court cases that raise the Bill of Rights issue, well under one-third of the challenges were successful. *See* Chan, *supra* note 64, at 7. In the last years of colonial rule, several members of the highest local court, the Court of Appeal, expressed reservations about the Bill of Rights Ordinance, one even going so far, as the Chair of the Local Judges Association, to file a critical report. Connie Law, *Top Judge Condemns Rights Bill*, S. CHINA MORNING POST, Nov. 14, 1995, at 2; Benjamin Liu, *The Past, the Present, and the Future of the Hong Kong Bill of Rights Ordinance, reprinted in* CHAN, *supra* note 64, at 183; Margaret Ng, *These Men Must Guard Our Liberty*, S. CHINA MORNING POST, May 31, 1996, at 21.

76. On the popular front, tens of thousands of Hong Kong people continued after the handover to attend the June 4th Tiananmen memorial demonstrations in a public park. Linda Choy & No Kwai-Yan, *Tiananmen Sorrow Undimmed*, S. CHINA MORNING POST, June 5, 1998, at 1.

77. Jane Moir, *Secrecy Over Rights Report Condemned*, S. CHINA MORNING POST, Apr. 19, 1998, at 2. China has signed both of the two leading international human rights covenants, though neither has been ratified. *Beijing to Sign UN Rights Pact in Autumn*, S. CHINA MORNING POST, June 22, 1998, at 1.

that the Standing Committee of the National People's Congress (NPC) could determine existing laws to be in contravention of the Basic Law, and therefore invalid. Assisted by its transition Preliminary Working Committee, and later the Preparatory Committee, China proceeded to review all of Hong Kong's laws under this provision.[78] This became a vehicle to reverse the most important parts of the above noted law reforms, especially respecting reform legislation which Chinese officials had earlier opposed.[79] The use of Article 160 review to take away rights, rather than protect them, became a source of Hong Kong anxiety about future rights security.

Several of the Beijing handover reversals had serious implications for Hong Kong. The most serious reversal related to the 1992 electoral proposal discussed above. At the handover, Beijing set aside the moderately democratic electoral law for the 1995 election and established an appointed provisional legislature.[80] The Beijing appointed Preparatory Committee also recommended deleting several implementing provisions of the Bill of Rights Ordinance and setting aside the reforms in the public order and societies ordinances; this recommendation was formally carried out by the Standing Committee of China's NPC.[81]

The actions of the local government and the Provisional Legislature immediately after the handover further heightened concern among rights advocates.[82] Laws were pushed through by this appointed provisional body with little regard for the deprivation of the rights presuma-

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78. *See* Connie Law & Chris Yeung, *PWC Asks China to Bury Bill of Rights*, S. CHINA MORNING POST, Oct. 18, 1995, at 1. Ultimately approximately twenty-five laws, including the electoral laws and key rights guarantees, were recommended for abolition or revision. Linda Choy & No Kwai-Yan, *Tung In Talks Pledge as Laws Voted Down*, S. CHINA MORNING POST, Feb. 2, 1997, at 1; Chris Yeung, *China Ignores UK to Change Laws*, S. CHINA MORNING POST, Feb. 24, 1997, at 1.

79. *See* Michael Davis, et al., *Human Rights in Hong Kong: The Year of Transition, in* CHINA AND HONG KONG IN TRANSITION CH. 12 (Joseph W. Dellapena, ed., forthcoming 1999).

80. Legis. Council Ordinance CAP 542 (Sept. 28, 1997). *See* Davis, et al., *supra* note 79.

81. Yeung, *supra* note 78, at 1.

82. On July 1, the provisional legislature passed the reunification bill, which gave legal effect to 13 bills that had been drafted by the appointed provisional legislature over the border in Shenzhen in the months prior to the handover. These bills included amendments to the 1992 Societies Ordinance and the 1995 Public Order Ordinance, reducing protection of the freedom to assemble and to protest. The reunification bill was followed by the legislative provisions (suspension of operations) bill, which froze and eventually scrapped pre-handover labor laws, including a bill protecting the right to collective bargaining as stipulated in International Labor Organization Conventions 87 and 88. Furthermore, the bill removed key elements of the 1991 Bill of Rights Ordinance, claiming that it violated the Basic Law. This alleged violation was never explained. The Bill of Rights Ordinance is a nearly verbatim adoption of the International Convention on Civil and Political Rights, which is guaranteed in the Basic Law. *See* Davis, et al., *supra* note 79.

bly secured under the Basic Law. While most rights and freedom of speech are still protected in Hong Kong, there is cause for concern about the roll-back of reform.[83] As noted above, this Beijing appointed Provisional Legislature also passed a very conservative electoral law that guaranteed to reduce the democratic camp to a minority position. Because such electoral law deprives Hong Kong residents of substantial democratic rights, the isolating of the democratic camp throughout the transition is especially troubling .[84]

The post-handover period saw a whole list of other retrograde legislative steps. The Provisional Legislature enacted new laws regarding public order and societies. These laws contain ominous provisions with respect to "national security".[85] The provisional Legislature also en-

83. While free speech rights are generally protected in Hong Kong, areas of emerging concern still arise. For example, empowering police to protect "national security" has given rise to some ambiguous areas under vague guidelines. Sharon Cheung & Angela Li, *Ousted Legislators Express Concern at Protest Rules*, S. CHINA MORNING POST, July 19, 1997, at 6; Stella Lee & Angela Li, *Security Ban on Freedom Rallies*, S. CHINA MORNING POST, July 19, 1997, at 1. There has been a noticeable increased aggressiveness of the police as they enforce public order during demonstrations. Yulanda Chung & Clifford Lo, *Qiao Protestors Try to Storm Barricades*, S. CHINA MORNING POST, Feb. 12, 1998, at 8; Stella Lee, *Democrat Criticises 'Hard-line' Policing*, S. CHINA MORNING POST, Feb. 26, 1998, at 4. A primary concern for the police is to protect mainland officials from protests. An example of one method occurred when the police played loud music to drown out protest noise. Stella Lee, *'No Penalty' for Beethoven Protest Officer; Complaint Initially Backed but Council Recommends Against Punishment Say Sources*, S. CHINA MORNING POST, May 6, 1998, at 2; Stella Lee & No Kwai-Yan, *Police Clash with Anti-Jiang Demonstrators*, S. CHINA MORNING POST, July 2, 1998, at 2. Pro-Beijing political figures have also occasionally raised cause for concern. The recent situation where leading pro-Beijing politician Xu Simin verbally attacked the local public broadcaster, RTHK, is a case in point. Specifically, in March, 1998, Mr. Xu used the occasion of the meeting of the Chinese People's Political Consultative Committee in Beijing to express concern that RTHK was too critical of the government. *Chief's 'Failed' RTHK in Free Speech Debate*, S. CHINA MORNING POST, Mar. 6, 1998, at 6; Linda Choy & Chris Yeung, *Tung Sparks RTHK Autonomy Fears; Government Policies Used to be Positively Presented Says Chief*, S. CHINA MORNING POST, Mar. 5, 1998, at 1. It is noteworthy that officials in Beijing indicated that this is a matter for Hong Kong and encouraged Hong Kong NPC and CPPCC deputies not to meddle in Hong Kong's local affairs. Linda Choy, *Xu's Attack on RTHK Dismissed*, S. CHINA MORNING POST, Mar. 8, 1998, at 4; Linda Choy, *HK Deputies Warned Not to Meddle; Jiang Tells NPC Delegation They Must Stay Out of SAR Government Affairs*, S. CHINA MORNING POST, Mar. 10, 1998, at 1. A similar criticism was leveled by Beijing at local NPC delegates when they criticized a court decision in 1999. Kwai-Yan No, *'Keep Quiet' Call to Local NPC Deputies*, S. CHINA MORNING POST, Mar. 11, 1999, at 4.

84. Leading democrats continue to be refused the right to enter the mainland that is accorded all other Hong Kong Chinese. Angela Li & Genevieve Ku, *Twelve Still Face Travel Ban on Mainland*, S. CHINA MORNING POST, July 6, 1998, at 9.

85. Margaret Ng, *Threat to Our Civil Rights*, S. CHINA MORNING POST, Apr. 11, 1997, at 23; Joice Pang, *National Security 'Knife Hanging Over Us', Activists Tell of Fears SAR Government Could Use Changes In Laws As Pretext to Bar Those It Dislikes*, S. CHINA MORNING POST, May 16, 1997, at 3; Chris Yeung, *Restraints on Protests and Political Finding Relaxed; 11 Changes But Future Government Stands Firm on National Security*, S. CHINA MORNING POST, May 16, 1997, at 1. The only positive event relating to national

acted a law that deprives mainland children of local Hong Kong permanent residents of their immediate right of entry into Hong Kong, that guaranteed reducing the Basic Law right of residence; this law applied retroactively.[86] In addition, the Provisional Legislature voted to suspend (for further study) labor rights ordinances and provisions extending the Bill of Rights Ordinance to include private violations.[87] These laws were enacted by the previous elected Legislative Council in its final days.[88] The "study" ultimately resulted in the full suspension of nearly all of the labor rights protections and the right for private actions under the Bill of Rights provided by pre-handover legislation.[89] All of this adds up to a rather crass disregard of rights protection and portends a rather ominous future.

C. *Rule of Law*

Whether the Basic Law falls short of the Joint Declaration's requirements regarding human rights depends a great deal on interpretation and the institution of constitutional judicial review. On their face the Joint Declaration and the Basic Law implicitly require the exercise of constitutional judicial review under the Basic Law.[90] Both documents require supremacy of the Basic Law, maintenance of the common law system, and independence and finality in the local courts.[91] These general requirements, now fully embodied in the Basic Law, would not

security is that the government has not yet carried out the Basic Law Article 23 requirement to enact a subversion law. May Sin-Mi Hon, *Subversion Law Will Not Be Rushed*, S. CHINA MORNING POST, June 30, 1998, at 1.

86. Sin-Mi Hon, *supra* note 85, at 1; May Sin-Mi Hon & Angela Li, *Abode Status Bill Gets Vote of Approval; Legislators Ignore Growing Fears of Court Challenge to Endorse Government Move*, S. CHINA MORNING POST, July 10, 1997, at 1.

87. The elected Legislative Council enacted several laws in the final hours of the pre-July 1, 1997, session, but the provisional legislature suspended them for further study until October 31, 1997. The suspended laws included labor laws that protect workers rights to collective bargaining; forbid discrimination against workers for union activities; and a general law that extends the Bill of Rights to include private actions. Genevieve Chan, *Activists in Last-ditch Bid to Save Labour Laws*, S. CHINA MORNING POST, July 15, 1997, at 6; Angela Li, et al., *Protestors Invade Gallery But Fail to Thwart Snub to Disbanded Legco; Pre-July 1 Laws Frozen*, S. CHINA MORNING POST, July 17, 1997, at 1.

88. *See* Davis, et al., *supra* note 79.

89. Jimmy Cheung, *Vote Overturns Amendments to Bill of Rights*, S. CHINA MORNING POST, Feb. 26, 1998, at 6. *See also* Margaret Ng, *Wrong Way on Rights*, S. CHINA MORNING POST, Jan. 23, 1998, at 21.

90. The Joint Declaration guarantees the maintenance of the common law system, the independence and finality of the local courts and the right to challenge the executive in the courts. Joint Declaration, *supra* note 1, at Annex I, arts. 2, 3 and 13. The Basic Law includes the same requirements in addition to various detailed requirements common to common law systems respecting the judiciary. Basic Law, *supra* note 2, at arts. 2, 8, 17, 80-96 and 158.

91. *Id. See also id.* at art. 11.

allow less.[92] Article 158 of the Basic Law specifically vests the power of interpretation of the Basic Law in the Standing Committee of the NPC. However, the Article further specifies that the Standing Committee shall authorize local courts, when adjudicating cases, to interpret those provisions which are "within the limits of the autonomy of the Region" and "other provisions."[93] Under further provisions in Article 158, if courts are confronted with the interpretation of provisions, which are the responsibility of the Central People's Government or concern local/central relations, then they must refer the matter to the Standing Committee of the NPC.[94] The Standing Committee, upon such referral, then decides the matter with the advice of the Committee for the Basic Law.[95]

Basic Law Article 17 further specifies that the Standing Committee can review newly enacted local legislation for conformity to the Basic Law, again within the scope of central authority or local/central relations, and with the advice of the Committee for the Basic Law.[96] Symmetry and common law practice suggest that courts have such review power within the scope of autonomy, or in any other case where the court determines that such referral is not required.[97] As a further limitation, under Article 19 courts have no jurisdiction over "acts of state such as defense and foreign affairs."[98] These are the two areas where China retains power over the HKSAR.[99] The breadth of the HKSAR act of state doctrine is yet to be determined.[100] Other than the Basic Law,

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92. *Id.* at arts. 2, 8, 11.

93. *Id.* at art. 158. The reference to "other provisions" in the third paragraph of Article 158 is not limited by the scope of autonomy.

94. *Id.*

95. The Committee for the Basic Law is provided for in NPC legislation enacted along with the Basic Law. It is made up of six local and six mainland members. Decision of the National People's Congress to Approve the Proposal by the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region on the Establishment of the Committee for the Basic Law of the Hong Kong Special Administrative Region Under the Standing Committee of the National People's Congress, Adopted at the Third Session of the Seventh National People's Congress on 4 April 1990 (published with the Basic Law). The Basic Law Committee was already appointed and in place upon the handover. Linda Choy & May Sin-Mi Hon, *Airport Boss Gets Senior Basic Law Job*, S. CHINA MORNING POST, June 28, 1997, at 6.

96. Basic Law, *supra* note 2, at art. 17.

97. In that the Joint Declaration requires independence and finality in the local courts and the Basic Law assigns some review power, especially concerning matters of central authority or local/central relations to the NPC Standing Committee, the Basic Law appears to fall somewhat short of the Joint Declaration's requirements in this area.

98. Basic Law, *supra* note 2, at art. 19.

99. *Id.* at arts. 13 and 14.

100. One would hope that this exclusion of court jurisdiction will be rather narrowly defined, perhaps with a scope roughly equivalent to the United States act of state or political question doctrines. However, this hope might be misplaced in light of a Sino-British deal on the Court of Final Appeal which added the word "etc." to the phrase "defense and foreign affairs."

the only mainland laws that ordinarily apply, through local enactment, in the HKSAR are those specifically listed in Annex III to the Basic Law.[101]

In the 1998 landmark judgment in the Ng Ka Ling case, the Hong Kong Court of Final Appeal (CFA) declared quite clearly that it has the power of constitutional judicial review over local Hong Kong legislation and that it has the right to examine acts of the mainland's NPC for conformity to the Basic Law.[102] The Ng Ka Ling judgment arose out of a challenge to a local Hong Kong immigration statute which severely inhibited the Basic Law guaranteed right of abode in Hong Kong for children born to Hong Kong resident parents.[103] In exercising the power of constitutional judicial review to overturn several provisions which heavily burdened that right, the Court declared it would take a purposeful and generous approach to interpreting constitutional rights guaranteed in the Basic Law.[104] In the judgment, the Court also explicitly declared that the CFA would have to determine when, in deciding disputed cases, to refer provisions respecting local-central relations or matters of central authority to the Standing Committee of the NPC.[105] The court took a narrow view of when such referral was required and concluded it was not required in this case.

While this decision was widely applauded in Hong Kong for its firm and unambiguous defense of human rights and the rule of law, there was a very severe response on two occasions. Immediately after the judgment was issued, leading mainland officials and "legal scholars", as well as their local pro-China supporters attacked the part of the judgment where the court articulated its right to "examine" acts of the NPC, claiming the Court was putting itself above the NPC.[106] They claimed

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101. Basic Law, *supra* note 2, at art. 18.

102. Ng Ka Ling v. Director of Immigration, Court of Final Appeal, Final Appeal 14 of 1998 (January 29, 1999) [hereinafter Ng Ka Ling I].

103. Article 24 of the Basic Law (the first Article in the chapter entitled "Chapter III: Fundamental Rights and Duties of the Residents) provides that Hong Kong residents include "persons of Chinese nationality born outside of Hong Kong" of Hong Kong residents. Under the Article, such residents are entitled, as are other Hong Kong residents, to the right of abode and a permanent identity card. The suit was brought by several such children claiming a denial of their basic right of residence under a newly enacted immigration ordinance which required them to apply on the mainland for an exit permit. The practical effect of such application process was likely to cause a lengthy delay, even years, of their entry into Hong Kong. *See* Basic Law, *supra* note 2, at art. 24.

104. While the courts assertive approach to protect the rule of law was widely applauded in Hong Kong, there was considerable public concern over the dangers of a flood of mainland born people with this right which would result from the decision. Lau Siu-Kai, *Verdict Tips the Political Balance*, S. CHINA MORNING POST, Mar. 2, 1999, at 17.

105. The standing committee would then be advised by the Basic Law committee when rendering such interpretation. Basic Law, *supra* note 2, at art. 158.

106. Mark O'Neill, *Beijing Says Abode Ruling was Wrong and Should be Changed*, S. CHINA MORNING POST, Feb. 9, 1999, at 1.

the judgment had to be "rectified".[107] The HKSAR government filed an unprecedented motion for the CFA to "clarify" the orbiter dicta in its judgment declaring its power to examine acts of the NPC.[108] This clarification was granted in a second brief judgment in which the Court explicitly stated that it did not hold itself above the NPC, a judgment in which the Court essentially restated its original position.[109] A second, more serious attack on the Judgment and the Rule of Law occurred in May 1999 when the government, after issuing a Report claiming the Judgment would produce a flood of 1.67 million migrants into Hong Kong, made a request to the Standing Committee of the NPC to interpret the relevant provisions of the Basic Law, effectively overturning the CFA Judgment.[110] As a result of the latter action, the finality of judgments of the CFA in Hong Kong has clearly been called into question and the Rule of Law has been seriously undermined.

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107. *See* Margaret Ng, *The Legal Perils of 'Rectification'"*, S. CHINA MORNING POST, Feb. 26, 1999, at 19.

108. Cliff Buddle, et al., *Judges Asked to Clarify Right of Abode Decision*, S. CHINA MORNING POST, Feb. 25, 1999, at 1.

109. Ng Ka Ling v. Director of Immigration, Court of Final Appeal, Final Appeal No. 14 of 1998 (Feb. 26, 1999) [hereinafter Ng Ka Ling II]. In the original judgment the Court had really not held itself above the NPC, but had merely indicated that it would implement the Basic Law as required by the NPC; it had not denigrated the NPC Standing Committee's power to interpret the Basic Law. In the second clarifying judgment, the CFA simply made this more explicit while continuing to uphold the pre-eminence of the Basic Law. The Court concluded, "nor did the court's judgment question, and the Court accepts that it cannot question, the authority of the National People's Congress or the Standing Committee to do any act which is in accordance with the provisions of the Basic Law and the procedure therein." *Id.* It appears that a Court created under the Basic Law was merely upholding the priority of the Basic Law as required on its face. The overturning of local legislation implicates the standard separation of powers concerns of constitutional judicial review. In addressing its relationship to the NPC, the Court appeared to be merely giving priority, as a source of law, to the sovereign instructions of the NPC reflected in the Basic Law. In the Second clarifying judgment, the Court explicitly sought only to respond to confusion over "interpretations (which) have been put on part of the court's judgment", and not to amend the judgment.

110. In late April the government eventually estimated the likely migration figure to be 1.67 million. Chris Yeung, *Court Gives 1.67 m Right of Abode*, S. CHINA MORNING POST, Apr. 29, 1999, at 1. The government asked the Standing Committee to re-interpret Articles 22 (which relates to Mainland control of people from other parts of China) and 24(3) (which specifies the residence rights of children born to Hong Kong residents) to effectively overturn the CFA Final Judgment. Chris Yeung, *NPC Will be Asked to Revoke Abode Rights for 1.5m Migrants*, S. CHINA MORNING POST, May 19, 1999, at 1. In doing this, the government targeted for exclusion the children of Hong Kong residents who were born before their parents became residents. The CFA previously upheld the right of such children under Article 24. The government explicitly rejected the more legally acceptable alternative of amending the Basic Law. The government's decision to undermine a Final Court Judgment has produced strong condemnation from the Democratic camp, the Bar and leading constitutional scholars. Michael C. Davis, *Home to Roost*, S. CHINA MORNING POST, May 16, 1999, at 10; Angela Li, *Uproar Sweeps Democracy Camp*, S. CHINA MORNING POST, May 19, 1999, at 3.

When it comes to the rule of law in Hong Kong, there are several troubling aspects of the circumstances surrounding this case. The most blatent damage is reflected in the simple reality that final judgments in Hong Kong, at least where constitutional rights are concerned, are simply not final. They are subject to being overturned by a combination of local government and Mainland interference. This will certainly have a chilling effect on courts.[111] There is reason for real concern that the Hong Kong courts will be faced with further political attacks by mainland and pro-China forces in the future. This may lead to intimidation and timidity in the Courts. There is specific concern that several of the political attacks on the court's judgment were articulated by members of the Basic Law Committee, the very committee which would be called upon to advise the Standing Committee of the NPC when issues of Basic Law interpretation are referred.[112] The members of this committee showed little concern to maintain a judicial demeanor, leading to suspicion that any future advice forthcoming from this committee will be of a political, rather than legal, nature. The government's motion for clarification raises further concern about the court's independence and finality. The only positive aspect of this procedure and the resultant extraordinary judgment is that the Court appeared to stick to its substantive position in articulating its clarification.

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111. Article 158 of the Basic Law designates the Hong Kong CFA to determine when a matter must be referred to the Standing Committee. For the Standing Committee to be asked by the government to offer an alternative interpretation in reaction to a final judicial decision violated the guaranteed independence and finality of the local courts and the procedures outlined in Article 158. Basic Law, *supra* note 2, at arts. 19 and 158. The governments sidestepped the problem of a lack of specified power in the government to make such referral by seeking an endorsement from the Legislative Council (which was assured, given the process by which the majority of the Legislators were selected) and asking the State Council to make the referral on its behalf. In referring the right of abode case to the Standing Committee, the government took the position that the right of the Standing Committee to interpret the Basic Law has no limits. The government's submission emphasized that the Standing Committee has the best grasp of the true legislative intent. This emphasis on the privileged knowledge of the drafters appears to empower Mainland leaders and their local Hong Kong supporters in a perverse use of a rather questionable original intent doctrine. Under this view, neither independence and finality in the courts, the provisions in Article 159 respecting Basic Law amendment, nor Hong Kong's autonomy appear to constrain NPC Standing Committee action. Mainland leaders and their appointed Hong Kong supporters, among local NPC delegates and the Basic Law Committee, will take up the central role of giving meaning to the Basic Law. Such interpretation of the Mainland NPC Standing Committee's power would seemingly, in the face of local or Mainland government dissatisfaction, render the Basic Law a nullity, and cannot be right.

112. Basic Law, *supra* note 2, at art. 158; Decision of the National People's Congress to Approve the Proposal by the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region on the Establishment of the Committee for the Basic Law of the Hong Kong Special Administrative Region under the Standing Committee of the National People's Congress, adopted at the Third Session of the Seventh National People's Congress on 4 April 1990 (Apr. 4, 1990) [hereinafter Basic Law Committee Decision].

Though the Court of Final Appeals has seemingly taken a firm stand on constitutional judicial review there is plenty of room for timid judges to shirk this responsibility and for the government to continue to threaten the judicial bedrock of Hong Kong's stability. In addition to a generally conservative human rights posture, judges may avoid their responsibility through several routes by: 1) claiming to avoid sensitive political issues;[113] 2) too readily referring matters to the Standing Committee under the above noted articles;[114] or 3) simply giving in to official political pressure or intimidation.[115] The President of the Legislative Council (and the then Beijing appointed Provisional Legislature), Rita Fan Hsu Lai-tai, soon after the handover, had even argued that legislation that has not been overturned by the Standing Committee of the NPC under Article 17 of the Basic Law was presumptively constitutional.[116] The concern with this negative presumption theory is that it would undermine the entire system of common law review and represents a serious hazard to the rule of law in Hong Kong. Another hazard would be for the Standing Committee to all too frequently interfere by reviewing laws or overriding final judicial judgments, as has been requested in the Ng Ka Ling Case.

Finally, the Rule of Law in Hong Kong has been continuously threatened by the rather passive approach of the Hong Kong Secretary for Justice, the government official charged with upholding the Rule of Law and prosecutorial functions. The government has been rocked by a series of criticisms concerning its commitment to the Rule of Law.[117]

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113. When a member of the Democratic Party was denied leave for judicial review to challenge the legality of certain actions of the Provisional Legislature prior to the handover, the judge is reported to have described him as a pawn of the Democratic Party and to have indicated that the court would not get involved in a political wrangle between the Chinese and British governments. *See* Audrey Eu, *Keep Politics Out of the Law*, FAR E. ECON. REV., July 10, 1997, at 34.

114. Michael C. Davis, *Threat to Integrity*, S. CHINA MORNING POST, July 20, 1997, at 10.

115. In this regard it is ominous that the mainland Public Security Bureau already got into the debate on the law respecting the residence rights of mainland children of Hong Kong residents by indicating its view that the law did not violate the Basic Law. Chris Yeung & Linda Choy, *Beijing Backs Bill Deporting Thousands of 'II' Children*, S. CHINA MORNING POST, July 15, 1997, at 1.

116. Specifically, she noted the legislative obligation under Article 17 to report all new ordinances to the Standing Committee; if the Standing Committee did not object to the ordinance, (in that case the ordinance restricting the residence rights of Mainland children of Hong Kong permanent residents) then she argued it was presumptively constitutional. May Sin-Mi Hon, *Public 'Can Judge Attempts for Help,'* S. CHINA MORNING POST, July 14, 1997, at 6.

117. These included the failure to prosecute Xinhua for allegedly violating the privacy act; the failure to prosecute Sally Aw, a prominent business executive and CCPCC member, after she was implicated as a co-conspirator in the Hong Kong Standard corruption scandal in which several others were convicted (the Secretary of Justice argued in part that "the public interest" demanded that Ms. Aw not be prosecuted because she was the head of a large corporation in financial trouble); the big spender case, in which the gov-

The government appears to continually take a passive approach to defending the Rule of Law and seems determined to shy away from any challenges to central authorities.[118] The risk of further hazards await additional post-handover experience. To the government's credit, it has put in place a highly respected Chief Justice and the Court of Final Appeal that provided the excellent judgment in the right of abode case discussed above.[119] But even good judges, in a politically unsupportive environment, may not save Hong Kong's human rights and rule of law regime from the many potential hazards on the horizon.[120]

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ernment remained silent while a Hong Kong citizen was executed for crimes committed in part within Hong Kong's local jurisdiction; the related case of the Telford Gardens murder, where the government again remained quiet while a Mainland court tried and convicted a suspect for crimes committed entirely within Hong Kong's jurisdiction; and finally, with regard to the right of abode case, pushing for a clarification and the ultimate overturning of the decision by the Court of Final Appeal, after speaking to leaders in Beijing. The Secretary of Justice was reported to have actually discussed her plans to file the clarification motion with the Chief Justice of the Court before the decision to seek clarification was made public. As a result of the Sally Aw case and these various circumstances, the Legislative Council held a vote of no-confidence in the Secretary of Justice on March 12, 1999, but the motion failed to pass after heavy government lobbying. Chris Yeung, *Doubts Planted Over Rule of Law*, S. CHINA MORNING POST, Feb. 6, 1999, at 5; Chris Yeung & Rhonda Lam Wan, *Justice Secretary Survives Vote Despite Attacks on Competence*, S. CHINA MORNING POST, Mar. 12, 1999, at 1.

118. In one of the last ordinances proposed by the government for enactment by the Provisional Legislature in April 1998 - the Adaptation of Laws Ordinance - the review of certain acts of Mainland bodies was delivered a severe blow when certain Mainland organizations were exempted from the application of any laws that did not explicitly or by necessary implication apply to them. This law exempts both mainland official bodies and the local HKSAR government. The bill was widely criticized for exceeding the powers of the Provisional Legislature, for violating Basic Law provisions specifying that Mainland organs are subject to the HKSAR laws, and for essentially putting Mainland official bodies above the law. The Mainland bodies to which this law applies seemingly include the local branch of the New China News Agency (Xinhua), the Chinese Foreign Ministry, the local PLA Garrison and the Chinese side of the Joint Liaison Group. Gren Manuel, *Legal Experts Fear Bill Will Make Mainland Organs Immune to at Least 14 Pieces of HK Legislation: State Bodies 'Exempt for Laws'*, S. CHINA MORNING POST, Mar. 29, 1998, at 1; Gren Manuel & Felix Chan, *Rights Monitor Fears 'Two Systems of Law,' Bar Lashes Out Over Transfer of Privileges*, S. CHINA MORNING POST, Apr. 7, 1998, at 1; Gren Manuel & Angela Li, *Courts Decide on Exempt State Bodies*, S. CHINA MORNING POST, Apr. 8, 1998, at 6.

119. May Sin-Mi Hon & Patricia Young, *Continuity in Choice of Top Appeal Judges*, S. CHINA MORNING POST, June 13, 1997, at 1; Chris Yeung, *Andrew Li Named as Top Judge*, S. CHINA MORNING POST, May 21, 1997, at 1. The Court of Appeal (under the CFA) has also recently gained some credit by overturning local ordinances that prohibit flag desecration. HKSAR v. Ng Kung-Siu, Court of Appeal, Magistry Appeal No. 563 of 1998, Mar. 23, 1999. This case is now on appeal to the CFA. With the recent intimidation in the Ng Ka-Ling case there is cause for concern that the CFA may shy away from ruling that flag desecration is protected as a matter of Freedom of Speech. Cliff Buddle, *Defiling Flags No Crime: Judges*, S. CHINA MORNING POST, Mar. 24, 1999, at 1.

120. To the current court's credit, it has recently demonstrated a serious commitment to open justice by adopting a report requiring a large number of civil proceedings, that were previously held in chambers without public access, to be open to the public. Cliff Buddle, *Judges Unlock Doors of Closed Court Hearings*, S. CHINA MORNING POST, Feb. 11,

III. A COMPETING POLITICAL PARADIGM— THE SINGAPOREANIZATION OF HONG KONG

To make constitutional sense out of the above policies and practices it is important to consider the objectives that may underlie China's plans for Hong Kong and to evaluate their internal consistency. This section considers the political and economic ideas that shape China's evolving Hong Kong human rights policies. The long-standing Chinese official admonition that Hong Kong is to be an "economic," not a "political" city, suggests the ideological source of Hong Kong's current human rights tensions, and the political risks on the horizon.[121] There appears to be a kind of Singaporean vision—authoritarianism plus liberal economic policies and some commitment to the rule of law—evident in official circles in China and the HKSAR.[122] For the present analysis, I will just briefly focus on some of the evidence of this vision and the difficulties it offers for human rights purposes.[123] The general idea of this vision is that Hong Kong people should just concentrate on making money and leave politics to China's chosen Hong Kong leaders. The purveyors of this vision would have Hong Kong people avoid political agitation and criticisms that might trouble the mainland regime and concentrate on business and material wealth formation. That is, the business of Hong Kong is business; politics should not distract people from that. This view is consistent with the views of the local business elite, who are being asked by mainland officials to run Hong Kong. Yet, this view creates a considerable challenge to those who value democracy and freedom.

The most striking evidence of the attempted Singaporeanization of Hong Kong is purposeful concentration of political power in Hong Kong in the hands of the business elite. Appointed Chief Executive Tung Chee Hwa is one of the most successful businessmen in Hong Kong. He has surrounded himself in the chief government deliberative body - the Executive Council - with a predominance of conservative business and pro-China people.[124] Similar appointees make up the local NPC delegation and the Basic Law Committee that have seized center stage in the

1998, at 1; Cliff Buddle, *Top Judges Back Changes in Full*, S. CHINA MORNING POST, Feb. 25, 1998, at 1.

121. Warnings that Hong Kong not be turned into a political city were made by China's then chief policy spokesman on Hong Kong, Mr. Lu Ping. Linda Choy, *Lu Warns Against Meddling*, S. CHINA MORNING POST, May 7, 1994, at 1.

122. *See generally* Beng-Huat Chua, Communitarian Ideology and Democracy in Singapore (1995) (discussing Singapore's political development).

123. A more thorough analysis of this aspect of China's Hong Kong Policy is taken up in my recent article. Michael C. Davis, *Constitutionalism in Hong Kong: Politics Versus Economics*, 18 U. PA. J. INT'L ECON. L. 157 (1997).

124. Chris Yeung, *Tung Reveals His Top Team*, S. CHINA MORNING POST, Jan. 25, 1997, at 1.

right of abode row. A similar concentration of political power was also reflected in the defunct appointed Provisional Legislature.[125] This rule by tycoon is the rather stunning product of political appointments by Beijing's allegedly Marxist regime. In the transition, both the Chief Executive and the Provisional Legislature were chosen by a 400 member Selection Committee which was itself chosen by the business sector dominated, and Beijing appointed, Preparatory Committee.[126]

By insuring a predominance of business elite in the now defunct Selection Committee and Preparatory Committee, China insured a like-minded first HKSAR government.[127] Throughout the closing years of colonial rule, Chinese officials worked energetically to exclude the more grass roots oriented Democratic Party from its various appointed advisory bodies, though it allowed another grass roots oriented pro-China party to have a minor role.[128] As noted above, China has been especially concerned with ensuring that popular democracy does not take hold. This was the basis for objecting to Chris Patten's democratization formula. The continued concentration of power in the conservative business elite seems assured under the above noted electoral model slated for the coming years. A legislative majority agreeable to Beijing is essentially assured through the combination of narrow business oriented functional constituencies and proportional representation in direct geographical polls.[129]

This Singaporeanization is more widely evident on the rhetorical

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125. With a makeup of 33 of the then incumbent legislators mostly from conservative functional constituencies and parties, minus the democrats, plus eleven mostly pro-China losers of the 1995 elections, the Provisional Legislature reflected a sharp swing to the right and the pro-China camp in comparison to the previous elected Legislative Council. *Incumbents and Legco Losers win Selection Fight; Qian's Pointer to Smooth Transition is Martin Lee's 'Darkest Day' since '89, While Governor Sickened*, S. CHINA MORNING POST, Dec. 22, 1996, at 1.

126. Linda Choy and Fung Wai-Kong, *Four Lesser Known Candidates Declared After Selection Body Finalized: Race for Chief Executive Down to Eight Runners*, S. CHINA MORNING POST, Nov. 3, 1996, at 1.

127. In the 150-member appointed Preparatory Committee, only about 15 (many of which are from the pro-China camp) would be considered grassroots representatives. *The Preparatory Committee - The List of Members*, S. CHINA MORNING POST, Dec. 29, 1995, at 6; Fung Wai-Kong, *Committee 'Full of China Puppets,'* S. CHINA MORNING POST, Mar. 14, 1996, at 7 (reporting a Legislative Council motion condemning this). The Selection Committee, which was selected by a vote of the Preparatory Committee, had 400 members, of which 100 were listed as grassroots, with the balance being business and professional. *Full List of Winners in the Beijing Ballot*, S. CHINA MORNING POST, Nov. 3, 1996, at 4.

128. The popular Democratic Party was completely excluded from appointment to the Preparatory Committee, which served as the foundation for the subsequent chain of selection processes culminating in the formation of the HKSAR government. Connie Law & Louis Won, *Warning of Threat to Autonomy*, S. CHINA MORNING POST, Dec. 29, 1995, at 5.

129. *See* Chris Yeung, *Keeping a Tight Rein on Legco; 'It Will Be a More Fragmented Body With No Single Political Party Able to Snap Up a Sizeable Majority of Seats'*, S. CHINA MORNING POST, July 12, 1997, at 15.

plane, in the rhetoric of mainland officials and their Hong Kong appointees. This rhetoric began to emerge in 1989 when mainland officials began worrying about Hong Kong being a "base of subversion."[130] Many of the above noted efforts to cut back on democracy, human rights and the rule of law followed in the early 1990s.[131] But this rhetoric acquired a more concrete "Asian values" and economic developmental message in the late transition period. The notion of a politically inert and economically dynamic Hong Kong began to take shape in Chinese policy pronouncements. A sampling of this rhetoric includes the following situations. In May 1994, China's then chief policy spokesman on Hong Kong, Lu Ping, warned against attempts to turn Hong Kong into a "political city;" China's Ninth Five-Year Plan in 1995 introduces an economic partnership, while characterizing the political relationship as "between a parent and a child."[132] By 1996 Chinese officials were warning against commemorative marches to remember June 4, 1989, personal attacks on Chinese leaders, the spreading of rumors and lies, demonstrations against the Chinese government or the advocacy of Taiwan independence.[133] Although some of the latter warnings were later retracted, the main emphases of these comments have persisted in the post-colonial HKSAR government.[134]

China's appointed HKSAR leaders, charged with passing laws on public order, subversion and sedition, have shown an alarming tendency to pick up on some of these politically charged themes to advance "national security" and restrain hostile international forces.[135] The

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130. In July 1989 the new Chinese Communist Party General Secretary Jiang Zemin warned that "the well water does not interfere with the river water" and the People's Daily accused democrats Martin Lee and Szeto Wah of "subversive activities." *See Chronology, supra* note 23, at 209 (providing a chronology of the history of Hong Kong).

131. *See id.* at 211-14.

132. *See* Willy Wo-lap Lam, *Economy to Remain Separate After '97*, S. CHINA MORNING POST, Sept. 8, 1995, at 1.

133. *See* Chris Yeung, *Anti-Beijing Protests to Be Banned, Says Lu Ping*, S. CHINA MORNING POST, June 5, 1996, at 1; Chris Yeung, *Britain to Take Action on Quian's June 4 Ban*, S. CHINA MORNING POST, Oct. 18, 1996, at 1; Chris Yeung, *Contradictions Cast a Shadow; 'They (The Media) Can Put Forward Critic, But Not Rumors or Lies (or) . . . Personal Attacks on Chinese Leaders'*, S. CHINA MORNING POST, Oct. 19, 1996, at 19; Chris Yeung, *Lu Clarifies Position on Press Freedom*, S. CHINA MORNING POST, June 6, 1996, at 1.

134. John Ridding, *Tung Denies Plan for Crackdown on Dissent*, FIN. TIMES, May 1, 1997, at 6. After the Handover, Mainland Foreign Ministry Officials said that the June 4, 1998 commemorative demonstrations posed no threat and would not affect Hong Kong-Mainland relations. Linda Choy & No Kwai-Yan, *Tiananmen Sorrow Undimmed*, S. CHINA MORNING POST, June 5, 1998, at 1.

135. The 1997 Public Order Ordinance allows police to object to demonstrations on "national security" grounds, which is defined as "safeguarding the territorial integrity and independence of the People's Republic of China." They are also allowed to take into consideration whether Tibetan or Taiwanese independence was advocated. *See* Davis, et al., *supra* note 79. In August 1998, fears over "foreign speculators" were marshaled to support government intervention in the stock market and to give the Chief Executive greater

above noted attack by local CPPCC delegate Xu Simin on the failure of public broadcaster RTHK to support the government position is just a more blunt recent local manifestation of this political line. The Chief Executive has often emphasized alleged Chinese values to avoid confrontation, encouraging people to "talk more about our duties rather than our rights."[136] In early 1998, the Chief Executive reemphasized that Hong Kong should not be an "anti-Beijing base."[137] The passage by the Provisional Legislature of a law to set aside the protection of various workers' rights in the first weeks of the HKSAR, further suggest the intention of China's appointed Hong Kong leaders to impose a strong business orientation on the new Hong Kong regime.[138] Likewise, the elevation of expediency over the principles associated with the Rule of Law in the right of abode row demostrates the ascendency of the Singaporean vision. This intention is also evident in the increased emphasis on the need to plan Hong Kong's economy.[139] This emphasis became evident when the government established a new high-powered advisory Commission on Strategic Development.[140] In the face of the East Asian economic crisis, one would hope the movement would be away from the East Asian developmental model. These various developmental arguments have thus far been confronted by a well developed democratic movement and a sophisticated free press.

The disturbing aspect of this ostensibly Singaporean orientation is the lack of a coherent vision that may have animated some of the earlier Asian developmental models, and the utter inapplicability of this

decision-making power. *Tsang Plea for Global Purge of Speculators*, S. CHINA MORNING POST, Sept. 9, 1998, at 1.

136. Fung Wai-Kong, et al., *Tung Stresses Consensus, Not Confrontation*, S. CHINA MORNING POST, Oct. 23, 1996, at 1; Chris Yeung, *Tung Wants Focus on Daily Life, Not Politics*, S. CHINA MORNING POST, Oct. 28, 1996, at 4; Chris Yeung and Linda Choy, *Tung Manifesto Preaches Chinese Cultural Virtues*, S. CHINA MORNING POST, Oct. 23, 1996, at 4. *See also Hong Kong's Freedoms Imperiled*, N.Y. TIMES, Nov. 21, 1996, at 28.

137. Jimmy Cheung, *Anti-Beijing Base Warning by Tung*, S. CHINA MORNING POST, Mar. 9, 1998, at 4; Fung Wai-Kong et al., *Tung Stresses Consensus, Not Confrontation*, S. CHINA MORNING POST, Oct. 23, 1996, at 1.

138. The Provisional Legislature set aside several laws to protect workers rights and rights under the Bill of Rights Ordinance enacted in the last week of the elected Legislative Council. *See* Angela Li et al., *Pre-July 1 Laws Frozen*, S. CHINA MORNING POST, July 17, 1997, at 1.

139. The influential Chair of the Hong Kong General Chamber of Commerce has emphasized that Hong Kong should move away from the colonial laissez faire economic policy toward more planned business-friendly anti-labor policies. James Tien Pei-chun, *Bright Prospects*, S. CHINA MORNING POST, June 8, 1997, at 10.

140. Tung Chee-Hua, *Policy Address 97*, S. CHINA MORNING POST, Oct. 9, 1997; Chris Yeung, *Public to Help Forge Long-term Strategy*, S. CHINA MORNING POST, Jan. 17, 1998, at 6. In addition to the Commission on Strategic Development, the Government also established a Council of International Advisors, comprised of fourteen foreign business leaders. *Offering a New Perspective*, S. CHINA MORNING POST, Jan 20, 1999; *Win Friends and Influence People*, S. CHINA MORNING POST, Oct. 16, 1998.

Singaporean model to Hong Kong. Asian developmental models seek to capitalize on certain alleged Asian values[141] and a form of capitalist planned economy.[142] The more substantial micro-planning component tends to target certain industries for external competition under an export-led growth paradigm.[143] This might be combined with certain forms of social welfare, especially housing and health care, to afford the regime legitimacy based on success relating to livelihood issues.

There are two apparent problems with this idea in the Hong Kong context. First, Hong Kong, as distinguished from the other Asian Newly Industrialized Countries (NICs), has not traditionally relied on this micro-planning model to achieve its enormous economic success. Second, even those Asian NICs that have relied on such a model have, in recent years, recognized the need for political and economic reform to allow greater openness and competition. This recognition has been especially encouraged by the current economic crisis. With regard to the first issue, political economists have generally characterized the Hong Kong model as embodying laissez faire competition and macro-infrastructural support.[144] The laissez faire component has relied on the rule of law and freedom to insure a level playing field; the infrastructural support has included substantial housing and transportation subsidy, as well as substantial public health care.[145]

Regarding the second point, the other Asian rapid-developers have

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141. Samuel Huntington argues that Confucian society advances the group over the individual, authority over liberty, responsibility over rights, and values such as harmony, cooperation, order, and respect for hierarchy. Samuel P. Huntington, *Democracy's Third Wave*, *in* THE GLOBAL RESURGENCE OF DEMOCRACY 3 (Larry Diamond & Marc F. Plattner, eds. 1996). Some scholars have attacked this brand of "orientalism" and have accused East Asian authoritarian leaders of adopting it as a self-defining discourse. *See* CHUA, *supra* note 122, at 159; Francis Fukuyama, *Confucianism and Democracy*, 6 J. DEMOCRACY 20 (1995).

142. The prototype Asian authoritarian developmental model is usually characterized by a tripartite framework of a highly autonomous technocratic bureaucracy, a politically authoritarian regime or ruling party, and a connected or compliant business elite. *See* PETER EVANS, EMBEDDED AUTONOMY: STATES AND INDUSTRIAL TRANSFORMATION 12 (1995); CHALMERS JOHNSON, MITI AND THE JAPANESE MIRACLE: THE GROWTH OF INDUSTRIAL POLICY, 1925-1975 17-23 (1982); ROBERT WADE, GOVERNING THE MARKET: ECONOMIC THEORY AND THE ROLE OF GOVERNMENT IN EAST ASIAN INDUSTRIALIZATION 26-29 (1990).

143. *See* Stephan Haggard, Pathways from the Periphery: The Politics of Growth in the Newly Industrializing Countries 9-22 (1990).

144. *See* STEPHEN CHIU, THE POLITICS OF LAISSEZ-FAIRE: HONG KONG'S STRATEGY OF INDUSTRIALIZATION IN HISTORICAL PERSPECTIVE 7-8 (1994); HAGGARD, *supra* note 143, at 25-27. A recent study characterizes the role of government in the Hong Kong model as one of positive non-intervention: "The clear separation in Hong Kong between the role of government as referee, and the role of private companies as active players in the economy, is unique in Asia, and rare world-wide." MICHAEL J. ENRIGHT ET AL., THE HONG KONG ADVANTAGE 30 (1997).

145. *Id.* at 29-32.

discovered that their success has produced more demands for representation of diverse social interests, inspiring political reforms; at the same time, the increased costs of production and the globalization of the economy have required Asian companies to compete with each other on a global scale.[146] Many blame the East Asian economic crisis beginning in late 1997 on the business/government alliance evident in this East Asian developmental model, a model which is said to have spawned what many now call crony capitalism.[147] The critical point here is the increased recognition of the pernicious qualities inherent in business decisions made in such incestuous ways. In the face of these developments, the rolling back of civil liberties in Hong Kong becomes merely a poorly disguised attempt to control political opposition. So-called authoritarian Asian political values have no role to play in contemporary Hong Kong. Any attempt to stifle freedom and access to information in Hong Kong would be a retrograde step detrimental to Hong Kong's competitiveness.

IV. SUSTAINING HONG KONG'S AUTONOMY

In addition to the difficulties relating to the competing paradigm discussed in the previous section, Hong Kong's status as an HKSAR in China presents problems of sustaining its autonomy on both domestic and international levels. The two sections in this part address respectively Hong Kong's domestic and international autonomy. This analysis raises several serious implications for Hong Kong's constitutional order, including maintenance of democracy, human rights and the rule of law. Under the "one country, two systems" formula, in the face of a dramatically contrasting mainland system, autonomy is the key to the success of the Hong Kong model. On the domestic level, the absence of true autonomy will result in the undermining of Hong Kong's constitutional and human rights regime, a dramatic increase in corruption and the full integration of Hong Kong into the mainland system. This represents a serious threat to both Hong Kong's way of life and its livelihood. This threat may disadvantage both Hong Kong and China. On an international level, true autonomy can be the source of investor confidence in Hong Kong and empowerment in Hong Kong's international affairs and its relationship with the mainland.

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146. *See* Michael C. Davis, *The Price of Rights: Constitutionalism and East Asian Economic Development*, 20 HUM. RTS. Q. 303, 303-37 (1998). Dietrich Rueschemeyer and colleagues have described the ways that economic development transforms societies and creates needs for diverse representation. DIETRICH RUESCHEMEYER ET AL., CAPITALIST DEVELOPMENT AND DEMOCRACY (1992).

147. *See* David E. Sanger, *Bailout Time: The Stock of 'Asian Values' Drops*, N.Y. TIMES, Nov. 23, 1997, at §4, p. 1. *See also* Donald K. Emmerson, *Americanizing Asia?*, FOREIGN AFF., May/June 1998, at 46.

A. Establishing Domestic Autonomy

It is sometimes useful to think of Hong Kong's late colonial constitutional and human rights order in terms of a tripartite framework.[148] One may visualize this as an inverted triangle with Britain and China represented by the vertices on the top and the Hong Kong community the vertex on the bottom. Political discourse along any boundary or axis has often been related to activities or the cessation of activities along the other axes. During the late colonial period the people were not confronted directly with Chinese rule, though the resumption of Chinese sovereignty at some point in the future, as specified in the Joint Declaration, represented the primary human rights concern.[149] Nevertheless, at various times, especially in the Basic Law drafting process in the late 1980s, and in the late transition period in the mid-1990s, Hong Kong people engaged in a direct human rights dialogue with Chinese leaders.[150] At other times, especially during the post-1989 Tiananmen crisis and in the 1992-94 debate over democratic reform, the Hong Kong political and human rights culture was permitted to grow in an environment largely sheltered from rather menacing Chinese government actions.[151] There were similar hot and cold periods in the relations between the two governments. In spite of the increasing Chinese involvement in Hong Kong affairs, pre-handover Hong Kong achieved a degree of genuine autonomy. Before the handover, when conflicts arose there was still the possibility of saying no to or resisting China's demands over democracy, human rights and other issues that may arise.

This pre-1997 period also experienced an emerging dialogue between Hong Kong people, Britain and China, over the substantial

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148. A detailed analysis of such tripartite framework is provided in a recent article. Michael C. Davis, *Human Rights and the Founding of the Hong Kong Special Administrative Region: A Framework for Analysis*, 34 COLUM. J. TRANSNAT'L L. 301 (1996).

149. Joint Declaration, *supra* note 1.

150. In the late 1980s the Basic Law drafting process was in full bloom and even the leaders of the democracy movement participated in this more hopeful dialogue with China. This largely came to an end with the development of the Tiananmen crisis. But, again, in the immediate pre-handover period substantial numbers of business and pro-China elite became party to China's second stove operations, which by 1996 had largely displaced British policy machinery. NORMAN MINERS, THE GOVERNMENT AND POLITICS OF HONG KONG 14-42, 228-38 (5th ed. 1998).

151. After the Tiananmen massacre even Chinese contact with the substantial pro-China community ground nearly to a halt, as the Basic Law process was itself suspended. At this stage Britain began to question its earlier policy of accommodation; it then advanced initiatives on nationality and human rights, while still holding out on democracy. Limited democracy became the subject of an agreement with China. Britain was more forthcoming in its 1992 democracy initiative, and again a storm ensued, this time producing polarization between the democratic and pro-China forces in Hong Kong. *Id.*

mainland intrusion into Hong Kong affairs. The political establishment in Beijing developed substantial formal mechanisms for monitoring developments in Hong Kong and reviewing the actions of the British Hong Kong government.[152] The Beijing government demanded and seized veto power over developments set to extend beyond the handover date.[153] Large infrastructure projects, such as the airport and port facilities, required Beijing approval for financing.[154] China likewise demanded the same for political and legal developments that would extend beyond the handover date.[155] Due to the radically different ideological perspectives of the parties, these developments, relating to democracy, human rights and the court system, became the focus of almost all conflicts along all axes.[156] For any institutional change to be allowed, they ultimately required China's approval. In response, Hong Kong people either contested China's policies directly or pressured Britain to do so.[157] Yet all the while, moderate political reforms were allowed to take place under the shelter of British rule, producing an evolution of Hong Kong's political and legal skills, in the civil society, the media and legal institutions.[158] On a structural level the tripartite

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152. In Beijing the Hong Kong and Macau affairs office took primary responsibility for Hong Kong Policy. In Hong Kong the local branch of the New China News Agency served as China's representative in Hong Kong. After Governor Patten introduced his election model for 1995, Xinhua and the Hong Kong and Macau affairs office seized every opportunity to "undermine the authority and prestige of the government, and create unrest, in order to persuade Britain to recall Patten and appoint a more amenable Governor." MINERS, *supra* note 150, at 237. A Sino-British Joint Liaison Group (JLG) was established for consultation over transition matters, as provided for in Annex II of the Joint Declaration. In the Basic Law drafting process, there were the Basic Law Drafting and Consultative Committees and, as the handover neared, the various Mainland transition bodies noted above, emerged. The preliminary working committee, in particular, was set up in 1993 to bypass the JLG altogether and prepare for the transition without British and Democratic Hong Kong participation. *Id.* at 237-38.

153. Frank Ching, *Toward Colonial Sunset, in* PRECARIOUS BALANCE, *supra* note 23, at 187-88. Britain and China disagreed over the purpose of the JLG, China arguing that the Joint Declaration compelled Britain to use the JLG to obtain Chinese permission on all important matters, effectively giving China veto power. MINERS, *supra* note 150, at 232.

154. Ching, *supra* note 153, at 187-88.

155. *See* Representative Government in Hong Kong, *supra* note 36; Ching, *supra* note 153, at 189-91; *UK Accused of Breaching the Trust by Leaking Confidential Details*, *supra* note 36, at 12-13.

156. Ching, *supra* note 153, at 189-91.

157. After Britain caved in to Chinese demands that only one overseas judge sit on the Court of Final Appeal, the newly elected Legislative Council voted to reject this proposal. This was the first time that the Legislature opposed an agreement between Britain and China involving Hong Kong. *Id.* After Chris Patten became Governor, the British government became more responsive to Hong Kong concerns, resulting in the 1995 election proposals that sped up the democratization time-table and increased local participation in government decisions. *See* MINERS, *supra* note 150, at 228-38. *See also* Davis, *supra* note 148, at 310-11.

158. Most noteworthy in this regard were the 1991 and 1995 elections to the Legisla-

framework grew to reflect aspects of the emerging constitutional character of this changing society.

At the same time, China learned to play the Hong Kong political game, cultivating its own supporters to promote its preferred policies. At the transition's end, in 1996-1997, through the complex system of appointments to various mainland committees and previously discussed rewards, China put in place a post-1997 political regime occupied almost entirely by its loyal lieutenants. This process began with drafting the Basic Law, and reached its zenith in the late transition, by which time the Hong Kong-British axis was almost entirely eclipsed by the axis of discourse between China and its chosen Hong Kong supporters. In the late transition stage China refused nearly all contact with electorally popular democratic forces in Hong Kong. Upon the handover, the Chinese government expelled remaining democratic forces in the Legislative Council. Within the pro-China camp was a well worn path to Beijing, as China focused on the minutia of the transition. For Hong Kong's elite willing to play this game, Beijing was the venue for important political and economic rewards.

The post-1997 period shows a confrontation between two forms of power: the forces of a liberal democratic society and the forces of power and influence achieved through the national regime. Both power sources have enjoyed some success. Hong Kong decision-makers ignore both popular opinion and powerful Beijing connected business interests at their peril. In many respects, some success in both aspects suggests the tripartite relationship that developed during the transition period will likely continue as the fundamental character of Hong Kong's constitutional politics. Britain's position in the pre-handover triadic relationship is being taken up by a partially responsive Hong Kong government and the pre-handover Hong Kong vertex occupied by an emergent civil society. This tripartite structure is not as attractive as true autonomy in Hong Kong, but it is more attractive than direct Beijing rule. With a substantial level of political and economic development already achieved in Hong Kong, any attempt to rule too closely by Beijing would almost certainly be noticed and invite strong public protest. The maintenance of tight control requires heavy-handed tactics and Hong Kong would almost certainly be destroyed in the ensuing conflict.

Even a looser attempt by Beijing to control outcomes in Hong Kong, perhaps under a de facto tripartite model, invites erosion of Hong Kong's distinct character. Through interfering too readily in Hong

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tive Council and the 1991 passage of the Bill of Rights Ordinance, bringing in an era of active public debate on politics and human rights. Political, educational, legal and media institutions have developed in this vibrant environment, presenting political leaders who have endeavored to roll back these developments with a formidable challenge. *See* MINERS *supra* note 150, at 196-213, 256-60. *See generally* Ching, *supra* note 153. at 188-89 (discussing the 1991 elections).

Kong's domestic issues, Beijing may invite a corruption of Hong Kong's political and economic systems, and an intrusion by the mainland's system into Hong Kong. Any attempts by either locally influential people or highly placed mainland officials to cut around local political decisions will directly corrupt Hong Kong's political and constitutional systems. This would create a system where cultivating influence in Beijing will be important, and invite further corruption. Mainland institutions that offer avenues to invite intrusion by Beijing leaders include Hong Kong's appointed delegations to China's NPC and CPPCC, the Basic Law Committee (especially local members), the local branch of the New China News Agency (an agency which historically has been China's de facto embassy in Hong Kong), Beijing's Hong Kong and Macao Affairs Office, the newly instituted branch office of the Mainland Foreign Ministry in Hong Kong, the local People's Liberation Army Garrison Command, and the local underground cell of the mainland Chinese Communist Party.[159] Perhaps the most important channel is through the Hong Kong elite that can directly approach mainland leaders.[160] Democratic processes and openness are the only reliable security for local autonomy.

In the initial phase of the HKSAR there was a noticeable diminution in mainland public official comment on Hong Kong. It is not clear whether mainland interference diminished or went behind closed doors, given that mainland chosen local officials are now in place.[161] It is clear that China's locally appointed business and pro-China leaders and offi-

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159. The local cell of the Chinese Communist Party has historically been the Hong Kong Macao Work Committee, but recent rumors suggest this committee may be replaced by the Party Organization of Hong Kong-Based Chinese Enterprises. Willy Wo-Lap Lam *Cadres and Tycoons Jockey for Position*, S. CHINA MORNING POST, July 30, 1997, at 17.

160. In this regard several examples of such influence are evident in local developer Li Ka Shing going directly to Beijing to get a mainland prosecution in the Big Spender case; local complaints regarding the local public broadcaster RTHK's criticisms of government policy made by Local NPC delegate Xu Simin; and local Basic Law Committee member Raymond Wu attacking the recent landmark Court of Final Appeal judgment (encouraging Beijing to overturn it). *See* Linda Choy, *Xu's Attack on RTHK Dismissed: Local Delegates Told CPPCC Has No Role in SAR*, S. CHINA MORNING POST, Mar. 8, 1998, at 4; No Kwai-Yan, *Beijing Adviser Rejects Calls for His Resignation*, S. CHINA MORNING POST, Feb. 5, 1999, at 4; Willy Wo-Lap Lam, *Beijing's Answer to Tycoon's Lament*, S. CHINA MORNING POST, Jan. 6, 1999, at 15.

161. There were some attempts by local NPC deputies (who, by virtue of their appointment process, tend to be pro-China business elite) to have a direct role in the HKSAR but these were seemingly rebuffed by Beijing. Linda Choy, *NPC Deputies Want to Give Tung Views on Policy*, S. CHINA MORNING POST, May 6, 1998, at 2; No Kwai-Yan, *'Keep Quiet' Call to Local NPC Deputies*, S. CHINA MORNING POST, Mar. 11, 1999, at 4. Others have accused local officials of attempting to "second-guess" Beijing. Stella Lee, *Officials 'Second-guess' Beijing*, S. CHINA MORNING POST, June 30, 1998, at 6. The Chief Secretary Anson Chan was once quoted as saying that Beijing officials give policy hints, but this was later denied. Genevieve Ku, *Beijing May Have Given Policy Hints, Says Anson*, S. CHINA MORNING POST, June 18, 1998, at 4; Genevieve Ku & Jimmy Cheung, *Anson Denies Job Hints From Beijing*, S. CHINA MORNING POST, June 19, 1998, at 4.

cials offer little challenge to well-known mainland policies, leaving mainland officials with little reason to openly interfere. These local leaders appear very accommodating of favored mainland policies, to the extent of sometimes exceeding the conservative policies of mainland officials. The example of local NPC Deputy Xu Simin's comments about RTHK's failure to support the HKSAR and Chinese governments is a case in point, where even the mainland officials seemed disapproving of Mr. Xu's conservative position.[162]

Recent examples of seeming favoritism toward mainland entities and pro-China figures from within the HKSAR government include the failure of Hong Kong's Department of Justice to prosecute the New China News Agency for violating privacy laws and the failure to prosecute a leading pro-China publisher for distorting circulation figures, though she was charged as an unindicted co-conspirator with three of her prosecuted colleagues.[163] If allegations of favoritism were substantiated, this calls into question the degree of autonomy from mainland influence, and, as discussed above, delivers a severe blow to popular conceptions of human rights and the rule of law in Hong Kong. To their credit, mainland officials have often reiterated that Hong Kong issues are for Hong Kong officials to determine.[164] It is not clear whether this attitude will persist as the democratization process proceeds and Hong Kong officials are under more severe pressure to be less accommodating.[165]

Another possible source of corruption and threat to liberty and property interests could arise from the large mainland business contingency in Hong Kong. The perception that mainland companies are fully subject to local autonomy and laws, and that local officials are fully committed to enforcing such laws, is vital to Hong Kong's future. The improper offering or withholding of business privileges on the mainland should also be of concern to mainland officials. Local companies relin-

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162. See Linda Choy, *Xu's Attack on RTHK Dismissed Local Delegates Told CPPCC Has No Role in SAR*, S. CHINA MORNING POST, Mar. 8, 1998, at 4.

163. *Fear of One Law for Rich, One for Poor*, S. CHINA MORNING POST, Mar. 19, 1998, at 3; *Row Over Aw Decision; Justice Boss Urged to Explain Why Publisher was not Prosecuted*, S. CHINA MORNING POST, Mar. 19, 1998, at 1.

164. It is noteworthy that the mainland government has even attempted to rein in local NPC Deputies, rejecting calls that they be given separate offices within the territory, an arrangement which surely would have contributed to the establishment of a separate power base. Linda Choy, *Local NPC Base Ruled Out*, S. CHINA MORNING POST, Mar. 4, 1998, at 4. *See also* Linda Choy, *supra* note 161.

165. Annexes I and II of the Basic Law allow for the possibility of reforming the method for selection of the Chief Executive and Legislative Council in 2007, allowing for the possibility of universal suffrage and full direct elections in geographical constituencies. But since this requires the approval of two-thirds of the Legislative Council (which at that stage will only have half of its members directly elected) and the Chief Executive, it seems unlikely such reform will be approved if China and the pro-China camp fear a loss of control. Basic Law, *supra* 2, at Annexes I and II.

quishing substantial interest to mainland companies to gain favor raises cause for concern in this latter regard. Without strict control, mainland practices can intrude across the border and local attempts to curry favor with powerful mainland investors could intrude upon free market practices and decisions in Hong Kong. The ability of mainland companies' to influence local markets is also of concern. Occasionally stock market and property increases in Hong Kong are supported, in part, by the perception that the mainland government is a quasi-guarantor of sustained growth. The mainland government should clearly recognize the local boundary and be reluctant to over-react to every hiccup in Hong Kong markets.[166] There should also be concern over any reluctance of local business advisers to offend prominent mainland companies.[167] This phenomenon raises important liberty issues for business advisors and the related media. Overall, the security of property rights is at stake if mainland companies are allowed to avoid the same legal standards as others, and flex their muscles in the local economy. Though the attempt was later abandoned, a group of mainland enterprises attempted to be assigned a functional constituency under the Electoral law that governed Hong Kong's 1998 election for the Legislative Council.[168] This open channel may have been preferable to numerous possible back-door channels to power.

B. External Autonomy and the Global Process

A final concern when it comes to Hong Kong's autonomy and ultimately the security of human rights and the rule of law is the preservation of Hong Kong's international status. Any properly constituted community must have a fully recognizable external projection if it is to survive. It has been argued in this regard that external effectiveness translates into internal effectiveness.[169] As hinted by the previous section, internal effectiveness also translates into external effectiveness. The international community was told in the Joint Declaration that it could rely on Hong Kong's high degree of autonomy when dealing with Hong Kong. Any perception that Hong Kong is merely a front for the Chinese government would destroy any confidence in this promise to

166. The East Asian economic crisis is believed to have spawned increased corruption, such that the dangers of mainland companies under economic pressure being pulled into corruption is realistic. Niall Fraser, *'Economic Turmoil to Blame' for Graft Surge*, S. CHINA MORNING POST, July 9, 1998, at 5.

167. There is some evidence that local investment advisors may shy away from criticizing influential companies in an Asian environment where official approval is critical. Mark Landler, *Asian Dilemma: Can 'Guests' Advise?*, INT'L HERALD TRIB., Mar. 12, 1999, at 13.

168. Chris Yeung & Quinton Chan, *Mainland-funded Firms Dropped Bid for New Seat*, S. CHINA MORNING POST, Sept. 7, 1998, at 8.

169. W. MICHAEL REISMAN, PUERTO RICO AND THE INTERNATIONAL PROCESS: NEW ROLES IN ASSOCIATION 53-67 (1975).

the fatal detriment of Hong Kong. The price for China of any confidence in its commitments is to fully allow Hong Kong, without interference, to conduct it internal affairs, as discussed above, and its external relations, as discussed in this section. China's policies in this regard are not without concern.

The Joint Declaration and the Basic Law are quite generous in granting Hong Kong the right to conduct its own external affairs.[170] The present essay need only highlight the contours of this authority. While retaining control over Hong Kong's foreign and defense affairs the mainland government has granted Hong Kong almost complete autonomy in nearly all areas of external relations with respect to commercial, cultural and social affairs.[171] This includes the right to participate in most international organizations, with the proviso that if such organization is confined to states then Hong Kong must participate as part of the Chinese delegation.[172] Hong Kong has its own overseas trade offices and may issue its own visas.[173] It is also allowed to sign international agreements on its own within the scope of these permitted areas.[174] Again, China is required to assist Hong Kong in this regard where necessary. On paper this is an extraordinary degree of autonomy for a non-state community, but a degree that is essential to the kind of constitutional community that Hong Kong is expected to be.

The present analysis of the tensions running through the Hong Kong model concerns the degree of compliance. The above sections already consider the degree of compliance with the Joint Declaration on the domestic front. The question for the present section is the degree of external compliance or Hong Kong's degree of effectiveness in complying with it own commitments. In this regard, Hong Kong runs up against some serious difficulties inherent in China's world view. There seems little doubt that the current world order would generally be welcoming of an autonomous community like Hong Kong. Historically statist world views have generally given way to views that favor local self-determination and participation by a wide range of territorial communities. Exclusive control by nation-states has generally given way to an inclusive order regulating vast areas of human endeavor.[175] Hong Kong already belongs to several international organizations and is party to many international agreements.[176]

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170. Basic Law, *supra* note 2, at arts. 150-57.

171. Basic Law, *supra* note 2, at arts. 2, 13, 39, 114-18, 148-57; Joint declaration, *supra* note 1, at art. 3(6)-(10), and Annex I arts, VI-IX.

172. Basic Law, *supra* note 2, at art. 152.

173. *Id.* at arts. 154-57.

174. *Id.* at arts. 151 and 153.

175. *See* Myres McDougal et al., *The World Constitutive Process of Authoritative Decision*, *in* MYRES MCDOUGAL & W. MICHAEL REISMAN, INTERNATIONAL LAW ESSAYS 191 (1981).

176. As of early 1996, the Joint-Liaison Group, which under the Joint Declaration co-

The problem for Hong Kong is that China's world view has been far less accommodating of flexible approaches to sovereignty. Under nineteenth century views of sovereignty China has been more likely to admonish others to not meddle in its internal affairs and has specifically taken the view that both its human rights practices and Hong Kong are internal affairs.[177] This legal positivist view may be further colored by a nationalistic view that the world is out to contain China; of particular concern in the present context is China's concern that Hong Kong not be employed in the service of this containment.[178] In this regard, sustaining real autonomy for non-nationalistic Hong Kong may be the best strategic option. Such seems preferable to a less autonomous Hong Kong which would have incentives of its own to meddle in China's affairs and would, at the same time, be a subject of suspicion regarding foreign meddling. Any attempt to disempower Hong Kong internationally is clearly contrary to the Joint Declaration and the expectation of international reliance on Hong Kong's autonomy.

In addition to the formal channels offered to territorial communities. The other channel, beyond the exclusive control of nation-states, increasingly available to international actors, is what is now referred to as the global order. Globalization, the tendency to move areas of international power and effectiveness beyond state control, has opened up vast areas of influence to non-state actors. This non-territorial global space is concerned with a wide range of topics from human rights, information and the arts to science and business. In the commercial area John Gerald Ruggie describes a world of "transnational microeconomic links."[179] As a non-state international commercial center Hong Kong is a very effective player in this latter global space. However, global effectiveness, while beyond state control, depends a great deal on territorial communities to provide a hospitable environment for global actors.[180]

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ordinates transition matters between China and Britain, had already agreed on Hong Kong's continued participation in thirty international organizations; others were anticipated. RODA MUSHKAT, ONE COUNTRY, TWO INTERNATIONAL LEGAL PERSONALITIES: THE CASE OF HONG KONG 6 (1997).

177. China's claims that, despite the Sino-British Joint Declaration, Hong Kong is China's internal affairs have persisted after the handover. Glenn Schloss, *West Warned to Stop Meddling*, S. CHINA MORNING POST, Aug. 1, 1997, at 4. An early twentieth century case expresses this 19th century positivist view of sovereignty, arguing for the "principle of the exclusive competence of the state in regard to its own territory in such a way to make it the point of departure in settling most questions that concern international relations." Island of Palmas Case (United States v. Netherlands), 2 R.I.A.A. 829 (1928). A month after the handover, China's Commissioner of the Ministry of Foreign Affairs in Hong Kong, Ma Yuzhen, hit out at Britain's first six-monthly report on Hong Kong by warning that Hong Kong was now an internal affair. Schloss, *supra*.

178. *See* SAMUEL S. KIM, & LOWELL DITTMER, CHINA'S QUEST FOR NATIONAL IDENTITY 258 (1993).

179. John Gerard Ruggie, *Territoriality and Beyond: Problematizing Modernity in International Business*, 47 INT'L ORG. 139 (1993).

180. *See* Davis, *supra* note 146, at 303-37.

Communities which provide democratic processes, human rights and the rule of law are more likely to attract global commercial and other activities.[181] Such communities, in the present world, are also likely to provide a better quality of life and a wealthier environment for their inhabitants.[182] Hong Kong is such a community, and as a global city, has served as a conduit for vast amounts of mainland Chinese business that seeks participation in this global economy.[183] In this regard, destroying Hong Kong's autonomy and constitutional order would operate to destroy Hong Kong as a venue for global enterprise. Destroying Hong Kong as such a venue would be a great detriment to both China and Hong Kong. Even the leader of the largest mainland enterprise in Hong Kong, Larry Yung, argued that the mainland government must not interfere with Hong Kong's autonomy or its rule of law, that to do so would destroy Hong Kong.[184]

V. CONCLUSION

This article described a new type of territorial community for which the assurances of constitutional order and human rights are vital. The analysis seeks to contextualize human rights in the processes of community construction and survival. Autonomous functioning is vital to these processes. Smaller territorial communities, including nation-states, in a world marked by a rapidly expanding international order and globalization, are constantly called upon to defend their autonomy and political integrity, while pursuing greater integration in the wider global order. The Hong Kong case of a highly autonomous community within a much larger and more powerful state highlights the complexity of this effort. In the context of Hong Kong, it is important to see that constitutionalism and human rights are both constructive of and dependent on autonomy, both domestic and external. In focusing our attention on competing concerns surrounding constitutional developments prior to the handover and during the first two years of the HKSAR this paper seeks to highlight the complex tensions inherent in this constitutional process and the attendant risks of failure.

In the face of China's contrarian system, protection of Hong Kong people's liberty, human rights and way of life, as valuable ends in themselves, is dependent on political will, both in terms of ideological

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181. *Id.*

182. *See* GERALD W. SCULLY, CONSTITUTIONAL ENVIRONMENTS AND ECONOMIC GROWTH 12-14, 183-84 (1992); Adam Przeworski, et al., *What Makes Democracies Endure?*, 7 J. DEMOCRACY 1, 39-55 (1996).

183. *See* ENRIGHT, ET AL., *supra* note 144, at 53-83; Yue-Man Yeung and Fu-Chen Lo, *Global Restructuring and Emerging Urban Corridors in Pacific Asia*, *in* EMERGING WORLD CITIES IN PACIFIC ASIA 17-47 (Yue-Man Yeung and Fu-Chen Lo, eds., 1996).

184. Larry Yung, et al., *Risk, Guanxi and 40% Luck—An Interview With CITIC Pacific Chief Larry Yung*, TIME, June 30, 1997, at 22-23.

aspirations and in respect of autonomous space. With respect to Hong Kong's role in China, three prominent hazards are identified and addressed with the following conclusions: (1) the attempted Singaporeanization of Hong Kong, with the attendant loss of liberty and rights, would likely lead to serious diminution in the entrepreneurial effectiveness of Hong Kong as a developed commercial center; (2) failure to respect Hong Kong's autonomy within China and preserve its liberal constitutional order will lead to the integration of Hong Kong into China's under-developed economy, with the attendant risk of corruption, loss of confidence and diminution of wealth to the detriment of both Hong Kong and China; and (3) failure to respect Hong Kong's autonomy in external affairs will deprive it of the ability to confidently represent its own interest in both formal international arenas and the global economic space. As a consequence, any failure to fully comply with the Joint Declaration's commitments to liberal constitutional government and a high degree of autonomy in a generous spirit that is protective of basic human rights and the rule of Law will result in a tragic loss to both Hong Kong and China.

MULTILATERAL TREATIES AND THE ENVIRONMENT: A CASE STUDY IN THE FORMATION OF CUSTOMARY INTERNATIONAL LAW*

CRAIG L. CARR** AND GARY L. SCOTT***

I. INTRODUCTION

Although the question of whether multilateral treaties create customary international law upon coming into force remains controversial, there is good reason to suppose that they do.[1] Pressing global problems demand cooperative solutions, and cooperative solutions are best achieved by means of the treaty process. Yet treaties bind only those states that are parties to the treaty, and often the critical number of parties is not great enough to assure an effective international response to global problems like environmental degradation. So it is tempting to assert that multilateral treaties generate an "instant custom"[2] that ob-

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* An earlier draft of this paper was presented at the Joint Convention of the Mexican International Studies Association (AMEI) and the International Studies Association (ISA), Manzanillo, Mexico, December 11-13, 1997.

** Professor, Division of Political Science, Mark O. Hatfield School of Government, Portland State University.

*** Professor, Division of Political Science, Mark O. Hatfield School of Government, Portland State University.

1. *See e.g.*, R.R. Baxter, *Multilateral Treaties as Evidence of Customary International Law*, 41 BRIT. Y. B. INT'L L. 275,(1965-66) [hereinafter *Multilateral Treaties*]; ANTHONY D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW (1971) [hereinafter CONCEPT OF CUSTOM]. *But see*, Arthur M. Weisburd, *Customary International Law: The Problem of Treaties*, 21 VAND. J. TRANSNAT'L. L. 1 (1988). For a cogent debate on the subject of customary law formation from treaties see, Anthony D'Amato, *Custom and Treaty: A Response to Professor Weisburd*, 21 VAND. J. OF TRANSNAT'L L. 459 (1988); Anthony D'Amato, *A Brief Rejoinder*, 21 VAND. J. TRANSNAT'L L. 489 (1988); A.M. Weisburd, *A Reply to Professor D'Amato*, 21 VAND. J. TRANS. L. 473 (1988). *See also* Hiram E. Chodosh, *An Interpretive Theory of International Law: The Distinction Between Treaty and Customary Law*, 28 VAND. J. TRANSNAT'L L. 973 (1995). For a specific discussion of the law-creating abilities of environmental multilateral treaties see Oscar Schachter, *The Emergence of International Environmental Law*, 44 J. INT'L AFF. 457 (1991); Daniel Bodansky, *Customary (and Not so Customary) International Environmental Law*, 3 IND. J. GLOBAL LEGAL STUD. 105 (1995).

2. *See supra* note 1 for sources discussing the meaning of "instant custom" and how multilateral treaties may create instant custom under international law.

ligates even non-parties to adhere to their terms.

In an earlier article in the Denver Journal of International Law and Policy we argued that multilateral treaties can in fact generate customary international law upon coming into force when three basic conditions are met:

1) A sufficient number of states in the international system accept the treaty.

2) A significant number of those states whose interests are substantially affected by the treaty (hereinafter "pertinent states") are parties to the treaty.

3) The treaty does not allow reservations on the part of the parties.[3]

We do not intend to repeat our argument here. Instead, we shall examine the universe of environmental treaties to see which treaties, if any, qualify as customary international law under our standards. We do so for two reasons. First, our prospective case study will enable us to sharpen and refine the standards themselves, thus demonstrating with some degree of precision how they structure the reach of customary international law in one particularly important policy area. Second, the study should aid a state in understanding its legal obligations to other states regarding the environment.

We will begin in Part II with a brief review of our three conditions and a discussion of why we think them necessary for the formation of customary international law. In Part III we briefly discuss some preliminary matters regarding the formation of instant custom. Then in Part IV we will arrange the existent multilateral treaties on the environment into three categories, viz., those treaties that establish customary international law according to our standards, those treaties that do not, and those troubling cases that remain too close to call from the standpoint provided by our three conditions.

II. MULTILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW

The reasons for thinking that multilateral treaties establish customary international law upon coming into force derive from the principle of customary international law itself. Customary practices reach the status of international law when a large number of the states within the international system suppose these practices establish appropriate guidelines for the relations of states.[4] Presumably, a treaty

3. Gary L. Scott & Craig L. Carr, *Multilateral Treaties and the Formation of Customary International Law*, 25 DENV. J. INT'L L. & POL'Y 71 (1996).

4. *See, e.g.*, G. SCHWARZEWNBERGER, A MANUAL OF INTERNATIONAL LAW 32-33 (5th ed. 1967). For the most influential treatise on the formation of customary law see D'AMATO, *supra* note 1.

relation between a large number of states could be based upon the same conviction. When this is the case, there is no need to suppose that treaty requirements must "harden" or "ripen into" customary international law.[5] The significance which a large segment of the international community attaches to the provisions of the treaty is evidenced by the treaty itself. There is, so to speak, nothing that needs to harden; things are hard enough already.

Nevertheless, one cannot decide abstractly which multilateral treaties qualify as sufficiently "hard"; this requires the establishment of some criteria capable of guiding judgment on the matter. The three conditions introduced at the outset are designed to meet this objective with some degree of specificity. As we shall see, however, these conditions contain an inescapable generality and this means that we cannot hope to achieve perfect clarity on the question of which multilateral environmental treaties actually create customary international law. This problem, however, can be overcome by appeal to the obligatory nature of international law. We take it as a principle of law that its obligatory character must be clear. That is, if Treaty X creates a legal obligation, those subject to Treaty X must be able to understand that they have an obligation to obey it. If there is some question about Treaty X's status as law, there is also some question about whether it is obligatory. Where we cannot say with surety that an obligation exists, there is no such obligation. So, hard or troublesome cases, we will conclude, do not make customary international law under our conditions.

The three conditions introduced above are relatively straightforward. For a multilateral treaty to generate customary international law upon coming into force, a sufficient number of states must accept it, a significant number of pertinent states must accept it, and it must not allow reservations.[6] Perhaps the best way to make these conditions clear is to apply them to a specific area of international concern, like the environment, with a reasonable number of multilateral treaties that establish a foundation for international law. Before we turn to the more applied discussion, however, a few general remarks about our three conditions are in order.

A. *The Number of Parties to the Treaty*

The notion of customary international law derives from the general belief that the shared customary practices of numerous states provide

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5. D'AMATO, CONCEPT OF CUSTOM, *supra* note 1, at 139.

6. Article 2 of The Vienna Convention on the Law of Treaties defines "reservation" in the following manner: " 'reservation' means a unilateral statement, however phrased or named, made by a state, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that state. . . ." Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, U.N. Doc. A/CONF. 39/27, May 23, 1969 *reprinted in* 63 AM. J. INT'L L. 875 (1969).

reason to suppose that such widely accepted practices deserve to be respected as lawful.[7] They meet the criterion of general propriety since they already regulate the relations of a great many states. Presumably, the officials of those states adhering to these customary practices have found them to be appropriate regulations. The condition of general propriety can also be met, however, by numerous states accepting a particular treaty regulation. Here, too, it is possible to conclude that a large number of states—in this case the parties to the treaty—consider the regulations associated with the treaty appropriate for the governance of inter-state relations. The numerical condition, then, seems a necessary requirement for any inter-state practice to qualify as customary international law.[8]

Nevertheless, the condition is obviously imprecise; how many states must ratify a multilateral treaty before it can be said to establish customary international law?[9] It hardly seems reasonable to think that a modest number of states should be able to bring into force a treaty that would then obligate the remaining states of the world. On the other hand, if the number of required states is too large, there is little point to thinking that multilateral treaties can generate customary international law. Few such treaties could hope to receive the general support required to establish instant custom, and the point would quickly become moot.

Perhaps it is worth noting that the numerical condition raises problems even in more traditional areas of customary international law formation. Here, too, we need to consider how many states must adhere to a custom before it receives the general allegiance required to create international law. For its part, the International Court of Justice (ICJ) has demonstrated an inclination to measure state involvement as pertinent to the formation of customary international law without any further need to identify a magic number that brings such law into being.[10] If, however, we are to use our conditions as a guide to thinking about when multilateral treaties form customary international law, we must do better than this.

Nevertheless, the abstract assertion of a specific number is sure to seem arbitrary. Moreover, the number of states that are parties to a particular treaty may not indicate either efficacy or pertinent support. For example, at this writing only eighty-three states have ratified the Vienna Convention on the Law of Treaties (Treaty Convention).[11] Al-

7. D'AMATO, CONCEPT OF CUSTOM, supra note 1, at 99 passim. *See also*, Michael Byers, *Custom, Power, and the Power of Rules: Customary International Law from an Interdisciplinary Perspective*, 17 MICH. J. INT'L L. 109 (1995).

8. For additional discussion of this point, *see* Baxter, *supra* note 1, at 285; D'AMATO, CONCEPT OF CUSTOM, *passim*.

9. *See* Scott & Carr, *supra* note 3, at 86-87.

10. *See, e.g.*, North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.) 1969 I.C.J. 3, Nos. 51 & 52, at 42 (Feb. 20).

11. *See* Vienna Convention on the Law of Treaties, *supra* note 6..

though this is a sizeable number, it remains less than half of the states of the world.[12] However, this may be less important than the fact that the world's major treaty making states (including the United States which accounts for 7% of the world's treaties) are not included in this number.[13] When it comes to the identification of a magic number demonstrating significant support for certain treaty provisions, then, the question of how many parties there are to the treaty may be less important than the question of who these parties are. If all the major treaty making states ratified the Treaty Convention, the case for thinking it establishes customary international law would presumably be greater than it now is.

B. Pertinent States

This point suggests that treaty ratification by certain pertinent states is a more significant determiner of instant custom than the sheer number of ratifications. We understand pertinent states to be those states whose participation in a treaty is required if the treaty is to have real meaning and a real chance of achieving its intended objective.[14] In the case of the Treaty Convention, for example, pertinent states would be the major treaty making states. Absent their involvement, it seems pointless to insist that the Treaty Convention establishes customary international law governing the treaty process.

Another apt illustration of the pertinent state requirement is the International Convention for the Prevention of Pollution from Ships (MARPOL).[15] By 1990, parties to MARPOL accounted for 85% of gross merchant tonnage.[16] At present, however, fewer than half of the world's states have ratified MARPOL, and yet 85% of the world's significant shipping states are included among those parties.[17] The number of pertinent state parties thus looks more than sufficient to conclude that MARPOL establishes customary international law.

The number of identifiable pertinent states will vary according to the treaty and the issue in question. Depending upon the issue, some multilateral treaties may have few pertinent state parties, but if the number is sufficient to demonstrate a clear consensus among pertinent states, and if our first condition is satisfied, then there is reason to

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12. POLITICAL HANDBOOK OF THE WORLD (Arthur S. Banks & Thomas C. Muller eds., 1998) (listing 193 sovereign states currently in existence).

13. 1 PETER H. ROHN, WORLD TREATY INDEX 111-17 (2d ed. 1984).

14. *See* Scott & Carr, *supra* note 3, at 90.

15. International Convention for the Prevention of Pollution from Ships, Nov. 2, 1973, I.M.C.O. Doc. MP/CONF/WP.35, *reprinted* in 12 I.L.M. 1319 (1973) [hereinafter MARPOL].

16. THE EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL AGREEMENTS: A SURVEY OF EXISTING LEGAL INSTRUMENTS 161 (Peter H. Sand ed. 1992).

17. U.S. DEP'T OF TRANSP., MARITIME ADMINISTRATION, MERCHANT FLEETS OF THE WORLD: OCEANGOING STEAM AND MOTOR SHIPS OR 1,000 GROSS TONS AND OVER AS OF JANUARY 1, 1987 (1988).

think the treaty establishes customary international law. In other cases, of course, there may be a great many pertinent states, and this raises another numbers problem. How many pertinent states are required to ratify a multilateral treaty before it establishes customary international law? Once again, it seems foolish to suppose we can identify a magic number. One must examine individual treaties to get some sense of the significance of the involvement of pertinent states. In certain instances we may be unable to make a clear determination of that involvement. In those situations we can only say that multilateral treaty formation of instant custom is presently doubtful. However, doubtfulness is a form of exactness; such treaties cannot be said to create instant custom.

One might object that, by placing such great weight on pertinent states in determining whether multilateral treaties create instant custom, we turn efficacy into a condition of lawfulness. If enough pertinent states adhere to some regulation, by virtue of treaty agreement, then the fact that the treaty proves efficacious determines its lawfulness. One might wonder, however, about the significance of thinking that an efficacious treaty should obligate states whose people have less at stake with regard to the regulations in question. One might also wonder why efficacy should count as a condition of lawfulness.

We are not arguing, however, that efficacy does imply lawfulness. Efficacy is a test of the viability of a particular multilateral treaty. In the event a significant number of pertinent states regulate themselves by means of a common treaty agreement, we can suppose that the regulation demonstrates established practice among those states commonly involved in such matters. That is, we can suppose that the treaty indicates what has become the perceived proper mode of association in the area in question. It is in this sense that the treaty generates customary international law. For it is now easy to see that the treaty provisions codify, so to speak, the regulations that the most relevant states think appropriate for the inter-state system. The treaty yields the same results that would be achieved by the evolution of custom under more traditional standards of customary international law.

Efficacy, then, is an indication of significant general acceptance. And it escapes the danger of inter-state tyranny by establishing that a majority of uninterested states cannot legally impose unwanted regulations on states with a stake in some regulatory field. Moreover, since not all pertinent states may be parties to the treaty making instant custom, the force of the law remains significant. In the event a pertinent state refused to ratify a multilateral treaty that managed, nevertheless, to create instant custom, this state would still be obligated under international law to adhere to the terms of the treaty. The multilateral treaty process thus becomes an important mechanism for the self-regulation of pertinent states in issue areas that matter to them.

C. *Reservations*

Our third condition will be familiar enough to those who have considered the question of whether multilateral treaties create instant custom. It has been noted by Richard Baxter, and subsequently formalized by the ICJ in the *North Sea Continental Shelf* cases. There, the Court stated that any treaty provision subject to state reservations could not create customary international law.[18]

Of the three conditions, the reservation condition is by far the most stringent and will no doubt severely limit the number of multilateral treaties that generate instant custom. However, the reason for insisting upon this condition is clear. Treaties allowing reservations permit parties to exempt themselves from those provisions they prefer not to accept. Any provision that a party to the treaty can treat as not applying to itself can hardly become customary international law that obligates states which do not have a similar opportunity to reject. It is hardly appropriate to suppose that non-parties should be obligated to adhere to provisions of a treaty that the parties themselves are not obligated to obey. It is also unreasonable to suppose that a party to a treaty incurs an obligation to obey a provision that it exempts itself from through the reservation process because the treaty has created instant custom. To insist that multilateral treaties that allow reservations can still make instant custom, then, seems both unfair to non-parties and contradictory. It is contradictory because it encourages us to assert that a party to a treaty may have an obligation to obey a treaty provision from which it has formally and permissibly exempted itself.

III. TREATY PROVISIONS AND THE FORMATION OF INSTANT CUSTOM

Before we begin to measure instant customary environmental law by our standards, two preliminary comments are in order. First, it is important to be clear about what kinds of customary international law can be derived from multilateral treaty provisions. There are several hundred multilateral treaties in force that are relevant to the international environmental legal regime. These treaties are both global and regional in scope. However, by our count only forty-one of these environmental treaties, presently in force, are global in scope; the remainder are regional. For purposes of our analysis then, we will focus only on these forty-one global multilateral treaties that have the potential of sufficiently wide participation to become part of customary international law. We will not address, at this time, the ancillary question of whether regional treaties can create regional customary international law.

Admittedly this omits many important regional multilateral trea-

18. Baxter, *supra* note 1, at 284; North Sea Continental Shelf, *supra* note 10, at 42.

ties and overlooks the possibility of the formation of a regional customary international law. It also overlooks the possibility of groupings of similar bilateral treaties forming the basis for customary international law, particularly on a regional basis.[19] The question of regional customary law formation, however, involves the necessity of a theoretical discussion of a different sort and is beyond the purview of the present research.[20]

Secondly, it is necessary to emphasize that before a treaty provision can become part of customary international law, it must be of a generalizable nature.[21] Thus, for example, a treaty provision generally designed to protect endangered species by discouraging trade would be generalizable,[22] while a specific provision, say, to require an import permit for *Loxodonta Africana* may not.[23]

Treaty provisions may also be part of the process[24] of the formation of customary international law by providing further evidence for the existence of certain provisions which may qualify as customary international law, but which have, prior to their incorporation into a general multilateral treaty, not had much supporting evidence as proof of their existence. Provisions, such as the *sic utere tuo, ut alienum non laedus* principle and the precautionary principle in environmental law,[25] may require the backing of multilateral treaties to further solidify their basis as accepted customary international law. These questions, however, are also beyond the scope of this paper. Instead, we examine the issue of customary international law formation or "instant custom" as a result of a multilateral treaty coming into force.

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19. D'Amato points out that by sheer numbers alone bilateral treaties must be taken as evidence of customary international law. He states, "[y]et, as I argued in my book on custom in 1971, if we look at the matter mathematically, a multilateral convention among ten states is the equivalent of forty-five similarly worded bilateral treaties among the same ten states." D'AMATO, CONCEPT OF CUSTOM, *supra* note 1, at 99. On regional or "special custom," *see, e.g.*, Anthony D'Amato, *Special Custom*, *in* INTERNATIONAL LAW ANTHOLOGY 157-61 (Anthony D'Amato ed., 1994).

20. For a discussion on regional law in the Americas see, Donna Lee Van Cott, *Regional Environmental Law in the Americas: Assessing the Contractual Environment*, 26 U. MIAMI INT'L AM. L. REV. 489 (1995).

21. *See, e.g.*, Baxter, *Multilateral Treaties*, *supra* note 1; D'AMATO, *supra* note 1.

22. Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 1976 UNTS 244, 27 U.S.T. 1087, T.I.A.S 8249, U.K.T.S. No. 101 (1976), *reprinted in* 12 I.L.M. 1085 (1973); [hereinafter CITES].

23. *Id.* at Appendix I.

24. While it is traditional to view customary international law and treaties as "sources" of international law, we think it more useful for our discussion to adopt George Schwarzenberger's terminology of "law creating processes." *See* SCHWARZENBERGER, *supra* note 4, at 28-35.

25. The precautionary principle requires states to act with caution toward potentially environmentally damaging practices, *i.e.* to err on the side of caution.

We are interested, then, in the extent to which certain multilateral treaties can be said to be formative of customary international law on their own, rather than through a contribution to the normal processes of *opinio juris* and state practice.

IV. THE FORMATION OF INSTANT CUSTOM: A CLASSIFICATION SCHEME

For purposes of our analysis we will divide the relevant universe of global multilateral treaties into three categories. Category I will be those treaties that definitely do not meet our three part test for the formation of customary international law. Category II will include those treaties that seem quite clearly to meet our test and Category III will consist of those treaties about which some doubt may still remain even after applying our test. This latter category is the most interesting because it illustrates the difficulty, even with the application of a strict test, of being certain that a treaty creates customary international law.

A. *Category I*

Most of the treaties in our Category I have failed to meet the most onerous condition of our three conditions set out above, that the treaty not allow reservations to its substantive provisions. We consider that all treaties not specifically *prohibiting* reservations allow them to take place. In this line of reasoning we are following the stipulations of Article 19 of the Treaty Convention.[26] Moreover, the ICJ in its advisory opinion in, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*,[27] upheld the notion that reservations, not specifically prohibited, are allowable so long as the reservation is compatible with the object and purpose of the treaty.[28]

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26. Vienna Convention, *supra* note 6. Article 19 states,

> A state may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless: (a) the reservation is prohibited by the treaty; (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or (c) in cases not falling under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

Id.

27. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15 (May 28). For a similar opinion directly relevant to the Americas see, Advisory Opinion No. OC-2/82 of Sept. 24, 1982, The Effect of Reservations on the Entry into Force of the American Convention on Human Rights, *reprinted in* 22 I.L.M. 37 (1983). For a discussion of reservations to multilateral treaties *see generally*, Catherine Redgwell, *Universality or Integrity? Some Reflections on Reservations to General Multilateral Treaties*, 64 BRIT. Y. B. INT'L. L. 245 (1994).

28. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 27, at 29.

Although the "no reservations provision" is quite restrictive,[29] the Court has indicated that the derivation of customary law from treaty law is a result, "not lightly to be regarded as having been attained."[30] Even so, some may object that we have excluded treaties that many think have become part of customary international law, but, for reasons to be discussed below, we think that most of this customary law may have come about, not through the treaty process itself, but rather through the more traditional formative processes of customary international law, i.e., *opinio juris* and state practice.

One such treaty is MARPOL.[31] MARPOL's 1978 revision has a total of 106 Parties.[32] While this represents only slightly fewer than half of the world's states, as noted above, it represents 85% of the world's significant shipping states and over 93% of the world's gross merchant tonnage.[33] This wide acceptance among shipping states has caused Birnie and Boyle to proclaim, "It is thus beyond question that it is now included in the 'generally accepted international rules and standards' prescribed by Article 211 of the 1982 UNCLOS as the minimum content of the flag state's duty to exercise diligent control of its vessels in the prevention of marine pollution."[34] In spite of such claims, we have included MARPOL in our Category I because it does not prohibit reservations to its provisions. While no reservations have been made to date, the treaty, nonetheless, offers the possibility of a state opting out of or modifying certain provisions through reservation. While we do not disagree that MARPOL's provisions may have come to be regarded as customary international law, they have done so because of the normal processes included in the creation of customary international law, state practice and *opinio juris*. As Birnie and Boyle point out, "Moreover, quite apart from their incorporation by treaty, such international standards may acquire customary force, if international support is sufficiently widespread and representative. The MARPOL Convention may be one example of this transformation process."[35]

Another environmental treaty that may have evolved into customary law, but which we also include in Category I because it does not prohibit reservations, is The International Convention for the Regulation of Whaling ("Whaling Convention"), done originally in 1946 and amended nine times between 1975 and 1992.[36] Since 1979, this conven-

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29. The no reservations test eliminates 31 of the 41 global environmental treaties under consideration for this study.

30. North Sea Continental Shelf, *supra* note 10, at 41

31. MARPOL, *supra* note 15.

32. *See* Llloyd's Register of Shipping/World Fleet statistics, Dec.31, 1997 (noting 106 parties to MARPOL).

33. Sand, *supra* note 16, at 161.

34. PATRICIA W. BIRNIE & ALAN E. BOYLE, INTERNATIONAL LAW AND THE ENVIRONMENT 267 (1992).

35. *Id.* at 94.

36. International Convention for the Regulation of Whaling, Dec. 2, 1946, 161 U.N.T.S. 72, 62 STAT. 1716, T.I.A.S. 1849 [hereinafter Whaling Convention].

tion, which had only eight original parties, and which added only eight more in the succeeding three decades, has gained thirty additional parties in the past two decades.[37]

Participation in the Whaling Convention has certainly gained momentum during a period of heightened environmental consciousness. This momentum has caused some writers to assert that the generalizable provisions of this treaty, e.g., the protection of whales in general, have become part of customary international law.[38] D'Amato and Chopra argue that customary law regarding whales has evolved so far that whales can be seen as having an emerging "entitlement to life."[39]

We do not consider the Whaling Convention itself, however, to be formative of customary international law, because, as noted above, it does not prohibit reservations. Further, states may opt out of the regular amendments to the Schedule to the Convention which establish specific conservation regulations on whaling.[40] Moreover, it should be noted that participation in the Whaling Convention, while growing, still does not include nearly two-thirds of the world's coastal states.[41] To what extent this limits the treaty from constituting customary international law under our test is a moot point, since the treaty fails our no-reservations test. It would become an issue only if the treaty did prohibit reservations.

The Whaling Convention, then, may have evolved into customary international law through the normal practices of the expression of *opinio juris* and state practice. Indeed, D'Amato and Chopra argue that there has been, ". . . a broadening international consciousness about whaling amounting to an *opinio juris* - the psychological component of international customary law."[42] And further, "When this component is added to the evolving practices of states toward whaling, the combination of psychological and material elements arguably constitutes binding customary law."[43] We do not dispute this claim, nor would we argue that the Whaling Convention has not contributed to the formation of this law in subtle ways. Rather, we argue that the Whaling Convention itself did not create the customary law on the subject of whaling. Further evidence that the Whaling Convention and MARPOL became customary international law through non-treaty processes is the length of time that passed before these customary law principles gained their present widespread acceptance. The Whaling Convention, in particu-

37. Treaty data from the UNTS website (last modified November 10, 1997) <http://www.un.org/Depts/Treaty>.

38. Anthony D'Amato & Sudhir K. Chopra, *Whales, Their Emerging Right to Life*, 85 AM. J. INT'L L. 21, 49 (1991). *See also*, Sudhir K. Chopra, *Whales: Toward a Developing Right of Survival as Part of an Ecosystem*, 17 DENV. J. INT'L L. & POL'Y 255 (1989).

39. D'Amato & Chopra, *supra* note 38, at 49.

40. Whaling Convention, *supra* note 36, at art. V(3). *See also*, Sand, *supra* note 16.

41. Sand, *supra* note 16, at 258.

42. D'Amato & Chopra, *supra* note 38, at 22.

43. *Id.* at 22-23.

lar, languished in relative obscurity for nearly thirty years before the rise in environmental consciousness of the past two decades.

These are but two examples of environmental treaties often seen as having "hardened into" customary international law, even though they do not meet the requirements of our three part test. They illustrate the distinction between treaties which create customary international law and those which merely contribute to its formation by aiding the processes of *opinio juris* and state practice. Treaties in our next category are examples of the former, that is, they meet the standards of our three part test. Thus, we think that they are formative of customary international law in the form of "instant custom."

B. Category II

There are only ten global multilateral environmental treaties presently in force which do not allow reservations to their provisions, all of which are discussed below. Of these, eight belong to our second category, i.e., they seem rather clearly to meet our three part test. The following brief discussion of each of these treaties should make this clear.

The Convention on Biological Diversity came into force on December 29, 1993.[44] Its purpose is to slow the reduction of biological diversity caused by human activities.[45] The means to do this described in the Convention include ". . . the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, . . . transfer of relevant technologies, . . . and by appropriate funding."[46] There are 175 parties to the Convention on Biological Diversity.[47] Thus, 90% of the world's states subscribe to the principles contained therein. While biological diversity concerns all states of the world, the treaty provisions for sharing technology[48] and providing funding to the developing states[49] suggest that the pertinent states are the major industrialized and technologically developed states. All major developed states, except the United States, are parties to this convention.[50] The United States signed the treaty in 1993, but has yet to ratify it.[51] We do not consider the absence of a US ratification of this particular convention to constitute sufficient reason to deny the formation of customary international

44. United Nations Conference on Environment and Development: Convention on Biological Diversity, June 5, 1992, U.N. Doc. UNEP/Bio.Div./N7-INC.5/4, *reprinted in* 31 I.L.M. 818 (1992) [hereinafter Biological Diversity Convention].

45. *Id.*

46. *Id.* at art. 1.

47. Multilateral Treaties Deposited with the Secretary-General, United Nations, New York, ST/LEG/SER.E (visited Feb. 25, 1999), <http://www.un.org/Depts/Treaty>.

48. Biological Diversity Convention, *supra* note 44, at art. 16.

49. *Id.* at art. 20.

50. *See* Multilateral Treaties Deposited with the Secretary-General, *supra* note 47. *See also* List of Signatories, *reprinted in* 31 I.L.M. 1004 (1992). (as of June 29, 1992, 157 states and the European Economic Community had signed the treaty).

51. *See* Multilateral Treaties Deposited with the Secretary-General, *supra* note 47.

law by this treaty on the basis of our pertinent states test. The US signature constitutes an interim acceptance of the principles contained in the treaty, so one could argue that the US is, in one sense, agreeable to laws formulated by this treaty. This line of reasoning, however, is probably unnecessary. The issue of biodiversity is sufficiently broad based so that the absence of a single large and wealthy state should not hinder customary law formation. With 170 parties, including most of the world's technologically developed states, and most of its developing states, this treaty meets both the sufficient numbers and pertinent states conditions. We believe this convention is an important step in the establishment of customary international law on the matter of biological diversity and that the remaining non-parties should consider its provisions as definitive in this area.

The Framework Convention on Climate Change ("Climate Change Convention") came into force on March 21, 1994[52] and at present it has 177 members. As in many of the environmental treaties, the developed states are the pertinent states in the Climate Change Convention. Those states which contribute the most to anthropogenic emissions responsible for global climate change, must naturally be "on board" for any solutions to global climate change problems. In recognition of this there are several provisions in the Convention calling for special contributions from developed states. Article 3.1 calls for developed countries to ". . . take the lead in combating climate change and the adverse effects thereof."[53] Article 4.4 requires the developed countries to ". . . assist the developing country Parties that are particularly vulnerable to adverse effects of climate change in meeting costs of adaptation to those adverse effects."[54] Article 4.5 further requires developed states to " . . . take all practicable steps to promote, facilitate and finance, as appropriate, the transfer of, or access to, environmentally sound technologies and know-how to other Parties, particularly developing country Parties. . . ."[55]

Most of the world's developed states are parties to the Climate Change Convention, including The United States, Japan, The Russian Federation and The European Union states.[56] It can be said then that the Framework Convention on Climate Change meets both our wide acceptance test and our pertinent states test and thus forms instant custom.

The Vienna Convention for the Protection of the Ozone Layer which entered into force in September of 1988[57] and the subsequent Montreal

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52. United Nations Conference on Environment and Development: Framework Convention on Climate Change, May 9, 1992, U.N. Doc. A/AC. 237/18 (Part II) Add.1 and Corr.1, *reprinted in* 31 I.L.M. 849 (1992) [hereinafter Climate Change Convention].

53. *Id.* at art. 3.1

54. *Id.* at art. 4.4.

55. *Id.* at art. 4.5.

56. *See* Multilateral Treaties Deposited with the Secretary-General, *supra* note 47.

57. Vienna Convention for the Protection of the Ozone Layer, Mar. 22, 1985, 1513

Protocol on Substances that Deplete the Ozone Layer, which entered into force in January 1989,[58] both received widespread acceptance rather rapidly. This was probably due to the urgency felt on the part of most states once a hole was discovered in the ozone layer by British scientists.[59] The Vienna Convention presently has 169 parties[60] and the Montreal Protocol has 163 parties.[61] These parties include all of the major industrial states and the major producers and consumers of ozone depleting substances, primarily Chlorofluorocarbons (CFCs). Thus, the pertinent states are all parties to these two treaties that aim to limit the emissions of stratospheric ozone depleting chemicals. These two treaties on ozone depletion exemplify the theory that multilateral treaties can create instant customary international law.

The International Convention to combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa,[62] came into force on December 26, 1996.[63] While the focus is on African areas, primarily because of the severe problems experienced there, it is, nonetheless, of interest on a more global basis. There are a total of 146 parties to this convention,[64] giving it reasonably widespread acceptance. The pertinent states to this treaty are those states most experiencing desertification problems, and the developed states, because of the special provisions in the treaty calling for them to aid states experiencing desertification.[65] In regard to pertinent state participation, most of the states with drought or desertification problems are parties to the treaty. For example, the states of the Sahelian region of Africa, which consists mostly of drylands, are all parties to the treaty.[66] The developed states are well represented as parties to the Convention as well.[67] Given the relatively widespread participation in the Convention and the high percentage of participation of the perti-

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U.N.T.S. 293, 324, *reprinted in* 26 I.L.M. 1516 (1987) [hereinafter Vienna Convention].

58. Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, *reprinted in* 26 I.L.M. 1541 [hereinafter Montreal Protocol].

59. *See* Gary L. Scott et. Al., *Success and Failure Components of Global Environmental Cooperation: The Making of International Environmental Law*, 2 ILSA J. INT'L & COMP. L. 23, 46-58 (1995).

60. *See* Multilateral Treaties Deposited with the Secretary-General, *supra* note 47.

61. *See id.*

62. United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa, Oct. 14, 1994, U.N. Doc. A/AC. 241/15/Rev.7, *reprinted in* 33 I.L.M. 1328 (1994) [hereinafter The Desertification Convention].

63. U.N. Doc. A/AC.241/15/Rev.3 (Sept. 12, 1994).

64. *See* Multilateral Treaties Deposited with the Secretary-General, *supra* note 47.

65. The Desertification Convention, *supra* note 47, at art. 6.

66. *See* Kyle W. Danish, International Environmental Law and the "Bottom-Up" Approach: A Review of the Desertification Convention, 3 IND. J. GLOBAL LEGAL. STUD. 133, 136 (1995). The states are Cape Verde, Senegal, Mauritania, Mali, Burkina Faso, Niger, Chad, and Sudan. *See id.*

67. The authors note that most of the European Union States have ratified the Convention. Two notable absentees from the developed state parties are the United States and Japan. Both states, however, are signatories.

nent states, it can be said that the Desertification Convention meets each of our tests for becoming customary international law.

This brings us to The International Tropical Timber Agreement of 1983[68] and its successor agreement, the International Tropical Timber Agreement of 1994.[69] For purposes of our discussion, we will treat them as a single agreement, focusing primarily on the successor agreement. While these agreements are more commodities agreements than environmental agreements, they are, nonetheless, concerned with the preservation of tropical forests and thus can be classed as falling within the purview of the international environment. They have been generally treated as environmental treaties in the relevant literature.[70] Moreover, they are the only international agreements focused on forests, and the 1994 successor agreement does have more of an "environmental flavor" than the 1983 Agreement.[71] Presently there are 54 parties to the 1983 agreement and 54 parties to the 1994 agreement.[72]

While it may seem questionable whether these agreements have achieved sufficient participation worldwide such that they have created instant customary international law, they present a somewhat different problem in this area. Rather than taking the participation in the treaties as a percentage of all of the world's states, it should be noted that only a small percentage of the world's states are concerned with the export of tropical timber and only a slightly larger percentage with its import. Because most of the timber producing states and also a large percentage of the major timber consumers are parties,[73] the treaties contain sufficient breadth of participation and sufficient pertinent state participation to warrant consideration as formative of customary international law regarding the conservation of tropical forests. Therefore, since these treaties allow no reservations, have sufficient pertinent state participation, and arguably meet the breadth of participation requirement as well, these treaties must be considered as formative of customary international environmental law according to our three part

68. International Tropical Timber Agreement, Nov. 18, 1983, U.N. Doc. TD/TIMBER/11/Rev.1 (1984), *reprinted in* 1393 U.N.T.S. 67 (1985).

69. International Tropical Timber Agreement, Jan. 10, 1994, UNCTAD: Doc.TD/TIMBER. 2/Misc. 7/GE. 94_50830 *reprinted in* 33 I.L.M. 1014 (1994).

70. *See, e.g.*, Nicholas Guppy, *International Governance and Regimes Dealing with Land Resources from the Perspective of the North, in* GLOBAL ENVIRONMENTAL CHANGE AND INTERNATIONAL GOVERNANCE 169, 177-80 (Oran R. Young et. al. eds., 1992); Rodolfo Rendon, *Regimes Dealing with Biological Diversity from the Perspective of the South, in* GLOBAL ENVIRONMENTAL CHANGE AND INTERNATIONAL GOVERNANCE 141-42 (Oran R. Young et. al. eds., 1992); Ann Hooker, *The International Law of Forests*, 34 NAT. RESOURCES J. 823, 849 (1994).

71. The 1983 Agreement contains only one paragraph among its "Objectives" which relates to environmental concerns. International Tropical Timber Agreement, *supra* note 53, ch. 1, art.1. The 1994 Agreement contains 6 paragraphs which refer to various environmental concerns such as sustainable development, conservation, and enhancement of resources. *Id.*.

72. *See* Multilateral Treaties Deposited with the Secretary-General, *supra* note 47.

73. *Id.*

test.

These agreements, however, offer an excellent example of why one should not be sanguine about an environmental issue, even though one can see that customary law has been formed regarding that issue. What is troublesome about these agreements is the way in which they have been structured and the results that this has had for the regulation of the destruction of tropical forests. Because of the weighted voting scheme within the International Tropical Timber Organization, which gives the most votes to the largest timber producing and consuming states,[74] the results have not been as many environmentalists had hoped. According to Nicholas Guppy, "In practice, therefore, the destruction of tropical forests is promoted by both sides, while the tropical timber market continues in a state of uncertainty and is manipulated by the main buyers - especially Japan - to keep prices low."[75] Therefore, while the clauses in these treaties relating to the conservation of tropical forests may have become part of customary international law, in practice the treaties and their parties are doing relatively little to preserve this resource that is so important to global environmental health. Simply knowing that customary international law has been created on this matter may breed false optimism concerning the future of tropical forests.[76]

The United Nations Convention on the Law of the Sea (UNCLOS)[77] presents another interesting study. While there is no doubt that UNCLOS incorporates many heretofore accepted principles of customary international law, such as the freedom of the high seas, coastal state sovereignty over territorial waters, etc., it also represents a significant departure from some of the older concepts of the traditional law of the sea. For example, UNCLOS was the first treaty to give legal credibility to the shift from *res nullius* to *res communis* regarding the resources of the seas.[78]

Many authors have proclaimed that UNCLOS is formative of cus-

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74. Guppy, *supra* note 70, at 141.

75. *Id.*

76. *Id. See also*, Hooker, *supra* note 70; Tom Rudel & Jill Roper, *The Paths to Rain Forest Destruction: Crossnational Patterns of Tropical Deforestation*, 1975-1990, 25 WORLD DEVELOPMENT 53 (1997); Emmanuel Kasimbazi, *Sustainable Development in International Tropical Timber Agreements*, 14 J. ENERGY & NAT. RESOURCES L. 137 (1997); Phillip E. Wilson Jr., *Barking up the Right Tree: Proposals for Enhancing the Effectiveness of the International Tropical Timber Agreement*, 10 Temp. INT'L & COMP. L.J. 229 (1996).

77. United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, U.N. Doc. A/CONF.62/122 (1982), *reprinted* in 21 I.L.M. 1261 (1982) [hereinafter UNCLOS].

78. *See, e.g.*, the Preamble to UNCLOS which states, *inter alia*, ". . . that the area of the sea-bed and ocean floor and the subsoil thereof, beyond the limits of national jurisdiction, as well as its resources, are the common heritage of mankind, the exploration and exploitation of which shall be carried out for the benefit of mankind as a whole . . . ." *Id. See also* UNCLOS, part XI, art. 140.

tomary international law and that *res communis* is now the accepted view of the international community.[79] When this question is viewed against the background supplied by our instant custom test, this understanding of UNCLOS seems justified. Let us explain.

It should be noted, first, that UNCLOS meets our "no reservations" test. Further, UNCLOS has gained rather widespread acceptance among the world's states. At present there are 130 parties to the Convention.[80]

The pertinent states test is the issue that may make UNCLOS somewhat questionable regarding its formation of customary international law. It seems reasonable to regard those states with the largest blue water navies and those states with the world's largest gross tonnage of shipping as our pertinent states. Though nearly all states have an interest in UNCLOS, particularly with its *res communis* principle regarding the high seas and the adjacent subsoil, those states most affected will be the major shipping and naval powers.

Considering UNCLOS as a candidate for the formation of customary law in 1994, the year of the Agreement on the implementation of Part XI of UNCLOS, the prospects were not good.[81] At that time only one of the top ten naval powers [82] and only three of the top ten merchant shipping states[83] had ratified the treaty. Part XI of UNCLOS became the most controversial part of the Convention. In an effort to make this part of the treaty more palatable to the major maritime states, and thus to achieve universal participation in UNCLOS, the

79. For a discussion of the historical progress from *res nullius* to *res communis see, e.g.*, W. Frank Newton, *Inexhaustibility as a Law of the Sea Determinant*, 16 TEX. INT'L L.J. 369 (1981). *See also*, A. L. Morgan, *The New Law of the Sea: Rethinking the Implications for Sovereign Jurisdiction and Freedom of Action*, 27 OCEAN DEV. & INT'L. L. 5, 19 (1996); Christopher C. Joyner & Elizabeth A. Martell, *Looking Back to See Ahead: UNCLOS III and Lessons for Global Commons Law*, 27 OCEAN DEV. & INT'L L. 73 (1996); David L. Larson, *Conventional, Customary, and Consensual Law in the United Nations Convention on the Law of the Sea*, 25 OCEAN DEV. & INT'L L. 75 (1994), Philip Allott, *Mare Nostrum: A New International Law of the Sea*, 86 AM. J. INT'L L. 764 (1992).

80. *See* Multilateral Treaties Deposited with the Secretary-General, *supra* note 47.

81. Part XI of UNCLOS deals with the establishment of the deep seabed authority. Article 136 of Part XI establishes that the seabed and its resources are the "common heritage of mankind." UNCLOS, *supra* note, 77, at art. 136. Part XI was not well received among those states that had the seabed. The supplemental agreement which modified certain parts of Part XI seems to have assuaged most of the concerns of these states. *See* GERHARD VON LAHN, LAW AMONG NATIONS: AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW 399-403 (7th ed. 1996) (for a discussion of the particular objections and the modifications to Part XI).

82. The top ten naval powers are extrapolated from the INTERNATIONAL MILITARY AND DEFENSE ENCYCLOPEDIA, 1941 and *passim* (Trevor N. Dupuy ed., 1993). They are 1. USA, 2. Russia, 3. UK, 4. France, 5. Japan, 6. Argentina, 7. Brazil, 8. India, 9. Spain, 10. China. Only Brazil had ratified UNCLOS by 1994.

83. The top ten shipping states by gross tonnage are taken from Dupuy: These states are 1. Liberia, 2. Panama, 3. Japan, 4. Greece, 5. Cyprus, 6. USA, 7. Russia, 8. China, 9. Philippines, 10. Bahamas. Of these states only Cyprus, Philippines, and Bahamas had ratified UNCLOS. *Id.* at 1729.

General Assembly adopted the Agreement on the implementation of Part XI and put it forward for signature and ratification.[84] That it has largely achieved its desired effect is evidenced by the fact that 63 states have become parties to UNCLOS since the implementation of this supplemental agreement in 1994.[85]

In the wake of the supplemental agreement, all of the naval powers with the exception of the United States, and all of the major shipping states with the exception of the United States and Liberia, have become parties to UNCLOS.[86] Does this constitute sufficient participation by the pertinent states to declare that UNCLOS formulates customary international law and that its provisions therefore govern all states with respect to the sea?

The significance of the non-participation of the United States and Liberia cannot be minimized in considering this question. The United States is, by a considerable degree, the largest naval presence in the world.[87] Further, Liberia is the number one shipping state in the world by a large margin.[88] Liberia's absence from UNCLOS, coupled with the absence of the United States (not only the largest naval power, but a significant shipping power as well) at least raises some doubt about the ultimate effectiveness of the treaty or the customary international law formulated by the treaty.

It is necessary to clarify, then, whether the point behind our second condition is efficacy or general consensus. There is little doubt that the participation of pertinent states in a multilateral treaty is necessary if the treaty is to prove effective. However, effectiveness is a poor condition of lawfulness. As UNCLOS demonstrates, even in the category of pertinent states, some states may be more pertinent than others. To conclude that it is doubtful that UNCLOS establishes instant custom is to allow the most pertinent states on a question of treaty law to have a *de facto* veto over the issue of instant custom. This seems inconsistent, however, with the traditional view that customary practice can harden into international law because it demonstrates a general consensus that some regulation ought to be respected by all states. After all, customary international law is supposed to hold against all states and not permit the claim of *res inter alios acta* by any single actor.

Our pertinent state category does not deviate from this view; instead, it effectuates this view by adding a degree requirement to the issue of customary practice. Consensus on the propriety of a regulation, among states with a heightened involvement in a particular practice, supports the regulation in ways relevant to the formation of customary

84. G.A. Res. 48/263, U.N. GAOR, 48th Sess., Supp. No. 49, at 36, U.N. Doc. A/RES/48/263 (1994).

85. *See* Multilateral Treaties Deposited with the Secretary-General, *supra* note 47.

86. *Id.*

87. Dupuy, *supra* note 82.

88. *Id. at 1729.*

international law. When it comes to instant custom, this means that a high degree of consensus among pertinent states is required for a finding of instant custom.

A high degree of consensus, however, can fall short of unanimity. If enough pertinent states participate in a multilateral treaty, the non-participation of one or two should not affect the formation of instant custom, regardless of what this might do to the treaty's efficacy. Given the involvement of other pertinent states, then, we think the non-participation of the United States and Liberia does not stop UNCLOS from formulating customary international law. The United States, however, has signed the Agreement relating to the implementation of Part XI of the Convention and continues to be a provisional member of the International Seabed Authority.[89]

C. Category III

We now turn to those treaties that present difficulty in determining their qualifications as customary international law makers, even when viewed through our three part test. We have included only two treaties in this category.

The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal ("Basel Convention") came into force on May 5, 1992.[90] Presently there are 122 parties to this treaty,[91] a significant, but not overwhelming, percentage of the world's states. The purposes of the Basel Convention are first, to limit and control the transboundary movement of those materials set for disposal that are deemed by the convention to be of a hazardous nature, and second, to transfer technology to the lesser developed countries so that they may better be able to minimize the production of such hazardous waste and to minimize the handling and disposal problems of those wastes that are generated.[92]

Since most of these hazardous materials are the result of industrial and manufacturing processes, and since the technology transfers de-

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89. Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, U.N. Doc. A/RES.48/263 (1994). The United States signed the Agreement on July 29, 1994. The effect of the initial signature was to become a provisional member of the ISBA until November 16, 1996. In accordance with Article 7, paragraph 1, of the Agreement and by its own request, the US provisional membership in the ISBA has been extended to November 16, 1998. (Doc. ISBA/C/9).

90. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Mar. 22, 1989, U.N. Doc. UNEP/WG.190/4, *reprinted in* 28 I.L.M. 657 (1989) [hereinafter Basel Convention]. For a discussion of the Basel Convention specific to Latin America *see*, Gonzalo Biggs, *Latin America and the Basel Convention on Hazardous Wastes*, 5 COLO. J. INT'L. ENVT'L L. & POL'Y 333 (1994).

91. *See* Multilateral Treaties Deposited with the Secretary-General, *supra* note 47.

92. Basel Convention, *supra* note 90, preamble.

pend upon the technologically developed states, it would seem that the pertinent states in this particular convention must be the most advanced industrial states of the world. The Basel Convention has been quite successful in attracting members from this category of states. All members of the EU, along with Japan, Peoples' Republic of China, the Russian Federation and several other highly industrialized states are parties to the treaty.[93]

The one notable absentee from the major industrialized parties to the treaty is the United States, which has signed, but not ratified the treaty.[94] (The US Senate consented to the ratification of the Basel Convention in August 1992; however, the Congress has not yet passed the domestic legislation necessary to comply with the treaty obligations.)[95] As noted already, the non-participation of a single pertinent state is not sufficient to conclude that a treaty fails to make instant custom. Once again, however, the absence of the United States raises questions of efficacy. The United States is the largest producer and one of the largest transporters of hazardous waste materials.[96] Of course, the signature of the United States on this document does indicate interim approval of its provisions, and given the often slow legislative process in the United States, ratification may yet be forthcoming. Still, the present status of this treaty with the US missing from the parties raises serious doubts about its general efficacy.

Nevertheless, the absence of the US alone does not disqualify the treaty from establishing instant custom, for the same reasons presented in our discussion of UNCLOS.[97] There is, however, another relevant issue here. With the participation of only about 60% of the world's states in the Basel Convention,[98] there is reason to question whether our first

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93. *See* Multilateral Treaties Deposited with the Secretary-General, *supra* note 47.

94. Presently, the United States is the only member of the Organization for Economic Cooperation and Development (hereinafter OECD) that has failed to become a party to the Basel Convention. *See, e.g.*, <http://www.un.org/Depts/Treaty/fin> (last modified Nov. 10, 1997).

95. Biggs, *supra* note 90, at 357.

96. *See*, ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, TRANSFRONTIER MOVEMENTS OF HAZARDOUS WASTES: 1992-93 STATISTICS 10-11 (1997). According to the OECD Report, "[d]ue to differences in national definitions of hazardous wastes, great caution should be exercised when using these figures." For example, "[t]he difference between the waste generation figures for US and Europe arises largely because the US defines large quantities of dilute wastewaters as hazardous wastes while in Europe, these materials are managed under water protection regulations." *Id.* A further difficulty in comparing the statistics is that the reporting year for the various OECD states varies considerably, with Austria reporting 1995 waste generation statistics and Spain reporting them from 1985. All other states fall somewhere in between. The United States waste generation statistics are for 1993. Even with all of the difficulties of comparison, however, the fact that the United States hazardous waste generation is nearly 80% of the total OECD waste generation surely makes the United States the largest producer of hazardous waste materials.

97. *See supra* notes 81-90 and accompanying text.

98. *See* Multilateral Treaties Deposited with the Secretary-General, *supra* note 47.

condition is satisfied. Unlike the Convention on Biological Diversity,[99] where 90% of the world's states are parties,[100] the 60% participation in the Basel Convention seems too slight to conclude that the treaty creates instant custom. Here too we might note that the absence of a major pertinent state may be considered more significant in cases where general participation involves only a modest majority of states. We cannot say, however, that the 60% participation is an insignificant number, particularly when a considerable percentage of pertinent states participate in the treaty.

This is a close call; if the United States does pass the necessary domestic legislation and become a party to the treaty, the strong stand taken by the pertinent states might then be sufficient to conclude that the Basel Convention formulates instant custom. Similarly, if the percentage of states ratifying the treaty increases, there would again be reason to suspect that the treaty formulates instant custom. At present, however, the issue seems too close to conclude safely that the consensus required to generate customary law is in evidence. Consequently, we will leave this treaty in the doubtful category. In any event, it is a relatively new treaty and seems to be well on its way to meeting our three part test for inclusion into Category II.

The Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES") came into force on July 1, 1975.[101] There are 145 Parties worldwide to CITES.[102] We have not included CITES among those treaties not allowing reservations because while reservations to the general provisions of the Convention are prohibited, allowance is made for reservations pertaining to specific species of wild fauna and flora as listed in the Appendices to the Convention.[103] It is difficult to say if this provision should disqualify this treaty from being formative of customary international law, or whether the reservation provision is sufficiently specific to call for a relaxation of our no reservations test. One could argue for the latter, because it is highly unlikely that the specific species lists in the appendices are sufficiently generalizable to formulate customary international law.[104] On the other hand, states have made rather extensive use of the reservations to the

99. Biological Diversity Convention, *supra* note 44.

100. *See* Multilateral Treaties Deposited with the Secretary-General, *supra* note 47.

101. CITES, *supra* note 22.

102. *See* Multilateral Treaties Deposited with the Secretary-General, *supra* note 47.

103. CITES, *supra* note 22. Article XXIII, paragraph 1 of CITES states, *inter alia*, "[t]he provisions of the present Convention shall not be subject to general reservations. Specific reservations may be entered in accordance with the provisions of this Article and Articles XV and XVI." *Id.* at art. XXIII, para 1. Paragraph 3 goes on to state that "[u]ntil a Party withdraws its reservation entered under the provisions of this Article, it shall be treated as a State not a Party to the present Convention with respect to trade in the particular species or parts or derivatives specified in such reservation." *Id.* at para. 3.

104. According to Article XXIII, paragraph 3, a party having as reservation will be treated as not being a party to the treaty with respect to that particular species until such time as the reservation is withdrawn. *Id.* at art. XXIII, para. 3.

Appendices, and it could be argued that, therefore, the provision is sufficiently broad so as to possibly negate the effects of the entire treaty.[105]

As the name of the Convention indicates, its purpose is to insure that certain species are protected from exploitation as a result of their market value. Regulations throughout the Convention cover both the exporting states and importing states. That the Convention itself intends to develop customary international law on this subject is evidenced by the inclusion of regulations covering non-party states. Article X of CITES, "Trade with States Not Party to the Convention," requires that trade with non-party states ". . . substantially conform with the requirements of the present Convention. . . ."[106] With over 70% of the world's states as parties to CITES,[107] sufficient numbers are present to fulfill our criterion of widespread acceptance.

Analyzing the "pertinent states" condition under CITES is somewhat more difficult. Obviously in the case of trade in endangered species, both importing and exporting states fill the role of pertinent states. Although not all potential importing and exporting states are parties to the treaty there would seem to be sufficient numbers of both developing states and developed states to satisfy our pertinent states condition. Moreover, CITES continues to gain parties, perhaps partly because its provisions are extended even to non-parties and also because of global pressure regarding the trade in endangered species.[108] Between April 1996 and February 1999, an additional fifteen states became parties to CITES.[109] Thus the question regarding the no reservations test would seem to provide the greatest difficulty in determining with certainty if CITES qualifies as a treaty that is formative of customary international law.

V. CONCLUSION

An examination of the 41 global multilateral environmental treaties that are included in our study reveals that only ten of them meet our no-reservations test. Of these ten, we judged that eight definitely

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105. By 1992, reservations had been made by 17 states regarding 17 taxa in Appendix I, by 4 states regarding 23 taxa in Appendix II, and by 11 states regarding 12 taxa in Appendix III. Sand, *supra* note 16, at 80.

106. CITES, *supra*, note 22, at 251.

107. *See* Multilateral Treaties Deposited with the Secretary-General, *supra* note 47.

108. "A major factor influencing the decision of many countries to become parties to CITES is the pressure that stems from adverse publicity about illegal or harmful wildlife trade and about the mortality of animals in the large-scale pet trade." Sand, *supra* note 16, at 81.

109. The sixteen states with their dates of ratification are: Mongolia, April 4, 1996; Saudi Arabia, June 10, 1996; Georgia, Dec. 12, 1996; Turkey, Dec. 22, 1996; Latvia, May 12, 1997; Swaziland, May 27, 1997; Jamaica, June 22, 1997; Yemen, Aug. 3, 1997; Myanmar, Sept. 11, 1997; Cambodia, Oct. 2, 1997; Antigua and Barbuda, Oct. 6, 1997; Uzbekistan, Oct. 8, 1997; Fiji, Dec. 29, 1997; Mauritania, June 11, 1998; Azerbaijan, Feb. 21, 1999.

satisfied our three part test. We determined that the remaining two treaties were in the doubtful category. This means, then, that only eight of the 41 relevant multilateral treaties can be considered to create instant customary international law binding on all states, regardless of their non-participation in them.[110]

It might be argued that the record of compliance with this instant customary international law is not good. Some of the treaties that we have included in our Category II do not have good records of compliance either from the parties or the non-parties. But, this is not the question that has concerned us here. Rather, we have explored the issue of obligations created for states on the basis of the formation of instant custom. Our three part test has taken a rather conservative view of the formation of customary international environmental law through the treaty process as evidenced by the exceedingly small number of treaties that we think qualify as customary law creating instruments. Our test merely points to those customary environmental law principles by which states should consider themselves bound. Whether they comply with these principles is a different question entirely. Attempting to add some certainty to the nature of customary legal obligations in international environmental law, nonetheless, should prove valuable in clarifying the network of binding legal obligations that exist in this issue area.

110. Oscar Schachter took an opposite view in 1991 when he wrote, "[e]nvironmental treaties, though numerous, are limited in scope and in participation. On the whole, they are not accepted as expressions of customary law and are regarded as binding for the parties alone." Schachter, *supra* note 1, at 462. Participation in certain of these treaties, however, has grown considerably since 1991 and, as our discussions above indicate, the scope covered by these environmental treaties has grown as well.