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A Unified Concept of Population Transfer (Revised*)

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Population transfer is an issue arising often in areas of ethnic tension, from Croatia and Bosnia and Herzegovina to the Western Sahara, Tibet, Cyprus, and beyond. There are two forms of human population transfer: removals and settlements. Generally, commentators in international law have yet to discuss the two together as a single category of population transfer. In discussing the prospects for a unified concept of population transfer, this article is the first to compare and contrast international law's application to removals and settlements.

I. INTRODUCTION

International attention is focusing on uprooted people, especially where there are tensions between ethnic populations. The Red Cross has spent a significant proportion of its budget aiding what it called "displaced persons,"[1] removed *en masse* from their abodes. Ethnic cleansing, a term used by the Serbs, was a process of population transfer aimed at removing the non-Serbian population from large areas of Bosnia and Herzegovina.[2] The large-scale Jewish settlements into the Israeli-occupied Arab territories continue to receive publicity. Why not examine these and other mass removals and settlements of people under a single category, called population transfer?

Recent discussions at the United Nations and elsewhere, led by human rights activists, have hinted at such a unified treatment of population transfer in an effort to focus attention on "stateless people" faced

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** Associate, Curtis, Mallet-Prevost, Colt & Mosle, on leave as a Fulbright scholar in France, 1993-94. J.D., 1991, Harvard University. An early draft of this Article was presented at the Unrepresented Nations and Peoples Organization [hereinafter U.N.P.O.] Conference on the Human Rights Dimensions of Population Transfer, Tallinn, Estonia, January 11-13, 1992. The author expresses gratitude for comments on drafts by Henry Steiner and Michael van Walt van Praag. Support also came from Marc Granowitter, Christa Meindersma and the author's father, Edward W. Goebel, Jr. The foregoing do not necessarily share the views expressed herein.

1. UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, COMMISSION ON HUMAN RIGHTS, SUMMARY RECORD OF THE 36TH MEETING (SECOND PART), at 20, U.N. Doc. E/CN.4/1992/SR.36/Add.1 (1992). These operations were in Africa, Latin America, Asia, the Middle East, and Europe, which reflects the broad scope of the problem.

2. STAFF OF SENATE COMM. ON FOREIGN RELATIONS, 102D CONG., 2D SESS., THE ETHNIC CLEANSING OF BOSNIA-HERCEGOVINA 5 (Comm. Print 1992).

with either removal from an area or settlement into one.[3] A conference in 1992 deliberated on situations that occurred in what conference participants called "sovereign states" (e.g. Poland, claiming to have experienced principally large-scale removals in the form of expulsions by Hitler and Stalin), as well as areas "occupied" now or at some point in the recent past (e.g. Western Sahara, the Baltics States, East Timor and Tibet, by massive settlements and removals), "nations without a state" (e.g. Kurdistan, principally by removals), the lands of "indigenous peoples" (e.g. Aboriginals of Australia and Chakmas of the Chittagong Hill Tracts, by settlements and removals), the lands of "ethnic minorities" (e.g. Albanians in Kosova, principally by removals), and others.[4] This approach toward removals would take into account situations ranging from the more traditionally recognized expulsion of a minority from a country to the forced removal of a significant number of indigenous people for a dam project. Settlements would include those occurring on a large scale both across U.N.-recognized borders and internally. In any event, population transfer, however defined, should be confused neither with refugee movements[5] nor with normal migration on an individual basis for economic

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3. Just in the last three years, the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities [hereinafter U.N. Sub-Commission] has begun to adopt resolutions covering both forms of movement under the single category of population transfer. *See* UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, COMMISSION ON HUMAN RIGHTS, REPORT OF THE SUB-COMMISSION ON THE PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES ON ITS FORTY-FOURTH SESSION, 70-72, U.N. Doc. E/CN.4/Sub.2/1992/58 (1992) [hereinafter U.N. Sub-Commission Resolution 1992/28]; UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, COMMISSION ON HUMAN RIGHTS, REPORT OF THE SUB-COMMISSION ON THE PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES ON ITS FORTY-SECOND SESSION, U.N. Doc. E/CN.4/Sub.2/1990/59 (1990) [hereinafter U.N. Sub-Commission Resolution 1990/17]; UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, COMMISSION ON HUMAN RIGHTS, REPORT OF THE SUB-COMMISSION ON THE PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES ON ITS FORTY-THIRD SESSION, U.N. Doc. E/CN.4/Sub.2/1991/65 (1991) [hereinafter U.N. Sub-Commission Resolution 1991/28].

4. UNREPRESENTED NATIONS AND PEOPLES ORGANIZATION, HUMAN RIGHTS DIMENSIONS OF POPULATION TRANSFER: CONFERENCE HELD IN TALLIN, ESTONIA, JANUARY, 1992, at 6 (David Goldberg, rapporteur, 1992) [hereinafter U.N.P.O. CONFERENCE REPORT].

5. Although when refugee movements are large, such a distinction becomes difficult. Refugees, strictly defined, move freely out of their own political motivation. Convention Relating to the Status of Refugees, July 28, 1951, art. 1, 189 U.N.T.S. 150 (entered into force Apr. 22, 1954); Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967); RICHARD PLENDER, INTERNATIONAL MIGRATION LAW 393 (2d ed. 1988). *See also Institute of International Law: Resolutions Adopted at its Bath Session*, art. 1, 45 AM. J. INT'L L. 15 (Supp. 1951). In contrast, settlers and removed people in the context of this Article, rather than being motivated by a personal, individual desire for political asylum, are treated as group phenomena whereby planning and implementation of the movement, as well as the ultimate motivation, belong to governments. It is often difficult to tell whether a refugee moves freely. On a practical level, then, the categories of population transfer and refugee movements may overlap. One difference is that refugee movement, strictly defined, occurs across international frontiers, whereas population transfer can also occur within states. Regarding the Kurdish people, the period before the Gulf War saw movements that were population transfer, the removal of Kurdish people caused in part by the Iraqi government's use of poison gas. *See* MINORITY

reasons.[6] For years now, some in the policy-making community have mingled population transfer's two forms.[7] Despite such discussions, commentators on international law traditionally have not followed suit.[8] Besides a handful of scholars, including those recognized herein, few have published lately on either form of population transfer. A unique aspect of the present Article is that, while examining a broad concept of population transfer, it compares removals and settlements under applicable international law. Indeed, to some extent population transfers must be examined on a case-by-case basis. Rather than do so, however, this Article serves as an overview of issues relating to population transfer.

In the context of this Article, as a basic rule, transfers of both types are meant to have in common the element of moving a large number of people, in relative rather than absolute terms,[9] and state involvement or significant acquiescence in the movement. The specific people involved can be categorized as removed people, settlers, and, where there are settlers, original inhabitants of the area receiving the settlers. From there, analysis becomes more difficult. Forced removals, in specific circumstances, have been adjudged crimes against humanity. Settlements as well as removals, under certain restrictions, have violated doctrines of humanitarian law. Discrepancies exist between the two types of transfer along

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RIGHTS GROUP, THE KURDS: MASSACRE BY GAS (1989); MIDDLE EAST WATCH, HUMAN RIGHTS IN IRAQ (1990); Judith Miller, *Iraq Accused: A Case of Genocide*, N.Y. TIMES, Jan. 3, 1993, § 6 (Magazine), at 12, 16. By contrast, flows of Kurdish population in the post-Gulf War period, more than beforehand, involved refugees. For example, the landmark U.N. Security Council Resolution 688 addressed Kurdish refugees from Iraq. *See* S.C. Res. 688, U.N. SCOR, 46th Sess., 2982nd mtg., U.N. Doc. S/RES/688 (1991).

6. Regarding migration, see generally PLENDER, *supra* note 5. *See also* Myron Weiner, Security, Stability and International Migration (Dec. 5-6, 1991) (unpublished manuscript presented at the Conference on the Impact of International Migration on the Security and Stability of States, Center for International Studies, Massachusetts Institute of Technology) (differentiating between normal migration, on the one hand, and population movement with substantial government involvement on the other).

7. *See, e.g.*, Thayer Scudder & Elizabeth Colson, *From Welfare to Development: A Conceptual Framework for the Analysis of Dislocated People*, *in* INVOLUNTARY MIGRATION AND RESETTLEMENT 267 (Art Hansen & Anthony Oliver-Smith eds., 1982).

8. Some analyses, such as Israel Shahak, *A History of the Concept of "Transfer" in Zionism*, 18 J. PALESTINE STUD. 22 n.3 (1989) and Alfred M. De Zayas, *International Law and Mass Population Transfers*, 16 HARV. INT'L L. J. 207 (1975) [hereinafter De Zayas, *Law and Transfers*], treat population transfer as principally the removal of people, whereas other writings touch on settlements as a phenomenon isolated from removals. *See, e.g.*, Adam Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967*, 84 AM. J. INT'L L. 44 (1990).

9. *Cf.* U.N.P.O. CONFERENCE REPORT, *supra* note 4, at 7 ("Should numbers be part of the definition, or should the definition focus on the rationale and intention involved in the transfer?"). This conference report proposed a unified definition of "population transfer": "the movement of large numbers of people, either into or away from a *certain territory*, with state involvement or acquiescence of government and without the free and informed *consent* of the people being moved or the people into whose territory they are being moved." *Id.* (emphasis added). This definition turns on the element of consent. Also, it raises the issue of territorial definition, treated herein.

such doctrinal lines, and also as to whether the element of consent is a criterion proper to population transfer.[10] The extent to which those and other differences resolve themselves, and to which the two types of transfer thus collapse into a unified and coherent category of treatment, will depend on the future development of international law towards not only the practices of population transfer but also their effects on removed people, settlers, and original inhabitants.

II. PRACTICES OF POPULATION TRANSFER

A. *Population Transfer as a Crime Against Humanity and Possible Extensions*

The mass removal of citizens across internationally recognized borders of a state is called mass deportation or expulsion. Mass deportations, such as those perpetrated by Nazi Germany, may violate the Nuremberg principles and, therefore, constitute war crimes or crimes against humanity in times of international[11] and, it has been argued, civil war.[12]

As a recent example, the expulsion of masses of non-Serbs from eastern Croatia across front lines, by bus and other methods, was accomplished through coercion, including threats, violence and discrimination.[13] Similarly, in Bosnia and Herzegovina, the mass deportation of people to create ethnically pure areas was a strategy important to Serbia.[14] These

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10. The U.N. Sub-Commission was "*[c]oncerned* that the movement of people is often achieved either without free and informed consent of those people being moved or without the consent of those people into whose territory they are being moved." U.N. Sub-Commission Resolution 1990/17, *supra* note 3. *See also* U.N. Sub-Commission Resolution 1991/28, *supra* note 3; U.N. Sub-Commission Resolution 1992/28, *supra* note 3, at 70-71 (preamble).

11. Charter of the International Military Tribunal, Aug. 8, 1945, arts. 6(b)-(c), 59 Stat. 1546, 1547, 82 U.N.T.S. 284, 288; Indictment of the International Military Tribunal, *in* 1 OFFICIAL DOCUMENTS OF THE TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG 27, Count 3, §§ B, J, at 51-52, 63-65 (1947). *See also* Alfred-Maurice De Zayas, *Forced Resettlement*, *in* 8 ENCYCLOPEDIA PUB. INT'L L. 234, 235-36 (Rudolf Bernhardt ed., 1975) [hereinafter De Zayas, *Forced Resettlement*]; U.N. Sub-Commission Resolution 1991/28, *supra* note 3. Mass deportations should be distinguished from deportations on an individual basis. Ruth Lapidoth, *Expulsion of Civilians from Areas under Israeli Control in 1967*, 2 EUR. J. INT'L L. 97, 102-04 (1991) (It is more inconclusive whether customary international law has prohibited the deportation of individuals, as opposed to *en masse*). U.N. General Assembly Resolution 95 (1) of December 11, 1946, gave expression to the general applicability of the Nuremberg principles. 2 LASSA OPPENHEIM, INTERNATIONAL LAW 616-19 (7th ed. 1952). *But see* JULIUS STONE, NO PEACE, NO WAR IN THE MIDDLE EAST 17 (1969).

12. De Zayas, *Law and Transfers*, *supra* note 8, at 221; UNITED NATIONS, SECURITY COUNCIL, REPORT OF THE SECRETARY GENERAL PURSUANT TO PARAGRAPH 2 OF SECURITY COUNCIL RESOLUTION 808, at para. 47, U.N. Doc. S/25704 (1993) [hereinafter SECURITY COUNCIL 808 REPORT].

13. HELSINKI WATCH, WAR CRIMES IN BOSNIA-HERCEGOVINA 75-81 (1992).

14. *See id.* at 71; John F. Burns, *Bosnian Strife Cuts Old Bridges of Trust*, N.Y. TIMES, May 22, 1992, at A8 (noting that although non-Serbs also carried out deportations of Serbs, the process appeared to have been more systematic in the case of Serbs deporting non-Serbs).

expulsions contributed a substantial number of the non-Serbs who exited Bosnia and Herzegovina.[15] Occurring during international war, these expulsions surely could face adjudication for crimes against humanity. Had they occurred earlier, before the international community recognized the independence of Croatia and Bosnia and Herzegovina, the situations would have been deemed uniquely civil wars with the front lines inside national boundaries.[16] Nevertheless, the coercive tactics of "ethnic purification"[17] allegedly used by Serbian militia would not have changed with the varying classification of the war. This case weighs against drawing a strong distinction between international and civil war in determining whether population transfers are crimes against humanity.

As seen through the nature of the above examples, the treatment under international law of removals of people depends on whether the transfers occur during belligerency. Yet even in peacetime, mass expulsions across borders of citizens[18] or of aliens who were in the originating territory lawfully, such as Asians from Uganda,[19] are circumscribed closely by human rights law.[20] This is triggered by the presence of discriminatory or racist characteristics in the expulsions.[21]

Of course, not all governments undertaking removals across international borders lack concern for those being removed. The desire as a sovereign to "save" a threatened minority abroad by "inviting" it into the sovereign territory motivates some of these governments. An example is where an element of exchange is involved, like the 1922-23 swap of Greeks and Turks.[22] In such cases, despite any state benevolency, jurists

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15. HELSINKI WATCH, *supra* note 13, at 199 (categorizing the war as an international armed conflict involving two states, Yugoslavia and Bosnia and Herzegovina).

16. For an analysis of the conflict in former Yugoslavia as a civil war, see generally Charles Lewis Nier III, Note, *The Yugoslavia Civil War: An Analysis of the Applicability of the Laws of War Governing Non-International Armed Conflict in the Modern World*, 10 DICK J. INT'L L. 303 (1992).

17. Burns, *supra* note 14.

18. *See, e.g.*, European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Protocol 4, art. 3, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953).

19. *See* Richard Plender, *The Ugandan Crisis and the Right of Expulsion Under International Law*, 9 INT'L COMM. JURISTS REV. 19, 27-30 (1972).

20. *See* PLENDER, *supra* note 5, at 474 n.174, 477; R.C. Chhangani, Notes and Comments, *Expulsion of Ugandan Asians and International Law*, 12 INDIAN J. INT'L L. 400, 402, 405-07 (1972); De Zayas, *Law and Transfers*, *supra* note 8, at 244-45.

21. According to the U.N. Sub-Commission, "the practice of population transfer [referring to both removals and settlements] is discriminatory in its application and . . . inherently leads to widespread and systematic discrimination." U.N. Sub-Commission Resolution 1991/28, *supra* note 3. *See also* U.N. Sub-Commission Resolution 1992/28, *supra* note 3, at 70-71 (preamble).

22. *See* Alfred M. De Zayas, *A Historical Survey of Twentieth Century Expulsions*, *in* REFUGEES IN THE AGE OF TOTAL WAR 15, 17-20 (Anna C. Bramwell ed., 1988) [hereinafter De Zayas, *Historical Survey*]. During the Nuremberg trials, it was recognized that the motive for transfer could go beyond ill-treatment of those transferred. A government official could escape liability if military necessity motivated him. De Zayas, *Forced Resettlement*, *supra*

focus on more than just the attitude of the state. The perspective of the transferees counts, too. For example, the Institut de Droit International, in its 1952 session, expressed concern for those being removed, especially as to whether their movement was voluntary.[23]

The argument has been advanced that crimes against humanity apply outside of armed conflict even to the removal of people that starts and finishes within the territory of a state. The argument relies on the analogy to apartheid in South Africa.[24] The relocation of millions of blacks to artificially created homelands in the land-locked interior of that country, an effort by zonation programs of a development branch of the government, raised sufficient international condemnation to be considered censured under customary international law. Integral to the government's action of transferring the people were racism and discrimination. Yet, other massive removals within borders, such as occurred in Guatemala,[25] East Timor,[26] Australia,[27] Brazil,[28] Egypt, Argentina and Paraguay,[29] met less international disapproval. At least in the last five instances, which were relatively without belligerency in the sense of armed conflict, some deference may have been given to governments' motivations for economic development.[30] Still, as in South Africa, whether the

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note 11, at 236.

23. 44 ANNUAIRE INSTITUT DE DROIT INTERNATIONAL 138 (1952) (Sienna Session). *See also* PLENDER, *supra* note 5, at 474. Writing about removals, De Zayas comments that "most transfers of population are not likely to be voluntary." Alfred M. De Zayas, *The Legality of Mass Population Transfers: The German Experience 1945-48*, 12 E. EUR. Q. 1, 6 (1978) [hereinafter De Zayas, *German Experience*].

24. De Zayas, *German Experience*, *supra* note 23, at 253; De Zayas, *Forced Resettlement*, *supra* note 11, at 236. *But see* Lapidoth, *supra* note 11, at 104 (Drafters of the Nuremberg Charter may have meant to cover mass deportations undertaken specifically for forced labor and extermination).

25. *See* WEARNE PHILLIP, THE MAYA OF GUATEMALA (Minority Rights Group Report No. 62, 1989); *Counterinsurgency and the Development Pole Strategy in Guatemala*, CULTURAL SURVIVAL Q., vol. 12, No. 3, 1988, at 11; CULTURAL SURVIVAL, THE INDIANS OF GUATEMALA: PROBLEMS AND PROSPECTS FOR SOCIAL AND ECONOMIC RECONSTRUCTION (1987); CRAIG W. NELSON, WITNESS TO GENOCIDE: THE PRESENT SITUATION OF INDIANS IN GUATEMALA (1983); SURVIVAL INTERNATIONAL, GUATEMALAN REFUGEES NOW THREATENED BY RELOCATION (1984).

26. *See* JULIAN BURGER, REPORT FROM THE FRONTIER: THE STATE OF THE WORLD'S INDIGENOUS PEOPLES 142 (1987); FINNGEIR HIORTH, TIMOR PAST AND PRESENT 61 (1985); Steven Erlanger, *East Timor, Reopened by Indonesia, Remains a Sad and Terrifying Place*, N.Y. TIMES, Oct. 21, 1990, at A18.

27. *See* MINORITY RIGHTS GROUP, REPORT NO. 35, ABORIGINAL AUSTRALIANS (1988) (In Queensland, mining policies, which effectively destroyed some of the economic and social basis of Aboriginal traditional lifestyle, involved large scale removals).

28. *See* MINORITY RIGHTS GROUP, REPORT NO. 15, WHAT FUTURE FOR THE AMERINDIANS OF SOUTH AMERICA? (1977). In Brazil, the Sobradinho Dam project resettled about 60,000 urban and rural people. MICHAEL CERNEA, INTERNAL REFUGEES AND DEVELOPMENT-CAUSED POPULATION DISPLACEMENT (Harvard Institute for International Development, Development Discussion Paper No. 345, 1990).

29. *See* CERNEA, *supra* note 28, at 24-25. In Egypt, dam projects have removed and resettled at least 100,000 people; in the border between Argentina and Paraguay, submersion projects have removed some 45,000. *Id.*

30. If there is sufficient public interest for the transfer and proper compensation to-

effects on those being moved rise to the level of systematic racial discrimination is a factor that should be considered in determining whether any large scale population transfer violates customary international law.[31]

At least one international body has treated removal within borders with disapproval. The invasion of Cyprus by Turkish troops in 1974 resulted in the widespread eviction and population transfer of over 170,000 Greek Cypriots from their homes in the northern part of Cyprus. In *Cyprus v. Turkey*, the European Commission on Human Rights discussed population transfer: "The Commission . . . considers that the transportation of Greek Cypriots to other places, in particular the forcible excursions *within* the territory controlled by the Turkish army, and the deportation of Greek Cypriots . . . constitute an interference with their private life."[32] The Commission therefore linked a form of population transfer, the removal of people, to the right to private life. This right is related to the right to security of persons. Because the Commission saw forced transportation as an infringement of the right to private life, the case set a precedent regarding the use of force to transfer populations. The case emphasized the voluntariness of the transfer.

Most importantly, in terms of any division between transfers across borders and those only within, the language in *Cyprus v. Turkey* distinguished between those removals within the boundaries of the territory controlled by the Turkish army and those across borders. The Commission condemned both extents of transfer. This condemnation invites greater scrutiny towards removals occurring under belligerent conditions, such as military occupation, even though only within state borders.

In brief conclusion about removals, belligerency is present in situations highly condemned under international law, though the need for belligerency is reduced by the presence of systematic racial discrimination, as in Uganda or South Africa. Voluntariness is an important issue for removals. In order to invoke crimes against humanity, the blatant lack of voluntariness characterizing the victims of World War II-era transfers is

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wards those being moved, these factors should play into the determination of the transfer's permissibility. Claire Palley, Population Transfer and International Law 3 (Jan. 3, 1992) (draft paper presented at the U.N.P.O. Conference, on file with author of this Article).

31. "A state violates international law if, as a matter of state policy, it practices, encourages or condones (a) genocide . . . (f) systematic racial discrimination, . . . or (g) a consistent pattern of gross violations of internationally recognized human rights." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987) [hereinafter RESTATEMENT ON FOREIGN RELATIONS]; *accord* Barcelona Traction, Light & Power Co., Ltd. (Belgium v. Spain), 1970 I.C.J. 3, 32 (Feb. 5). *See also* International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, art. 5(d)(i), (ii), 660 U.N.T.S. 194, 220, 5 I.L.M. 352, 356 [hereinafter Discrimination Convention] (prohibiting racial discrimination within the borders of a state, occurring in conjunction with limitations on freedom of movement and residence); Palley, *supra* note 30, at 4. For further discussion of freedom of movement, see *infra* notes 90-91 and accompanying text.

32. Cyprus v. Turkey, App. Nos. 6780/74 and 6950/75, 4 Eur. H.R. Rep. 482, 519-20 (1976) (Commission report) (emphasis added).

vital. Furthermore, the issue of voluntariness has some importance regardless of state intention. As shown by *Cyprus v. Turkey*, it also has some consequence whether or not a transfer crosses international borders.

B. *Population Transfer Under Humanitarian Law*

The Baltic States, Cyprus, East Timor, the West Bank, Tibet, the Western Sahara, and Eritrea have been locations of the other form of population transfer: settlements.[33] These movements, unlike some expulsions, have never been formally adjudged crimes against humanity. Because these locales have been sites of military occupations, the settlements of the occupants' people have raised the issue of humanitarian law, a part of international law that emphasizes the protection of the individual not only during and following belligerency, but, according to some scholars, also during peacetime occupations.[34]

Article 49 of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War presents one of the clearest examples of positive international law governing population transfer:

> The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies. . . . Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited regardless of their motive.[35]

Furthermore, the Geneva Convention may outlaw population transfers into occupied lands not only during hostilities, but also afterwards until a final political settlement has been reached in those lands.[36] Protocol I to the Geneva Convention states that the Geneva Convention applies to "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of the right of self determination as enshrined by the Charter of the United Nations"[37] and contains language similar to article 49.

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33. Palley, *supra* note 30, at 5. For situations not documented elsewhere in the present article, see MINORITY RIGHTS GROUP, REPORT NO. 5, ERITREA AND TIGRAY 4-14 (1983). *See generally* U.N.P.O. CONFERENCE REPORT, *supra* note 4, at 26-33.

34. *See infra* note 57 and accompanying text.

35. Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 49, 6 U.S.T. 3516, 3548, 75 U.N.T.S. 287, 318 [hereinafter Geneva Convention]. Regarding the extent to which the Geneva Convention constitutes customary international law, see SECURITY COUNCIL 808 REPORT, *supra* note 12, at para. 37 ("The Geneva Conventions constitute rules of international humanitarian law and provide the core of the customary law applicable in international armed conflict").

36. *See* Geneva Convention, *supra* note 35, at arts. 1, 2, 4, 17, 47, 6 U.S.T. at 3518, 3518, 3520, 3530, 3548, 75 U.N.T.S. at 287, 288, 290, 300, 318.

37. Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 1, para. 4, 1125 U.N.T.S. 3, 7, 16 I.L.M. 1391, 1397 [hereinafter Protocol I]. Regarding the extent to which Protocol I constitutes customary international law, see Palley, *supra* note 30, at 7

These provisions dictate that, but for certain specific exceptions, settlements in an occupied territory contravene international law. While forced or forcible movement is illegal under these codes,[38] an important issue is that of voluntary movement. On the one hand, the voluntary nature of an act should not be interpreted to legalize what would otherwise be considered a violation of an international standard.[39] This is especially true if the movement involves the purposes and effects, on both those transferred and original inhabitants, that the Geneva Convention was crafted to prevent.[40] On the other hand, there are legal difficulties inherent in defining "voluntary." In this regard, it should be pointed out that most settlements, if not forced, are facilitated by government actions. One such tool is incentives, like increased industrialization in the area targeted for transfer as occurred in Soviet-occupied Estonia and Latvia.[41] Even if voluntary settlement on an individual basis is permissible under article 49, the settlement programs of the 1980s and 1990s, especially the ambitious programs like those of the Indonesian[42] and Chinese[43] governments, must be examined on an individual basis to determine whether

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(stating that "many states have not ratified [Protocol I], and it remains doubtful to what extent the Protocol is a reflection of customary law").

38. *Cf.* De Zayas, *Forced Resettlement*, *supra* note 11, at 236. Regarding the other form of transfer, i.e. removals, the "clear prohibition of forced resettlement in time of war has been codified." *Id.*

39. The U.N. Sub-Commission has recognized the link between the right to security of persons and the issue of population transfer. *See* U.N. Sub-Commission Resolution 1990/17, *supra* note 3; U.N. Sub-Commission Resolution 1991/28, *supra* note 3; U.N. Sub-Commission Resolution 1992/28, *supra* note 3, at 71 (preamble). In other contexts involving that right, the consent of an individual does not legitimize violations of an international norm. *See* Richard B. Lillich, *Civil Rights*, *in* 1 HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES 115, 120-124 (Theodore Meron ed., 1984) (explaining the right to security of persons in connection with the right-to-life norm).

40. Roberts, *supra* note 8, at 84.

41. *See* Romauld J. Misiunas, *The Baltic Republics: Stagnation and Strivings for Sovereignty*, *in* THE NATIONALITIES FACTOR IN SOVIET POLITICS AND SOCIETY 214 (Lubomyr Hajda & Mark Bessinger eds., 1990); *cf.* GEOFFREY A. HOSKING, THE FIRST SOCIALIST SOCIETY: A HISTORY FROM WITHIN 399 (1st ed. 1985). *See generally* Alan Cowell, *Pope, in Baltics, Faces Tangle of Ethnic Issues*, N.Y. TIMES, Sept. 11, 1993, at A3.

42. *See generally* MARIEL OTTEN, TRANSMIGRASI: MYTHS AND REALITIES, INDONESIAN RESETTLEMENT POLICY, 1965-1986 (1986).

43. *See* HUMAN RIGHTS ADVOCATES & THE INTERNATIONAL CAMPAIGN FOR TIBET, THE LONG MARCH: CHINESE SETTLERS AND CHINESE POLICIES IN EASTERN TIBET 5-9 (1991) [hereinafter EASTERN TIBET]; ASIA WATCH, MERCILESS REPRESSION: HUMAN RIGHTS ABUSES IN TIBET 15 (1990); Sechin Jagchid, *Discrimination Against Minorities in China*, *in* HUMAN RIGHTS CASE STUDIES 389, 401-02 (Willem A. Veenhoven ed., 1975); 134 CONG. REC. S15,500, S15,501-02 (daily ed. Oct. 11, 1988) (China trip report by Sen. Leahy); Note, *Human Rights in Tibet: An Emerging Foreign Policy Issue*, 5 HARV. HUM. RTS. J. 193 (1992) (China has been attempting since 1983 to dilute the Tibetan identity by transferring numerous Han Chinese into Tibet). While this Note adds that "[w]hether the Chinese are intentionally transferring Han into Tibet is a matter of complex debate," *Human Rights in Tibet: An Emerging Foreign Policy Issue*, *supra* at 196 n.25, see *infra* text accompanying notes 115, 117 and 121 for other important issues besides that of the intent of the transferring government.

the participants meet the criteria of "voluntary" settlers.

In the case of settlements, these difficulties about voluntariness lead to the question of whether consent should be relevant at all to a broad concept of population transfer. Yet, in the instance of removals, voluntariness is of paramount concern. The differing weight put on voluntariness will have to be reconciled for the two categories of transfers to be collapsed satisfactorily into a single category for legal treatment.

Just as national security might motivate governments to remove minorities through expulsion,[44] civilian settlements across the internationally recognized borders of a state are sometimes claimed necessary for the security of the transferring power and, therefore, essential to preserve public order and safety.[45] For example, the Indonesian government in controlling regions at the borders of lands that it dominated was said to have an explicit strategic objective that depended on settlements.[46]

In the Israeli Supreme Court's most important decision on population transfer, *Beth-El*,[47] Justice Witkon sustained a prior opinion that the fact that requisitioned lands were intended for Jewish *civilian* settlements did not deprive such requisitioning of its security character.[48] In addition, although no terrorist activity actually took place, Justice Witkon refused to distinguish *Beth-El* from a case in which terrorism had occurred.[49] The position of the Israeli court reflected the above-mentioned rationale behind Indonesian settlements. Both allowed the movement of civilians to gain control of other civilians. Even if population transfer is intended for national security purposes, settlements can cause such conflicts among settlers and original inhabitants that settlements may only exacerbate security problems.[50] Such cases suggest the illegiti-

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44. *See* De Zayas, *Forced Resettlement*, *supra* note 11, at 236.

45. Roberts, *supra* note 8, at 84.

46. Carmel Budiardjo, *The Politics of Transmigration*, THE ECOLOGIST, vol. 16, No. 2/3, 1986, at 111 (as related in 1985 by the Indonesian minister for population transfer).

47. H.C. 606/78, Ayub v. Minister of Defense, 33(2) PISKEI DIN 113, *translated and summarized in* 9 ISR. Y.B. HUM. RTS. 337 (1979) [hereinafter *Beth-El*].

48. *Id.* at 340.

49. *Id.* at 339. *See* GERHARD VON GLAHN, THE OCCUPATION OF ENEMY TERRITORY: A COMMENTARY ON THE LAW AND PRACTICE OF BELLIGERENT OCCUPATION 186 (1957); *cf.* H.C. 302/72, Sheikh Suleiman Abu Hilu v. Israel, 27(2) PISKEI DIN 169, *translated and summarized in* 5 ISR. Y.B. HUM. RTS. 384 (1975) (court unanimously upholding arguments that steps taken were necessary due to the terrorist activities and acts of sabotage which in fact took place in the area).

50. *See generally* Marcus Colchester, The Social Dimensions of Government Sponsored Migration and Involuntary Resettlement: Policies and Practice (Jan. 1986) (unpublished manuscript prepared for the Independent Commission on International Humanitarian Issues in Geneva, available through author of this Article). In the context of the occupied Arab territories, Roberts, Falk, and Weston lend support for two points: first, settlements are almost never necessary for genuine military or security purposes and do not, in fact, serve any such purposes; second, even if justified for military needs, transfers still violate rules of international law. *See* Roberts, *supra* note 8, at 84; Richard A. Falk & Burns H. Weston, *The Relevance of International Law to Palestinian Rights in the West Bank and Gaza: In Legal Defense of the Intifada*, 32 HARV. INT'L. L. J. 129, 147-48 (1991); *cf.* U.N.

macy of the national security rationale.

The issue of control over civilians exercised through population transfer causes some concern from the viewpoint of original inhabitants. True, voluntariness or consent, from the perspective of settlers, is a confusing, inconclusive subject. However, regarding original inhabitants, the subject gains significance, as will be explained below.[51]

National security arguments, such as the above, may lead to attempts to suspend respect for human rights. The International Covenant on Civil and Political Rights,[52] article 4(1), permits states in urgent circumstances to suspend or breach the right to security of the person, a right which population transfer may affect. Such derogation, however, has little relevance, if any, where a government undertakes settlements in order to change the demographic structure or the political, cultural, religious, or other characteristics of the original inhabitants in the receiving area.[53] The permanent nature of such changes means that the population transfer should never be justified on the temporary grounds necessary for derogation.

This is especially true where transfer occurs during prolonged military occupations. Prolonged military occupations have received some attention as a distinct category, having the characteristic of "belligerency ending."[54] The main conventions relating to military occupations, including the Geneva Convention and the 1907 Hague Regulations,[55] provide no meaningful variation in their rules because of the length of an occupation.[56] Indeed, in addition to covering belligerent occupations, these conventions may also address occupations in which the belligerency has subsided.[57] The rights of the occupant during peacetime diminish markedly

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Sub-Commission Resolution 1992/28, *supra* note 3, at 70-71 (preamble).

51. *See infra* text accompanying notes 109-116.

52. G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966) [hereinafter Political Covenant].

53. The U.N. Sub-Commission was "[d]isturbed by reports concerning the implantation of settlers and settlements in certain countries, including particular occupied territories, with the aim to changing the demographic structure and the political, cultural, religious, and other characteristics of the countries concerned." U.N. Sub-Commission Resolution 1990/17, *supra* note 3. *See also* U.N. Sub-Commission Resolution 1991/28, *supra* note 3; U.N. Sub-Commission Resolution 1992/28, *supra* note 3, at 71 (preamble). Derogation, generally, is "extremely troublesome from the human rights viewpoint." Lillich, *supra* note 39, at 120.

54. *See* Roberts, *supra* note 8, at 51-53; *cf.* Falk & Weston, *supra* note 50, at 142.

55. Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. 3, 36 Stat. 2277, 2290, 205 CONSOL. T.S. 277, 295-97 [hereinafter Hague Regulations].

56. The exception is the "one year after" provision of the Geneva Convention. Geneva Convention, *supra* note 35, at art. 6, para. 3, 6 U.S.T. at 3522, 75 U.N.T.S. at 292. However, this provision is of little importance. *See* Roberts, *supra* note 8, at 55-56; COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949 22 (Jean S. Pictet ed., 1958); MICHAEL BOTHE ET AL., NEW RULES FOR VICTIMS OF ARMED CONFLICTS 57, 59 (1982).

57. *See* Roberts, *supra* note 8, at 52; Adam Roberts, *What is Military Occupation?*, 1984 BRIT. Y.B. INT'L L. 249, 253. *But see* THEODOR MERON, HUMAN RIGHTS IN INTERNAL STRIFE: THEIR INTERNATIONAL PROTECTION 43 (1987) ("[T]here are, in fact, so many situa-

relative to its rights during belligerency.[58] Where population transfer extends from belligerent to prolonged occupation and then into peacetime, the occupant may assert progressively fewer rights. This, again, brings into doubt the temporariness justification for population transfer mentioned above.

Yet Justice Landau, concurring in *Beth-El*, supported the Israeli settlements against this obvious doubt by saying that the hope that a political solution someday will be reached justifies population transfer.[59] Regarding any particular occupation, Israeli or otherwise, even if one is satisfied that the Hague Regulations, and not the Geneva Convention, are in effect,[60] article 43 of the Hague Regulations limits the freedom of the occupant to undertake population transfer. This is especially true in extended or peacetime occupation.[61] Although many of the above-cited sources concern the occupied Arab territories, it bears mentioning that the Chinese and Indonesian governments see Tibet and East Timor, respectively, as important military zones.[62] Even if these are legitimate governmental interests related to national security during peacetime, the governments do not automatically gain free discretion to undertake population transfer into those areas.

If conventional law, including the relatively lenient Hague Regulations, applies to a given case of population transfer, governmental discretion to undertake transfer must include reference to the humanitarian concerns of all individuals affected by the population transfer.[63] The needs of both settlers and original inhabitants become particularly relevant as an occupation moves through its stages, from belligerent to prolonged and into peacetime.

If prolonged and peacetime, in addition to belligerent, occupations

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tions in which the applicability of the Geneva Conventions . . . has been denied that the common practice has been rejection of the law, rather than its formal recognition and implementation").

58. C. Lleewellyn Jones, *Military Occupation of Alien Territory in Time of Peace*, 9 GROTIUS SOC'Y TRANSACTIONS 149, 159-60 (1923). *See also* Roberts, *supra* note 57, at 273-79. Where military necessity exists, an occupying government has "considerable discretion." Falk & Weston, *supra* note 50, at 138. However, military necessity generally ends when belligerency stops.

59. *Beth-El*, *supra* note 47, at 392.

60. *See* Yoram Dinstein, *The Judgment in the Matter of Pitchat Rafiah*, 3 TEL AVIV UNIV. L. REV. 934 (Hebrew, 1973).

61. *See* Falk & Weston, *supra* note 50, at 142 (A duty is imposed upon the occupant vis-a-vis the original inhabitants); *cf.* H.C. 337/71, Christian Society for the Holy Places v. Minister of Defense, 26(1) PISKEI DIN 574, *translated and summarized in* 2 ISR. Y. B. HUM. RTS. 354, 355 (1972).

62. Regarding East Timor, see BURGER, *supra* note 26, at 142-43; Budiardjo, *supra* note 46, at 111. *See generally* FRANK CHALK & KURT JONASSOHN, THE HISTORY AND SOCIOLOGY OF GENOCIDE: ANALYSES AND CASE STUDIES 378-83 (1990). Concerning Tibet, see EASTERN TIBET, *supra* note 43, at 2-4; *What McMahon Wrought*, THE ECONOMIST, May 23, 1987, at 59.

63. Yoram Dinstein, *The International Law of Belligerent Occupation and Human Rights*, 8 ISR. Y.B. HUM. RTS. 104, 111-12 (1978); Falk & Weston, *supra* note 50, at 142.

are reasons for continuing prohibition of settlements, that signifies that the positive law prohibiting settlements is moving away from any necessity for belligerency. This may be compared to cases of removals. As mentioned above, a presence of racism or discrimination pushes the prohibition of removals away from a dependence on belligerency.

C. *Population Transfer Under Principles Regarding Colonialism*

The practice of population transfer is also part and parcel of colonialism. One case of population transfer into territory that was "colonized," according to the formal U.N. regime, occurred in the Western Sahara.[64] The Moroccan takeover of this area was marked by the settlement of over 200,000 Moroccans into it, as well as the removal by "brutal tactics" of some groups of original inhabitants of the area.[65] The Western Sahara situation went before the International Court of Justice.[66] The connection between population transfer and colonialism was patently clear. Condemnations of colonialism came from the ICJ[67] and, subsequently, the U.N. General Assembly[68] and noted experts.[69] In situations of traditional colonialism earlier than the Western Sahara, a nexus had been established between the use of force and its impact on a people's identity.[70]

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64. *See generally* VIRGINIA THOMPSON & RICHARD ADLOFF, THE WESTERN SAHARANS: BACKGROUND TO CONFLICT (1980); DAVID LYNN PRICE, THE WESTERN SAHARA (The Washington Papers, vol. 7, No. 63, 1979).

65. CLAUDE BONTEMS, LA GUERRE DU SAHARA OCCIDENTAL [THE WAR OF THE WESTERN SAHARA] 72 (1984). *See also* JOHN DAMIS, CONFLICT IN NORTHWEST AFRICA: THE WESTERN SAHARA DISPUTE 61-69 (1983). Although the brutality of Moroccan forces is well known and documented, it should be noted that not all of the population movement was forced by the Moroccans. Some of it was encouraged by the Polisario Front, a pro-independence movement, in face of the invasion. *Id.* at 72.

66. Western Sahara, 1975 I.C.J. 12 (Oct. 16). *See* THOMPSON & ADLOFF, *supra* note 64, at 167.

67. The ICJ declined to declare the Western Sahara "terra nullius" but also failed to declare the territory Moroccan or Mauritaurian. Western Sahara, 1975 I.C.J. at para. 162. While the Western Sahara case does not discuss population transfer directly, the opinion is important nonetheless for the connection it makes between self-determination and colonialism. *Id.*; Myron H. Nordquist & Nells P. Nordquist, *Self-Determination: The Cases of Fiji, New Caledonia, and the Western Sahara, in* 82 PROC. AM. SOC'Y INT'L L. 429, 439-42 (Michael P. Malloy ed., 1988). From this connection it is arguable that population transfer affects the right to self-determination. See Nordquist & Nordquist, *supra* at 443 (discussing this possible effect). *But see* DAMIS, *supra* note 65, at 60 (positing that the ICJ's decision was essentially political).

68. *See* DAMIS, *supra* note 65, at 94.

69. *See, e.g.*, UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, COMMISSION ON HUMAN RIGHTS, SUB-COMMISSION ON THE PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES, THE RIGHT TO SELF-DETERMINATION; IMPLEMENTATION OF UNITED NATIONS RESOLUTIONS, para. 69 U.N. Doc. E/CN.4/Sub.2/405/Rev. 1, (1980) [hereinafter SELF-DETERMINATION].

70. The U.N. General Assembly, in the context of colonialism, noted that "the use of force to deprive peoples of their national identity constitutes a violation of their inalienable rights and of the principles of non-intervention." G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (1970) [hereinafter Declaration on Friendly Rela-

The Western Sahara and its aftermath furthered this link.

D. *Some Limits on the Prohibition of Population Transfer Practices*

The Western Sahara may be contrasted with situations of indigenous groups, such as the Chakmas of the Chittagong Hill Tracts or the people of various sparsely inhabited Amazonian provinces of Bolivia, Peru, Ecuador, Colombia, Venezuela, and Brazil. These also faced what most considered to be settlements by ethnically distinct, dominating groups encouraged or even forced by U.N.-recognized governments.[71] The abovementioned nexus between force and its effect on a people's identity may have existed even in these instances of transfer.[72] In contrast to the Western Sahara and other examples of traditional colonialism, however, these settlements occurred within the governments' U.N.-recognized borders. At issue, then, was the possible constraint of article 2(7) of the U.N. Charter, which states that "[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State."[73] As with removals solely within domestic frontiers,[74] in the case of settlements the concurrent presence of systematic discrimination, genocide,[75] or gross and persistent violations of human rights[76] countenances article 2(7). So does the moral pressure of publicists like Theodoropoulos who recognize colonialism outside the traditional U.N. definition. Theodoropoulos asserts that South Africa was the chief paradigm of "settler colonialism."[77]

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tions]. The prohibition on the use of force is also now a rule of customary international law. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 1, 14, 98-101 (June 27).

71. *See* Hurst Hannum, *New Developments in Indigenous Rights*, 28 VA. J. INT'L L. 649, 668 n.71 (1988) (Approximately 300,000 Bengalis were settled in the Chittagong Hill Tracts from 1978 to 1988); UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, COMMISSION ON HUMAN RIGHTS, SUB-COMMISSION ON THE PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES, DISCRIMINATION AGAINST INDIGENOUS PEOPLES; WRITTEN STATEMENT SUBMITTED BY THE NORDIC SAAMI COUNCIL, INUIT CIRCUMPOLAR COUNCIL, INTERNATIONAL WORK GROUP FOR INDIGENOUS AFFAIRS AND ANTI-SLAVERY INTERNATIONAL, NON-GOVERNMENTAL ORGANIZATIONS IN CONSULTATIVE STATUS, U.N. Doc. E/CN.4/Sub.2/1991/NGO/3 (1991); Colchester, *supra* note 50, at 12 (regarding the other regions, besides the Chittagong Hill Tracts, that the text accompanying the present note mentions).

72. *See* Hannum, *supra* note 71, at 668; U.N. Sub-Commission Resolution 1992/28, *supra* note 3, at 71 (preamble).

73. U.N. CHARTER art. 2, para. 7. The U.N. Sub-Commission has not limited its concern to settlements occurring across international frontiers. *See* U.N. Sub-Commission Resolution 1990/17, *supra* note 3; U.N. Sub-Commission Resolution 1991/28, *supra* note 3; U.N. Sub-Commission Resolution 1992/28, *supra* note 3, at 70-71 (preamble).

74. *See, e.g.*, *supra* text accompanying note 24 (example of South Africa).

75. *See* discussion *infra* part III.B.2.

76. *See* RESTATEMENT ON FOREIGN RELATIONS, *supra* note 31, § 702.

77. CHRISTOS THEODOROPOULOS, COLONIALISM AND GENERAL INTERNATIONAL LAW: THE CONTEMPORARY THEORY OF NATIONAL SOVEREIGNTY AND SELF-DETERMINATION 51-52 (1988). Theodoropoulos writes of "settler colonialism," calling it "colonialism" where restrictions are "imposed on a colonial people by a colonial power existing geographically not apart from its colony but instead within the colonial territory." *Id. Cf.* ALAN JAMES, SOVEREIGN STATEHOOD: THE BASIS OF INTERNATIONAL SOCIETY 182 (1986) (Whether a state enjoys exclusive

The South African government undertook removals, through zonation, to clear the way to accomplish the other form of population transfer, settlements.[78] Both types of transfer started as well as finished within the boundaries of that state.

However, for settlements as well as removals occurring within such territorial limits, prohibition would be more meaningful if it came from positive law in a rule explicitly about population transfers. Then, such a ban would be less sensitive to issues defining territory. The following analysis, though limited in scope, concludes that prohibitions on removals within international frontiers are closer to benefitting from positive law such as the Geneva Convention, and from doctrines such as those on crimes against humanity, than are prohibitions on similarly located settlements.

The most significant positive law directly prohibiting settlements comes from the Geneva Convention. Therein, the condition of a given territory is crucial. Whether an occupation is belligerent or peaceful, the Geneva Convention requires that the territory be under some form of occupation.[79] It is true that Protocol I, also addressing transfers, generally applies beyond cases of military occupation,[80] but the language in Protocol I prohibiting transfers still refers strictly to transfers into or out of areas under occupation. These two instruments also refer to removals that, therefore, are somewhat constrained by the need for occupation.[81] Yet, removals, unlike settlements, have become the subject of crimes against humanity. Related commentary shows that, in general, prohibitions on removals may be less constrained by the very idea of territorial definition. For example, there is the view espoused by some scholars, such as Palley, that it was just as "unlawful" for the Allies and other countries after World War II to deport Germans *en masse* as it was for Germany to transfer populations during that war.[82] One example is the deportation of Germans from Sudetenland. The governments that transferred the Germans did not technically "occupy" this area. Furthermore, there is the

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power over a territory, such as through annexation thereof, is no longer a precise criterion for determining what constitutes a colonial territory). Admittedly, international bodies today do not emphasize decolonization. For example, the U.N. did not oppose apartheid in South Africa under the pretext of decolonization. Therefore, any law that develops on settlements within domestic frontiers will likely develop apart from doctrines on traditional colonialism.

78. Colchester, *supra* note 50, at 20.

79. Massive and permanent settlements across borders of states, excluding mass repatriation of refugees, are policies implemented uniquely into areas experiencing prolonged occupations. Settlements, as defined in this Article, almost never occur anymore from one sovereign state to another. *See* John Hucker, *Migration and Resettlement Under International Law*, *in* THE INTERNATIONAL LAW AND POLICY OF HUMAN WELFARE 338-39 (Ronald St. John Macdonald et al. eds., 1978). In this respect, settlements differ from removals.

80. *See supra* text accompanying note 37.

81. *See* Lapidoth, *supra* note 11, at 98-99.

82. Palley, *supra* note 30, at 17. *See generally* De Zayas, *Historical Survey*, *supra* note 22.

argument, buttressed by analogy to events occurring in former Yugoslavia, that crimes against humanity also apply to removals that, while occurring during civil war, take place in unoccupied land.[83]

More authoritative in dealing with the last-mentioned removals than the opinion of scholars is Protocol II to the Geneva Convention, which applies to armed conflicts without an international character.[84] Protocol II restricts population transfer, through article 17, in the form of removals but does not refer to settlements.[85] This exclusive reference to removals further supports the above comparison. International deliberations reinforce this comparison. *Cyprus v. Turkey* condemned removals that, while occurring in an area technically under occupation, started and ended there.[86] By contrast, settlements starting and ending within a territory under occupation have not fallen subject to comparable concerted deliberations. Thus, there may be some imbalance in existing international legal treatment of the two types of transfers when they occur within international frontiers. However, future developments in international law towards dealing with the effects of population transfer may overcome any such imbalance.

III. EFFECTS OF POPULATION TRANSFER

An adequate recognition of the effects of population transfer, along with an accounting of the actual movement of people, is important, even though these effects may be less detectable than the movement itself.[87] If the effects of any population transfer escalate to the level of gross and consistent violations of international human rights, that may give rise to a violation of customary international law, although the law violated may not necessarily refer directly to population transfer.

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83. De Zayas, *Law and Transfers*, *supra* note 8, at 221. *See also supra* notes 13-17 and accompanying text.

84. Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 609 (entered into force Dec. 7, 1978) [hereinafter Protocol II]. Protocol II supplements the Geneva Convention, article 3, which applies "in the case of armed conflict not of an international character," by extending article 3 to certain conflicts where signatories are capable of carrying out "sustained and concerted military operations." *Id.* at art. 1. Regarding the extent to which Protocol II constitutes customary international law, see Palley, *supra* note 30, at 7 (stating that "many states have not ratified [Protocol II] and Protocol II is not yet customary law").

85. "The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand." Protocol II, *supra* note 84, at art. 17.

86. *See supra* note 32 and accompanying text.

87. The notion that "[p]eople and socio-cultural systems respond to forced relocation in predictable ways," Scudder & Colson, *supra* note 7, at 267, suggests some hope for the establishment of international norms recognizing any costly and disruptive results from population transfer.

A. *Effects on Those Being Moved: Freedom of Movement and Other Rights*

The most significant limitations on a state's right to control the movement of people are based not on principles of economic interdependence but rather on rules designed to protect human rights.[88] The Universal Declaration of Human Rights,[89] article 13, provides that

> (1) Everyone has the right to freedom of movement and residence within the borders of each State.
> (2) Everyone has the right to leave any country, including his own, and to return to his country.

The right to freedom of movement, an essential part of the right to personal liberty,[90] is most likely part of customary international law.[91] An example of that status is the inclusion of freedom of movement in the Discrimination Convention.[92] Yet, despite any special status for freedom of movement, international law has yet to prescribe a satisfactory framework for the movement involved in population transfer.

Just as the issue of the voluntary nature of movement is more complicated in cases of settlements than removals, so also is the matter of freedom of movement. The Universal Declaration, article 13, refers to movement both within and across a state's internationally recognized borders.[93] Settlers moving across borders unquestionably have the right to leave their country. This raises a threshold question: are settlers *freely* leaving their country? A government may participate in population transfer to various degrees. It may sponsor settlers, for example financially, or

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88. PLENDER, *supra* note 5, at 62.

89. G.A. Res. 217, U.N. Doc. A/810, at 71 (1948) [hereinafter Universal Declaration].

90. Lillich, *supra* note 39, at 189. *Cf.* U.N. Sub-Commission Resolution 1990/17, *supra* note 3; U.N. Sub-Commission Resolution 1991/28, *supra* note 3; U.N. Sub-Commission Resolution 1992/28, *supra* note 3, at 71 (preamble) (all documents referring, in conjunction with population transfer, to freedom of movement and security of persons).

91. UNITED NATIONS, SECRETARIAT, EUROPEAN WORKSHOP ON THE UNIVERSAL DECLARATION; PAST, PRESENT AND FUTURE, U.N. Doc. HR/PUB/89/1, at 101 (1989); Daniel Turack, *A Brief Review of the Provisions in Recent Agreements Concerning Freedom of Movement Issues in the Modern World*, 11 CASE W. RES. J. INT'L L. 95, 95-96 (1979). *Cf.* Lillich, *supra* note 39, at 151 (Rights to transnational movement "seem well-established in conventional and perhaps even customary international human rights law"). But see *id.* for the position that the right to internal movement, distinct from movement across internationally-recognized borders, is not part of customary international law. Lillich's reasoning, however, is based on the weak evidence that internal exile, such as that practiced by the former Soviet Union, was not universally condemned.

92. *See* Turack, *supra* note 91, at 96.

93. The latter movement refers to the right to leave and to return to a country. The Universal Declaration grants both citizens and aliens the right to leave any country but limits the right to return to citizens of that country. *See* Universal Declaration, *supra* note 89, at art. 13(2). Article 12(1) and article 12(2) of the Political Covenant also allow both citizens and aliens the right to leave any country but subject this right to article 12(3) thereof. *See* Political Covenant, *supra* note 52, at art. 12; *see also infra* note 98 and accompanying text.

encourage their movement, possibly without any monetary support. In either case, the degree to which settlers are informed about all aspects of their transfer, including their destination, affects whether they are consenting to their transfer in an informed manner. If uninformed, they are not voluntarily, or freely, leaving the country.[94] The Discrimination Convention prohibits the use of racially discriminatory measures restricting an individual's right to leave or return to his or her country. After a population transfer has taken place, settlers who move across borders have the right to return to their home land should they so choose.[95]

Population transfer within a state's recognized borders can violate the right to free internal movement. Under the Universal Declaration, the right to free internal movement is linked inextricably to the right to choose one's residence.[96] Depending on the specifics involved, a government may violate both rights by removing people from their residences due to, or as part of, transfer across as well as within a country's borders.[97]

Although containing language similar to that of the Universal Declaration, the Political Covenant is qualified by article 12(3), which permits restrictions on the right to internal movement if such restrictions "are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others. . . ." Article 12(3) may come into play where governments undertaking economic development cause massive forced removals.[98] Limits on

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94. That poses further problems for the transferring government as well as settlers when the latter, facing rough conditions, choose to return to the country of origin. A government might not have an adequate infrastructure to aid them as equally in their return as in their original movement. For example, settlers from the central islands of Indonesia reportedly were not adequately informed of conditions in the outer, Indonesian-dominated islands. *See generally* Ria Gondowarsito, *Transmigrasi Bedol Desa: Inter-Island Village Resettlement from Wonogiri to Bengkulu*, 26 BULL. INDONESIAN ECON. STUD. 48 (1990); WORLD BANK REP. NO. 5597-IND, *reprinted in* INDONESIA REP. — HUM. RTS. SUPP. NO. 10 (1985).

95. If the motivation of the sponsoring or encouraging government is to create permanent change in an occupied area, this casts doubt on the existence of a meaningful right to return. *See, e.g.*, Camille Mansour, *L'Émigration des Juifs Sovietiques et le Processus de Paix Israélo-Palestinien* [*The Immigration of Soviet Jews and the Israeli-Palestinian Peace Process*], LA POLITIQUE ETRANGÉRE, Summer 1990, at 327, 329 (discussing the effects of administrative barriers).

96. The same article 13 of the Universal Declaration mentions both rights. Universal Declaration, *supra* note 89, at art. 13.

97. Given the absolute character of the right to free movement, people should enjoy that same right whether or not they are classified as citizens of the state whose government is undertaking population transfer. A possible objection is that the Discrimination Convention fails to prohibit general discrimination against aliens by states based on nationality, citizenship, and exclusions as between citizens and noncitizens. *See* Discrimination Convention, *supra* note 31, at arts. 1-3.

98. *Cf.* De Zayas, *Forced Resettlement*, *supra* note 11, at 236. Without mentioning whether states may properly derogate from the relevant provision of the Political Covenant, De Zayas writes that forced resettlement is "incompatible" with the freedom of movement provisions in both the Universal Declaration and the Political Covenant. *Id.*

governmental abuse include article 12(3) provisions that restrictions on freedom of movement be "necessary" and "consistent with other rights recognized in the present Covenant." Regarding removals within international borders, then, one can make a distinction between transfers such as those in Egypt, Paraguay, and Argentina, which may have had some development rationale, and transfers such as those in East Timor and Guatemala, which seem to have featured relatively less.

Other removals within international frontiers are unquestionably void of a legitimate economic foundation. For instance, population transfer also can occur during international and civil wars in which masses of dislocated people suffer due to armed conflict. At the time of writing, in Bosnia and Herzegovina, arrangements involving Serbs and Croats were reported that were to carve Bosnia and Herzegovina into "communal protectorates."[99] The comparison to zonation in South Africa[100] was vivid. These arrangements threatened thousands of Bosnian Muslims, whose coalition had tried to preserve a multi-religious community, with removal *within*, as well as across, the Bosnian borders.[101] The extent to which those who caused population transfers within those frontiers violated international law depended in part on a balancing of the right to internal free movement, backed by Protocol II prohibiting dislocation related to conflict,[102] with the Political Covenant's derogations and restrictions on the right to free movement.

Where the occurrence of settlements results in the practice of removals, conflicts may arise between different aspects of the right to freedom of movement. Although part of customary international law, the rights to leave and to return to a country are "difficult if not impossible to implement."[103] For example, in the present context, these rights might conflict with the right to internal movement. Unless consistent with the Political Covenant, article 12(3), settlers entering foreign lands cannot force original inhabitants to be removed against their will; as a logical extension, settlers cannot force original inhabitants into exile.[104] Should original inhabitants go into exile, they must enjoy the right to return. Furthermore, original inhabitants have both the right to choose their residence and the right to security of persons.[105]

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99. *Lean on Croatia, Too*, INT'L HERALD TRIB., May 14, 1992, at 8.

100. *See supra* text accompanying notes 24, 77 & 78.

101. *See* HELSINKI WATCH, *supra* note 13, at 13; Burns, *supra* note 14. For treatment of removals occurring in Bosnia and Herzegovina and resulting in the movement of people across international frontiers, see *supra* text accompanying notes 11-17.

102. *See supra* notes 84-85 and accompanying text.

103. Lillich, *supra* note 39, at 151.

104. The Universal Declaration, article 9, states that "[n]o one shall be subjected to arbitrary arrest, detention or exile." Universal Declaration, *supra* note 89, at art. 9.

105. The right to security of persons is given more concrete meaning by the guarantees against arbitrary arrest and detention and against interference with one's privacy, family, home, or correspondence spelled out in the Universal Declaration, articles 9 and 12, respectively. *See* Universal Declaration, *supra* note 89, at arts. 9, 12.

The problem that settlements across international borders may pose with the right to free internal movement takes on an added complication in cases of prolonged military occupation. Humanitarian law might conflict with human rights law. The Universal Declaration guarantees original inhabitants the right to freedom of movement and residence within the borders of each state, but article 78, paragraph 1 of the Geneva Convention provides that "[i]f the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or internment."[106] A case-by-case analysis of population transfer during prolonged occupation, where an occupant transfers its own people into the occupied territory and these people in turn obstruct the movement of original inhabitants, may turn on an assessment of "imperative reasons of security" upon which the occupant relies.

Where such arguments fail, there is a clear connection between settlements and the violation of human rights, stemming from the right to free internal movement. Nevertheless, the violation does not occur to settlers' rights, but rather to the rights of original inhabitants. The infringement is a by-product, though an important one, of population transfer; whereas in cases of isolated, massive removals any infringement on human rights may be more part and parcel of the actual population transfer because those whose rights are violated more likely are the actual transferees. At least where gross and persistent, violations of this type support the permeability of internationally recognized frontiers for U.N. or other attention.

This last comparison supports the above-mentioned conclusion that, as a general rule, removals, more easily than settlements, may overcome any limitations of territorial definition.[107] Further developments in human rights are important if a unified concept of population transfer, encompassing both types of movement, is to develop in such a direction that moves further away from the requirement of belligerency that originated from crimes against humanity and humanitarian law.

B. *Effects on Original Inhabitants*

1. Effects of Population Transfer on Self-Determination

The voluntariness, or consent, of original inhabitants facing population transfer is important to more than just their freedom of movement. For example, where a government in undertaking population transfer through settlements is motivated by a desire to have control over original inhabitants of settled areas, the perspective of these last people becomes relevant in another respect: did the original inhabitants agree to receive settlers?

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106. Geneva Convention, *supra* note 35, at art. 78, para. 1.
107. *See supra* text accompanying notes 79-86.

Consider original inhabitants to whom self-determination applies[108] and who also face population transfer. One historical example occurred after World War II. The original inhabitants of Germany received Germans removed from Poland and Czechoslovakia by these countries' governments. De Zayas is of the opinion that these population transfers violated international law because the legitimate sovereign, the receiving state of Germany, had not *consented* to receive them.[109]

By virtue of self-determination's applicability, the original inhabitants on the receiving end of such removals must have unique identifiable characteristics, including race or ethnicity, language, religion, culture, tradition and history, that set them apart from their neighbors. However, original inhabitants may not enjoy Germany's status as a well-established sovereign. Instead, the unit of self-determination of original inhabitants may be as an ethnic minority, indigenous people, nation without a state, or people in a territory under occupation. In any such event, it is more likely that population transfer will endanger the above special characteristics than in the instance of a sovereign state.[110]

Any group to which self-determination applies should have the opportunity to "freely determine their political status and freely pursue their economic, social and cultural development. . . ."[111] When their land

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108. The right, or even the principle, of self-determination in contemporary international law is still to a large extent unclear in its precise scope and content. *See generally* Daniel Thurer, *Self-determination, in* 8 ENCYCLOPEDIA PUB. INT'L L. 470 (Rudolf Bernhardt ed., 1975); SELF-DETERMINATION, *supra* note 69, at para. 7 (Self-determination pertains "to all peoples and nations, and [is] . . . a prerequisite of the enjoyment of all the rights and freedoms of the individual"); HURST HANNUM, AUTONOMY, SOVEREIGNTY AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS 41 (1990) (Most countries either have not specifically addressed the right to self-determination or have done so in such general terms that nothing is added to an understanding of its content). The author of this Article does not intend to express an opinion on such scope and content but, rather, for purpose of discussion only, assumes that self-determination applies to original inhabitants in question.

109. De Zayas, *Historical Survey*, *supra* note 22, at 18.

110. *See* U.N. Sub-Commission Resolution 1992/28, *supra* note 3, at 70-71 (preamble); Colchester, *supra* note 50, at 4. Third World *countries* often "view themselves as unrepresented and disfavored in the development of international law," Mose L. Floyd, *Iraq's Invasion of Kuwait Sparks Migration into Jordan: A Third World Nation Copes With the Administrative Nightmare of a Refugee Population*, 5 GEO. IMMIG. L.J. 57, 65 (1991), and thus without as much protection from international law. Minorities, indigenous, and other "stateless" groups have greater reason to view themselves as unrepresented, disfavored, and unprotected. *Cf.* P.J.I.M. de Waart, *Statehood and International Protection of Peoples in Armed Conflicts in the "Brave New World": Palestine as a U.N. Source of Concern*, 5 LEIDEN J. INT'L L. 3, 24 (1992) (expressing concern over the U.N. protecting the right to self-determination of a stateless group against a state's discrimination based on race, creed, or color).

111. G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 13, at preamble, para. 2, U.N. Doc. A/4684 (1960). *See also* Declaration on Friendly Relations, *supra* note 70, at 121. The International Covenant of Economic, Social and Cultural Rights, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, 52, U.N. Doc. A/6316 (1967) [hereinafter Economic Covenant], imposes the obligation on states to "promote the realization of the right of self-determination" and to "respect that right." *Id.* at art. 1. Relevant to self-determination is

is subject to an occupying or otherwise alien power's population transfer, original inhabitants may be stripped of the opportunity to determine their status and to pursue their development and, thus, denied in overt ways their access to self-determination. In the case of settlements, the denial might occur when administrators and settlers of an occupying or dominating power flood into the land of a distinct people, i.e. of original inhabitants, and appropriate for themselves superior positions in different aspects of society.[112]

The problem becomes more acute and troublesome if alien superiority results in subjugation, domination and exploitation of the original inhabitants, effects which have been denounced as contrary to the U.N. Charter and as constituting denials of fundamental human rights.[113] In his writings about the other form of transfer, removals, at the level of sovereign or occupied states, De Zayas recognizes the economic risks of exploitation. He believes that in addition to being willing to receive masses of expelled people, a state must also have the economic capacity to do so.[114] "In addition, the social and cultural adequacy of the receiving state ought to be considered,"[115] he adds, thereby referring to political domination and social subjugation. But slower to be recognized is that these same effects may play out in cases of settlements as well as removals. For example, if the sheer scale of a population transfer causes original inhabitants to become a minority in their own homeland, that dampens the possibility that they will ever realize self-determination.[116] This may

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whether people are distinct and have a capacity for self-management and ". . . a common desire to establish an entity capable of functioning to ensure a common future." SELF-DETERMINATION, *supra* note 69, at para. 56. For other elements of self-determination, see generally HANNUM, *supra* note 108, at 27-49.

112. That reasoning applies in cases of military occupation. *See* Asbjorn Eide, *Human Rights in a Pluralistic World*, *in* THE UNIVERSAL DECLARATION IN SPACE AND TIME 23, 42 (U.N. Educational, Scientific and Cultural Organization ed., 1990) (Those under military occupation are entitled to express self-determination). However, such a denial is also possible in cases of outside domination that do not involve military occupation. Such cases might jeopardize a people's right to "enjoy and utilize fully and freely their natural wealth and resources," provided for in the Economic Covenant, *supra* note 111, at arts. 1, 25. The Economic Covenant also states, in the same article referring to self-determination, that "[i]n no case may a people be deprived of its own means of subsistence." *Id.* at art. 1. Furthermore, a transferring government might violate original inhabitants' right to an adequate standard of living, provided in the Economic Covenant, article 11, by restricting their freedom of movement. *See* U.N. Sub-Commission Resolution 1990/17, *supra* note 3; U.N. Sub-Commission Resolution 1991/28, *supra* note 3; U.N. Sub-Commission Resolution 1992/28, *supra* note 3, at 71 (preamble) (mentioning all above rights in conjunction with population transfer).

113. Declaration on Friendly Relations, *supra* note 70.

114. De Zayas, *Historical Survey*, *supra* note 22, at 3. He adds: "The arrival of millions of expellees in a country already incapable to feed itself *necessarily* leads to chaos, both for the native population of the receiving state and for the arriving expellees." *Id.* (emphasis added).

115. *Id. Cf.* VERNON VAN DYKE, HUMAN RIGHTS, ETHNICITY AND DISCRIMINATION 76 (1985) (referring to the effect on political processes of mixing societies deeply divided along cultural lines).

116. *See* Yoram Dinstein, *Collective Human Rights of Peoples and Minorities*, 25 INT'L

happen even if the unit of self-determination being affected is not that of an occupied state.

Whether international law takes account of such effects will depend on resolution of the dilemma over how to measure respect for a country's domestic jurisdiction. For the future, the key factor may be whether and how original inhabitants in areas flooded by settlers, originating and ending within U.N.-recognized borders, are accorded and then able to realize self-determination. Developments in the rights of indigenous peoples and related land rights are also relevant,[117] but change has come slowly. For instance, in the revised text of the Draft Universal Declaration on the Rights of Indigenous Peoples, the right to self-determination was included in only a compromising manner.[118] Moreover, in an important convention on indigenous rights, there were provisions dealing only with removals, and these provisions were "weak."[119]

Self-determination does not always imply total independence from outside groups, but it does give those to whom it applies some control over their own destiny.[120] Logically, settlements, whether across or within international frontiers, may prevent a distinct group from determining its

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& COMP. L.Q. 105, 109 (1976) (referring to the effects resulting from diluting and dispersing a minority).

117. For example, as land rights relate to self-determination. For a discussion of the relationship between self-determination, land and indigenous rights, see generally Hannum, *supra* note 71, at 670-77. De Zayas makes the connection between land rights, respect therefor, and humane approaches to the problem of population transfer. However, his examples, which are removals and not settlements, occur across international frontiers. Nevertheless, he points out the gradual public sensitization to the "right of peoples to their native soil," and opines that "the best and most humane solution [to problems caused by population transfer] would be the increased permeability of national frontiers." De Zayas, *Historical Survey*, *supra* note 22, at 33-34. *See also id.* at 23; De Zayas, *German Experience*, *supra* note 23, at 5-6 ("The broad authority of sovereign states to pursue legitimate ends [through population transfer] should not be exercised to the detriment of a people's right to inhabit their native soil").

118. UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, COMMISSION ON HUMAN RIGHTS, SUB-COMMISSION ON THE PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES, DISCRIMINATION AGAINST INDIGENOUS PEOPLES; REPORT OF THE WORKING GROUP ON INDIGENOUS POPULATIONS ON ITS EIGHTH SESSION, at Annex II, U.N. Doc. E/CN.4/Sub.2/1990/42 (1990). Only minor changes were introduced for the 1991 session.

119. Hannum, *supra* note 71, at 668 n.72 (citing the International Labor Organization Convention No. 107, art. 12).

120. VAN DYKE, *supra* note 115, at 221 ("[A]n exercise of self-determination does not necessarily mean that the choice will be for independence. One of the potential choices is for autonomy within the framework of the state and given reasonableness on both sides this is the choice, or compromise that will be made"); Peter Malanczuk, *The Kurdish Crisis and Allied Intervention in the Aftermath of the Second Gulf War*, 2 EUR. J. INT'L L. 114, 124 (1991) (referring to self-determination as a "sufficient degree of autonomy within the existing state structure"); UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, COMMISSION ON HUMAN RIGHTS, REPORT ON THE UNITED NATIONS SEMINAR ON THE EFFECTS OF RACIAL DISCRIMINATION ON THE SOCIAL AND ECONOMIC RELATIONS BETWEEN INDIGENOUS PEOPLES AND STATES, U.N. Doc. E/CN.4/1989/22 (1989) (Self-determination may only imply "self-development").

own status and development *particularly* when the group's members do not *want* to receive the influx. Therefore, self-determination, should it apply to original inhabitants faced with population transfer, brings into play the element of consent. Self-determination thereby plugs a gap that otherwise exists between removals and settlements on the issue of consent. In this Article's discussion of this issue, before this section on self-determination, the conclusion has been that consent pertains more to removals than settlements. Self-determination, however, with its focus on the original inhabitants affected by settlements, brings out the importance of voluntariness to the process of settlements. It is, therefore, an important factor to a unified approach to population transfer.

The foregoing analysis advocates a shift in international attention away from governmental motives for undertaking settlements and towards the point of view of those directly affected by settlements. This shift parallels existing international treatment of removals. The Institut de Droit International recognized that, in addition to the importance of examining governmental motives for causing removals, the perspectives of removed people are also a significant factor in determining the permissibility of transfers. Yet governmental motives retain importance. The governmental practices of racism and discrimination lead to condemnation of removals. Where governments act on similar motives in undertaking settlements, this overlap also supports a unified concept of population transfer.

2. Effect of Population Transfer on Rights Regarding Genocide

There has been concern that people subjected to massive population transfer, either by facing settlers or by themselves being removed, have been threatened with genocide.[121] For instance, in Indonesian-ruled East Timor population transfer occurred in both forms. Concurrently, due to the inhumane conditions imposed there, some commentators believe that genocide happened.[122] The U.N. has adopted the following definition of genocide through the Convention on the Prevention and Punishment of the Crime of Genocide: "Genocide means . . . acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group,

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121. *See* U.N. Sub-Commission Resolution 1992/28, *supra* note 3, at 71 (preamble); DeZayas, *Forced Resettlement*, *supra* note 11, at 236 (expressing concern over genocide for removals but not for settlements). As an instance of concern expressed over genocide for settlements as well as removals, which the author of this Article cannot confirm as actual genocide, see CHITTAGONG HILL TRACTS COMMISSION, LIFE IS NOT OURS: LAND AND HUMAN RIGHTS IN THE CHITTAGONG HILL TRACTS, BANGLADESH (1991); *The Chittagong Hill Tracts*, INTERNATIONAL WORKING GROUP FOR INDIGENOUS AFFAIRS NEWSLETTER, July/Aug. 1991; INTERNATIONAL WORKING GROUP FOR INDIGENOUS AFFAIRS, DOC. NO. 5, THEY ARE NOW BURNING VILLAGE AFTER VILLAGE: GENOCIDE IN THE CHITTAGONG HILL TRACTS (1984).

122. *See* CHALK & JONASSOHN, *supra* note 62, at 379; Erlanger, *supra* note 26 (100,000 to 200,000 East Timorese died from 1974 to 1980); Budiardjo, *supra* note 46 (200,000 died); HIORTH, *supra* note 26, at 61 (In 1975, an estimated 650,000 East Timorese lived on the island).

as such."[123]

According to Dinstein, "[t]he right of peoples to physical existence corresponds to the prohibition of genocide."[124] In focusing, therefore, on the effects of population transfer on the right to existence, at least two issues arise. One is the distinction between genocide and ethnocide. The latter is a sub-category of the former. Yet, "[t]he suppression of a culture, a language, a religion, and so on is a phenomenon that is analytically different from the physical extermination of a group."[125] Concern over genocide in the sense of mass death applies to relatively few cases of population transfer. The meaning of ethnocide, which might also coincide with the denial of self-determination, pertains to relatively more instances of population transfer.[126]

A second issue important to the relationship between population transfer and the right to existence is *intent*: "the essence of genocide is not the actual destruction of a group — in our case, a people — but the intent to destroy it as such (in whole or in part)."[127] This implies that if a group, for example a "people," however defined, is destroyed, but no intent to destroy exists, then no genocide occurs. Conversely, one individual murder fits this essence of genocide if the act of murder is designed to further the extinction of a people.

The situation of the Kurds after the Gulf War involved less the removal of people than did the Kurdish plight before that war.[128] Nonetheless, Payam Akhavan believes that after the war the requisite intent for genocide existed. He states that "it was not in question that the deliberate policy of the Iraqi authorities had resulted in conditions which were so extreme as to cause the mass exodus of Kurds to neighboring States."[129] Given that the receiving area consisted of "inhospitable regions where their survival may [have been] threatened," Akhavan recom-

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123. Convention on the Prevention and Punishment of the Crime of Genocide, *opened for signature* Dec. 9, 1948, 78 U.N.T.S. 277, 28 I.L.M. 763 [hereinafter Genocide Convention]. Specific acts include "(a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group." *Id. Cf.* RESTATEMENT ON FOREIGN RELATIONS, *supra* note 31, § 702.

124. Dinstein, *supra* note 116, at 105.

125. CHALK & JONASSOHN, *supra* note 62, at 23.

126. Distinctions between ethnocide and genocide are de-emphasized by focusing on existence rather than extermination. This is a constructive, preventative approach to such comparison. Some causes are common to both ethnocide and genocide, one of which causes is discrimination. For example, prevention of discrimination would remove religious intolerance. One commentator refers to intolerance as "one of the decisive causes of genocide." WARWICK MCKEAN, EQUALITY AND DISCRIMINATION UNDER INTERNATIONAL LAW 121 (1983).

127. Dinstein, *supra* note 116, at 105 (citing NEHEMIAH ROBINSON, THE GENOCIDE CONVENTION: A COMMENTARY 58 (1960)).

128. *See supra* note 5.

129. Payam Akhavan, *Enforcement of the Genocide Convention Through the Advisory Opinion Jurisdiction of the International Court of Justice*, 12 HUM. RTS. L.J. 297 (1991).

mends that the International Court of Justice give an advisory opinion on whether the Iraqi policy constituted " 'deliberately inflicting on the group conditions of life calculated to bring about its destruction in whole or in part' within the meaning of the Genocide Convention."[130] A positive response, meaning genocide occurred, would carry significance despite article 2(7) of the U.N. Charter.[131]

Depending upon circumstances, the governmental intent required to raise an act to genocidal level may vary. For example, a high degree of centralized authority and quasi-bureaucratic organization in the government, like that of Iraq, is not always required. According to Chalk and Jonassohn, an exception has been "when the victim group is numerically small." They give as an example the phenomenon of population transfer, "such as the indigenous tribes wiped out by colonizing settlers."[132] Despite their loose use of the term "colonizing," under their analysis settlements may cause of genocide. An analysis such as theirs should be examined for its validity in the case of the Indonesian presence in East Timor.

In summary regarding genocide, governmental participation in population transfer might take the form of force, as in the case of some removals. Or it might take the form of encouragement or sponsorship, as in the example of some settlements. Although containing less obvious intent, the latter involvement needs to be examined further, through concerted case study, for the possibility that such settlements may result in the genocide of original inhabitants. Like the arguments in regard to voluntariness and freedom of movement, legal reasoning regarding genocide is more obvious to cases of removals but may apply also to settlements. As the concept of genocide is relatively blind to issues of the permeability of international frontiers and as it applies even outside of belligerency, it is crucial to any broad concept of population transfer.

IV. CONCLUSION

The law on genocide, like that on self-determination, refers to groups rather than individuals. Development of the consciousness of international law towards collectivities is important to a holistic legal approach towards uprooted people. However, given the differences between removals and settlements mentioned herein, international law is distant from treating removals and settlements as one category *per se*. A broad treatment should be pursued, especially where the motivations for and the effects of both types are egregious. Some variances or differences between the two types may be just noise. The law on population transfer is unde-

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130. *Id.* at 297-98.

131. Akhavan states that "given its status as a 'crime against humanity,' an inference that genocide exists would definitely put into question the proposition that the matter is one 'essentially within the jurisdiction' of Iraq." *Id.* at 298. *See also* Leslie Gelb, *The Strange Story of Mr. Bush Dealing With Saddam*, INT'L HERALD TRIB., May 5, 1992, at 4.

132. CHALK & JONASSOHN, *supra* note 62, at 28.

veloped and, thus, somewhat confusing. The coherent legal study of population transfer will gain speed as the realization grows that it is "inaccurate to use the passive voice to describe much of the world's population flows."[133]

133. Weiner, *supra* note 6, at 7.

Discriminating Genocide From War Crimes: Vietnam and Afghanistan Reexamined

HELEN FEIN*

Raphael Lemkin introduced the concept of genocide in 1942 as a way to understand the objective of Germany's policies toward the population of the occupied states.[1] Historically, this term has been used "to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves."[2] Since 1944, the concept has frequently been misused rhetorically and metaphorically for political ends. For instance, segregation and integration, drug addiction and methadone-maintenance, free choice of abortion and enforced birth control, AIDS, and condom use each have been labelled as "genocide."[3] Despite the prevalence of genocide[4] and the importance of the concept as an international norm, no satisfactory method exists to distinguish putative cases from rhetorical misuses and specious claims.

This article proposes criteria and conditions to be examined in evaluating charges of genocide and to differentiate such charges from war crimes and other mass killings.

It also illustrates these criteria by applying them to the accusations of genocide made against the superpowers arising from their interventions in the wars in Vietnam and Afghanistan.[5] Before evaluating these cases,

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1. RAPHAEL LEMKIN, AXIS RULE IN OCCUPIED EUROPE; LAWS OF OCCUPATION, ANALYSIS OF GOVERNMENT, PROPOSALS FOR REDRESS (1944).

2. *Id.* at 79.

3. JACK NUSAN PORTER, GENOCIDE AND HUMAN RIGHTS: A GLOBAL ANTHOLOGY 9-10 (1982).

4. BARBARA HARFF AND T. GURR, INTERNET ON THE HOLOCAUST AND GENOCIDE 13 (1987). From their estimates, I calculate that genocides and politicides have killed up to twice the number of people as have wars between 1945 and 1980. Similarly, I calculate that these state-sponsored massacres have killed up to 2.6 times the number of people that have died as a result of natural disasters.

5. For Vietnam: *See* THEODORE DRAPER, ABUSE OF POWER 178 (1967); DANIEL BERRIGAN, NIGHT FLIGHT TO HANOI 23 (1971); FRANCES FITZGERALD, FIRE IN THE LAKE: THE VIETNAMESE

however, it is necessary to review how the concept of genocide emerged, how genocide is legally defined, and the problematic situations in which war and genocide may emerge simultaneously.

I. ORIGINS OF THE LABEL, GENOCIDE

The impetus to recognize genocide as a distinct crime emerged as a reaction to the systematic mass murder of Jews and Gypsies, and the selective decimation of Poles and Slavic civilians in Nazi-controlled Europe during World War II. The mass murders of Jews and Gypsies were acts against intentionally discriminated and aggregated victims — acts not related to the goals of war as legitimated in international law and already criminalized by the Fourth Hague Convention of 1907. The perpetrators of these acts were indicted for genocide at Nuremberg, Germany in 1945 and later tried for their crimes against humanity. The foundation for these indictments was the Hague Convention's prohibition of the murder, deportation, and enslavement of civilians during war.[6]

A subsequent definition of genocide appeared in the United Nations Convention on the Punishment and Prevention of the Crime of Genocide, which became effective international law in 1951.[7] The Genocide Convention made genocide a crime for which individuals might be indicted, whether occurring in times of peace or war, and regardless of whether the victims were nationals of other states or of the perpetrators' own state. According to Article II of the Genocide Convention,

> genocide means any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group as such: a) killing members of the group; b) causing serious bodily or mental harm to members of the group; c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; d) imposing measures intended to prevent births within the group; e) forcibly transferring

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AND AMERICANS IN VIETNAM 502 (1973); JEAN-PAUL SARTRE, ON GENOCIDE (1968); MICHAEL MACOBY & RICHARD FALK, WAR CRIMES AND THE AMERICAN CONSCIENCE 80-81 (1970). *But see* DANIEL ELLSBERG, *Contra This, in* WAR CRIMES AND THE AMERICAN CONSCIENCE 82-83 (1970). *See also* W.V. O'BRIEN, THE NUREMBERG PRINCIPLES 3; THE VIETNAM WAR AND INTERNATIONAL LAW 198-199 (Richard Falk ed., 1972); HUGO ADAM BEDAU, *Genocide in Vietnam?, in* PHILOSOPHY, MORALITY AND INTERNATIONAL AFFAIRS (Virginia Held et al. eds., 1974).

For Afghanistan: *See* JAN GOODWIN, *The Media Ignores Genocide in Afghanistan*, 2 INST. FOR THE STUDY OF GENOCIDE NEWSL. 1 (1988); *Report of the Independent Counsel on International Human Rights on the Human Rights Situation in Afghanistan*, 42 U.N. GAOR C.3 (Agenda Item 12) U.N. Doc. A/C.3/42/8 (1987), *edited and reprinted in* W.M. REISMAN AND C.H. NORCHI, *Genocide and the Soviet Occupation of Afghanistan*, 4 INST. FOR THE STUDY OF GENOCIDE NEWSL. 1 (1988). *But see* BARNETT R. RUBIN, *Afghanistan: Over a Million Dead*, 7 INST. FOR THE STUDY OF GENOCIDE NEWSL. 1 (1988).

6. SEE BRADLEY F. SMITH, THE AMERICAN ROAD TO NUREMBERG: THE DOCUMENTARY RECORD 1944-45 (1982).

7. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, 1951 [hereinafter Genocide Convention].

children of the group to another group.[8]

The General Assembly first passed a resolution condemning genocide as a crime on 11 December 1948, stating that "[g]enocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings."[9] Kuper notes that "the crime of genocide in this resolution is wholly independent of crimes against peace or of war crimes."[10]

Discriminating among mass and arbitrary killings that are genocides under the Genocide Convention definition, killings that can be considered war crimes, and unintended killings that are ascribable to the effects of war itself may present problems. In order to distinguish genocide from civilian deaths resulting from warfare or war crimes, I suggest a paradigm to clarify the pattern, authorization, context, and intent of such acts. This paradigm will then be employed to evaluate the substantive case for charges of genocide against the United States in Vietnam (1963-1973) and against the Soviet Union in Afghanistan (1979-1988).

Since the claims of genocide in Vietnam and Afghanistan arose in the context of wars, certain definitional issues need to be clarified. "War is a 'legal condition which equally permits two or more groups to carry on a conflict by armed force.' "[11] Thus, war is ideally conceived of as a symmetrical conflict between two forces. By contrast, genocide is usually conceived of as the asymmetrical slaughter of an unorganized group by an organized force.

Although the Genocide Convention's definition of genocide[12] is the international norm, scholars of genocide have offered more encompassing definitions that include all groups, based on the concept of the defenseless victim. "Genocide is sustained purposeful action by a perpetrator to physically destroy a group directly or indirectly, through interdiction of the biological and social reproduction of group members, sustained regardless of the surrender or lack of threat offered by the victim."[13] "Genocide is a form of one-sided mass killing in which a state or other authority intends to destroy a group."[14] Marginal cases involving genocide include the Warsaw ghetto uprising and the 1915 Armenian defense of Van, memorialized in "The Forty Days of Musa Dagh."[15] In these cases, the victims knew they would be killed if they did not resist, so despite

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8. *Id.*

9. LEO KUPER, GENOCIDE: ITS POLITICAL USE IN THE TWENTIETH CENTURY 23 (1981).

10. *Id.* at 23.

11. MICHAEL WALZER, JUST AND UNJUST WARS: A MODEL ARGUMENT WITH HISTORICAL ILLUSTRATIONS 41 (1977), *quoting* QUINCY WRIGHT, A STUDY OF WAR 8 (1942).

12. *See* Genocide Convention, *supra* note 7.

13. Helen Fein, *Genocide: A Sociological Perspective*, 24 CURRENT SOC. 38 (1990); *see also* HELEN FEIN, GENOCIDE: A SOCIOLOGICAL PERSPECTIVE (1993).

14. FRANK CHALK & KURT JONASSOHN, THE HISTORY AND SOCIOLOGY OF GENOCIDE 23 (1990).

15. FRANZ WERFEL, THE FORTY DAYS OF MUSA DAGH (Geoffrey Dunlop Trans., 1934).

being poorly armed or unarmed, they fought in order to live or die fighting.

In wars fought according to international law, combatants are limited by what Walzer calls the "war convention."[16] Although the "war convention" was codified by both the Hague and Geneva Conventions in the late nineteenth and twentieth centuries, it cross-cuts many cultures and historical periods.[17] Similarly, Singh and McWhinney relate the sources of the "war convention" to the major world religions: Christianity, Hinduism, and Islam.[18] This is not to say that the "war convention" has been observed throughout this period but that the ideal transcends particular cultures and time.

The functions of the "war convention" are twofold: justifying war as a human institution by establishing criteria for evaluation of specific wars, and limiting the effects of war. These functions enable people to both make and conclude wars. International humanitarian law, which embodies the "war convention," prohibits the following:[19]

> 1) killing or wounding captured or surrendered prisoners;
> 2) not distinguishing non-combatants from combatants in waging indiscriminate attacks leading to the killing, wounding, or violating the rights of civilians intentionally;
> 3) inflicting foreseeable injury to civilians "out of proportion to the military advantage reasonably expected to be gained";[20] and,
> 4) certain means of warfare, such as poison gas and chemical weapons.[21]

These criteria can lead to justifications for killing civilians. Both "military necessity" and "proportionality" are flexible notions. The "principle of double effect," initially "worked out by Catholic casuists in the Middle Ages," is a sophisticated justification for foreseeable, but unwanted, civilian deaths that arise from pursuit of necessary military objectives.[22]

Walzer illustrates three types of situations involving pre-modern and modern warfare that have resulted in mass death of civilians. These situations, which have been labeled genocidal by some, undermine the view that war and genocide are always discrete phenomena. The first situation

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16. WALZER, *supra* note 11, at 44.

17. Walzer discussed this in a lecture on "Minimalism in Ethics" at the John F. Kennedy School of Government of Harvard University, February 25, 1991.

18. J. NAGENDRA SINGH & EDWARD MCWHINNEY, NUCLEAR WEAPONS AND CONTEMPORARY INTERNATIONAL LAW 14-15 (2d ed., 1989).

19. *See generally* HILAIRE MCCOUBREY, INTERNATIONAL HUMANITARIAN LAW (1990); WALZER, *supra* note 11.

20. WALDEMAR A. SOLF & W. GEORGE GRANDISON, *International Humanitarian Law Applied in Armed Conflict*, 10 J. INT'L L. & ECON. 583 (1979)(adding the proportionality element). *See also* DAVID WEISSBRODT & BETH ANDRUS, *The Right to Life During Armed Conflict: Disabled Peoples' International v. United States*, 29 HARV INT'L L. J. 71 (1988).

21. MCCOUBREY, *supra* note 19.

22. WALZER, *supra* note 11, at 152-153.

involves war or phases of wars in which one side relies on a strategy of attrition, such as tactical sieges and blockades.[23]

The second situation involves guerilla wars in which a rebel force tries to undermine state power, and the state undertakes the elimination of the guerilla force.[24] In so doing, the state indiscriminately kills large numbers of the ethnic or regional group from which the guerrillas are drawn, since the guerrillas are not readily distinguishable from innocent civilians. Is this situation an inevitable result of the ambiguity, or are these indeed genocidal massacres? Kuper, Fein, and other scholars employ the term "genocidal massacre" to define massacres that are not part of a continuous genocide but are committed by an authority or other organized group against a particular ethnic or other distinguishable group.[25] These "genocidal massacres" are organized to destroy victims selected on the basis of their identity alone and have been labeled pogroms, race riots, and communal violence.

The third situation involves total war, distinguished from a guerilla action by the use of weapons of mass devastation such as aerial bombardment with conventional or nuclear weapons. Some charge that targeting civilian populations with nuclear or other weapons, resulting in the killing of great numbers indiscriminately, is intrinsically an act of genocide.[26]

The types of situations in which genocide arises are not original to modern times. The first situation, encompassing blockades and encircled sites, has reoccurred throughout history. Typically, a city was seized or blockaded until its inhabitants surrendered. According to Walzer, neither siege nor blockades of civilian populations is prohibited by the rules of war when soldiers are fighting from within villages and cities inhabited or surrounded by civilians. In ancient and modern times, the number of civilians killed in such cases has been enormous. The Geneva Protocols of 1977, however, outlawed the starvation of civilians in the time of war.

Deliberate famines were imposed as a means of genocide in the Soviet Ukraine in 1932-33, the Warsaw Ghetto in 1941-42, and in other Jewish concentrated areas during the Holocaust.[27] These cases can be distin-

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23. *Id.* at 160-74. Since the 1977 Protocols to the Geneva Convention, which must have occurred subsequent to the printing of Walzer, all "methods of warfare designed to take effect through starvation of the civilian population are prohibited," according to McCOUBREY, *supra* note 19, at 117. *See also* INTERNATIONAL COMMISSION OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 653-54, 943, 1330, 1457 (Yves Sandoz et al. eds., 1987) [hereinafter ADDITIONAL PROTOCOLS].

24. *Id.* at 176-96.

25. KUPER, *supra* note 9, at 9; HELEN FEIN, *Scenarios of Genocide: Models of Genocide and Critical Responses, in* TOWARD THE UNDERSTANDING AND PREVENTION OF GENOCIDE: 2 PROCEEDINGS OF THE INTERNATIONAL CONFERENCE ON THE HOLOCAUST AND GENOCIDE 31 (Israel W. Charney ed., 1984).

26. KUPER, *supra* note 9, at 14, 17, 34-35, 45-46, 50, 55, 91-92, 102, 139, 174; ISRAEL CHARNY, GENOCIDE: A CRITICAL BIBLIOGRAPHIC REVIEW 7-8 (Israel Charny ed., 1988).

27. Commission on the Ukraine Famine, Report to Congress (1988); HELEN FEIN, Ac-

guished from other historical governmentally imposed famines since the military objectives were not designed to compel one side to surrender.

Reprisals are also permissible actions that may lead to the deaths of many civilians. Belligerent forces may conduct reprisals against civilians to punish and deter crimes of the opposing force, including violations of the "war convention." Walzer explains that

> [n]o part of the war convention is so open to abuse, is so openly abused, as the doctrine of reprisals . . . . It legitimizes actions otherwise criminal, if these actions are undertaken in response to crimes previously committed by the enemy . . . Reprisals of this sort have as their purpose the enforcement of the war convention . . . . Under the special conditions of combat, at least, utilitarian calculations have indeed required the 'punishing' of innocent people.[28]

Reprisals are also subject to the criteria of proportionality. This led to the severe condemnation, and subsequent indictment, of Nazi officers for the killings of hostages in occupied countries during World War II.[29]

Guerilla warfare presents another complicated series of challenges to the "war convention." How can both sides fight effectively with disparate means and at the same time respect the distinction between combatants and noncombatants? How do observers assess the responsibility of the guerrillas and the defenders of the state to protect the uninvolved citizens from reprisals? For

> the guerrillas don't subvert the war convention by themselves attacking civilians; at least, it is not a necessary feature of their struggle that they do that. Instead, they invite their enemies to do it. . . . [T]hey seek to place the onus of indiscriminate warfare on the opposing army. The guerrillas themselves have to discriminate, if only to prove that they really are soldiers (and not enemies) of the people.[30]

The killing of non-combatants often occurs in contexts where it is not readily possible for soldiers to distinguish between partisans and civilians, such as instances when non-uniformed partisans fight from the midst of civilian villages. In some cases, such killing is a result of confusion; in other cases, the arbitrary killings are simply rationalized by government forces because of their inability to identify partisans. Some guerilla forces use calculated killings of class enemies or indiscriminate killing as a means of creating terror, thus gaining power over the civilians.[31]

COUNTING FOR GENOCIDE: NATIONAL RESPONSES AND JEWISH VICTIMIZATION DURING THE HOLOCAUST 210 (1979).

28. WALZER, *supra* note 11, at 207-210.

29. *Id.* at 211; GEOFFREY BEST, HUMANITY IN WARFARE 294 (1980).

30. WALZER, *supra* note 11, at 180.

31. HELEN FEIN, LIVES AT RISK 25-27 (Institute for the Study of Genocide, 1990). For examples see the Shining Path guerrillas in Peru, the Tamil Tigers in Sri Lanka, Renamo in Mozambique, and Sikh terrorists in India.

Another issue is whether the use of fire power to respond to partisan attacks and to spare the state forces or intervenors casualties by exploiting their superior weaponry produces indiscriminate killing. If the sides are divided by ethnicity or nationality, as is often the case in guerilla and civil wars, a pattern of indiscriminate killing could constitute an attempt by one party to eliminate the other. Such a pattern of indiscriminate killing could constitute a disguised attempt to dry up the "sea" of supporters in which the guerrillas "swim," to use a metaphor by Mao. These charges have been raised both in civil wars and in interventions. We shall return to these scenarios when evaluating the charges against the United States and the Soviet Union.

The possibility that the use of nuclear weapons against civilians constitutes genocide needs to be examined. Most international lawyers who have considered this issue agree that the use of nuclear weapons is illegal under the law of war because of the extent of indiscriminate killing.[32] Another ground for finding the use of nuclear weapons illegal is the resulting radiation poisoning of the atmosphere of neutral states.[33]

Dissenters to this argument include McDougal, Schlei and Stone.[34] Further, governments that possess nuclear arms do not agree that use of those weapons is illegal. Opinions on the legality of tactical nuclear weapons are mixed.[35] However, some agreement exists on possible legal uses of nuclear weapons, including nuclear reprisals, destruction of incoming hostile aircraft carrying nuclear missiles, and the possession and stockpiling of nuclear arms.

Nuclear deterrence, a balance of terror designed to avoid "mutually assured destruction," raises an issue of the use of immoral threats. Some scholars who discuss genocide have said or implied that the use or threat of nuclear weapons leading to mass killing of another national group is genocidal.[36] Other genocide scholars, including Barbara Harff, Frank Chalk, Kurt Jonassohn, and myself disagree.[37] Singh and McWhinney consider nuclear war a violation of the Genocide Convention because of its effects, although it was not the intent of the Convention to prohibit

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32. *See* SINGH AND MCWHINNEY, *supra* note 18, at 313-19. Only two of fourteen members of the Special Commission of the *Institut de Droit International* in 1967 considered the use of weapons of mass destruction permissible. *Id.* Similarly, the Geneva Conference Report of experts convened by the Carnegie Endowment in 1969 concluded that atomic, biological, and chemical weapons were prohibited. *Id.* at 318.

33. *Id.* at 80-81, 157-63, 188-89.

34. *Id.* at 188-89, 301-12, 319.

35. *Id.* at 146, 171-74, 191-92, 195-99.

36. KUPER, *supra* note 9, at 17; IAN CLARK, WAGING WAR: A PHILOSOPHICAL INTRODUCTION 100 (1988), *quoting* Fred Charles Ikle; CHARNY, *supra* note 26, at 7-8.

37. CHALK & JONASSOHN, *supra* note 14, at 23-25; *see also* papers by Frank Chalk, Israel Charny, Helen Fein, and Leo Kuper presented at conference at Orville H. Schell, Jr. Center for International Human Rights, Yale Law School, February 16, 1991 (*forthcoming in* GENOCIDE: THE CONCEPTUAL AND HISTORICAL DIMENSIONS (George Andreopolus, ed., 1994)).

nuclear war.[38]

Analysis of this controversy requires consideration of three questions regarding the use of nuclear weapons. First, was the use of atomic weapons at Hiroshima and Nagasaki in 1945 an act of genocide? Second, does the threat of a nuclear response, building weapons, and calculating nuclear strategies (whether mutually assured destruction or counter-force) violate the prohibition against genocide? Does this question depend on the intention behind the use of the threat; for example, could a threat intended to deter war and its resultant casualties be genocidal? Third, would the use of any nuclear weapons, including tactical weapons, in a future war, whether in aggression or in self-defense, constitute genocide?

This article cannot fully address these questions, but it can suggest an approach to answering them. Regarding the question of genocide in Hiroshima and Nagasaki, the available evidence suggests that the answer is no. No one has suggested any evidence to show intent by the Allies to eliminate the Japanese as a people. Indeed, all allied acts of war ceased when Japan surrendered. Acts of genocide, by contrast, typically include the slaughter of people in captivity, people who have surrendered, or people without a state or political organization that can offer a credible threat to the perpetrator. The judgment whether such aerial bombings were wrong, unnecessary, or violations of the war convention is not the same as whether they were genocidal. The atom-bombing of Hiroshima and Nagasaki could be considered a crime of war or a crime against humanity, even though both cities were military centers.[39] But the evidence does not support an allegation of genocide.

Regarding the question of nuclear build-ups, the concept of "omnicide" appears more appropriate than that of genocide.[40] If a threat made with the intention to deter actually were to precipitate a nuclear war, there would be bilateral mass killings, without regard to racial, religious, national or ethnic identity of the victims and including citizens of each side in residence on the other side. Such an unprecedented situation cannot be described by the paradigm of genocide, which presumes a powerful perpetrator and a relatively powerless victim. Omnicide implies two perpetrator-victims, reciprocally engaged in mutually assured suicide.

The consideration of hypothetical events and rhetorical claims of genocide often blurs the perception of present events. It should not be forgotten that genocide has reoccurred several times since World War II.[41] If genocide is not understood and detered or stopped through intervention, it will certainly occur again. In order to detect emerging genocide, an examination of past acts of genocide is helpful. The following paradigm enumerates some general criteria that past acts of genocide had in

38. SINGH AND MCWHINNEY, *supra* note 18, at 119.
39. *Id.* at 150-52.
40. CHARNEY, *supra* note 26, at 7-8.
41. *See generally* KUPER, *supra* note 9.

common.[42]

II. THE GENOCIDE PARADIGM

A. *A Paradigm for Detecting and Tracing Genocide*

I have culled the elements of a paradigm to detect genocide and to document its course from studies conducted by myself and by others. The result is a set of propositions that examine the parameters identifying how genocide occurred and additional questions that further examine reinforcing conditions. The following propositions constitute a set of necessary and sufficient conditions to impute genocide. How each proposition "fits" the facts of a particular case is assessed by answers to the questions that follow the propositions.

Proposition 1: *There is a sustained attack, or continuity of attacks, by the perpetrator to physically destroy group members.* a) Did a series of actions or a single action of the perpetrator lead to the death of members of group X? b) What tactics were used to maximize the number of victims? Such tactics may include, among other things, preceding registration, orders to report and round-ups, and the isolation and concentration of victims. c) What means, besides direct killing, were used to destroy the victims or to interdict the biological and social reproduction of the group? Actions may include poisoning air or water, imposed starvation, introduction of disease entities, forcible prevention of birth, and involuntary transfer of children. d) What was the duration, the sequence of actions, and the number of victims? Trace the time span, repetition of similar or related actions, and the number of victims.

Proposition 2: *The perpetrator is a collective or organized actor or a commander of organized actors.* Genocide is distinguished from homicide empirically by the fact that it is never an act of a single individual. It is necessary to determine the following: a) Were the perpetrators joined as an armed force, paramilitary force, or informal band? b) Was there a continuity of leadership or membership of perpetrators or similar bases of recruitment for such forces? c) Were these forces authorized or organized by the state? d) To whom were those forces responsible — an agency of the state, army, or party? e) Were they organized and garbed to display or to deny government responsibility?

Proposition 3: *The victims are selected because they are members of a group.* a) Were the victims selected irrespective of any charge against them individually? b) Were they chosen on the basis of a state administrative designation or their group identity? Criteria for identity include membership in a religious body, physical differences, linguistic ability, or other sign of identity. c) Were they chosen on the basis of status within the group, such as religious leaders or the educated class? d) Was the basis of the group religion, race, ethnicity, tribal or linguistic status? e)

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42. FEIN, *supra* note 13, at 25-28.

Were they pre-selected or discriminated from other citizens before the killings? Evidence of pre-selection includes prior legal definition, denial of equal rights and entitlement under the law, stripping of citizenship, civil rights, state posts, licenses, benefits and legal group recognition, segregation and marking, rounding-up and ghettoization or concentration.

Proposition 4: *The victims are defenseless or are killed regardless of whether they surrendered or resisted.* a) Was the victims' group armed and organized to physically resist the perpetrators' group? b) Was their level of armament sufficient to wage war against the perpetrators? Were the armaments being used to defend themselves from being seized? c) Was there evidence, if the victims were armed, that they were killed after their surrender and that unarmed members of the group were systematically killed?

Proposition 5: *The destruction of group members is undertaken with intent to kill and the murder is sanctioned by the perpetrators.* a) Could the deaths of group members be explained as accidental outcomes? b) Was there evidence of repetition of destruction either in design or as a foreseeable outcome? c) Was there direct evidence of orders or authorization for the destruction of the victims? d) At what level did the authorization occur? e) Was there prima facie evidence showing that the authorities had to plan or deliberately choose to overlook a pattern of destruction? f) Was there any evidence of sanctions against agents responsible for such acts?

The following two questions examine reinforcing conditions:

Question 1: *Consistency of sanctions for killing group members:* a) Were there any rules promulgated by the perpetrator to punish or to exonerate individual murder, torture, and rape of members of the victim group? b) Were there institutional mechanisms to implement such rules? c) Were there examples of sanctions enforced for either the murder of members of the victim's group or the failure to protect victims from attacks by the perpetrators? Were there sanctions for refusing to participate in killing the victims or for reporting the commission of such killings?

Question 2: *Ideologies and beliefs legitimating genocide:* a) Was there evidence of an ideological, mythical, or articulable social goal justifying destruction of the victim? Can one observe religious traditions of contempt and collective defamation, stereotypes, and derogatory metaphors indicating that the victims were inferior or sub-human? Were the victims depicted in myth, ideology, or folklore as super-human, Satanic and/or omnipotent? Were there other signs that the victims were predefined as alien, outside the universe of obligation of the perpetrator, sub-human or dehumanized, or the enemy, such as rhetoric justifying the elimination of the victim group in order that the perpetrator may live? b) If destructive acts were acknowledged by the perpetrator, how were they labeled and justified? c) Did the acknowledgement, labeling, and justification change before different audiences?

B. *Two Putative Like Cases: Analogy Can Mislead*

The United States intervention in Vietnam (1963-73) and the Soviet intervention in Afghanistan (1979-88) have both evoked charges of genocide. While the charges against the United States were widely broadcast, the charges against the Soviet Union garnered little public attention for two reasons. First, no internal or international campaign to stop the Soviet Union existed. Second, many in the West professed that Afghanistan was "the Soviets' Vietnam"; thus, further judgment seemed superfluous. Even critics of the Soviet Union's invasion generally attributed the problematic questions of how the war was conducted to the nature of the anti-guerilla war and the tenacity of the Afghan's resistance.

There is no necessary or logical reason, however, to come to a similar judgment in both cases because the interventions may not have been similarly motivated. In both cases, the intervenor's motives are in dispute. Did the United States intervene in Vietnam to stop communism under fear of the "domino" theory, to provide a further application of the use of low-level warfare by guerilla movements elsewhere, to deter aggression, or to prevent an ally from falling? Did the Soviet Union intervene in Afghanistan to expand its sphere of influence by aggression, to dominate Southwest Asia, or to prevent a communist state and ally from falling in accordance with the Brezhnev doctrine?

I shall not review the evidence here because the underlying rationale of the intervenors is beyond the scope of this article. Further, the judgment whether either action became genocide does not depend on the goals of either the United States or the Soviet Union, but it does depend on the intent and pattern of their uses of force.

I will not address the issue of whether these were just wars, *jus ad bellum*, but will instead focus on the questions raised about the conduct of the war, *jus in bello*. This does not imply that I condone either intervention — I do not. Rather, it simply recognizes that the assessment of war crimes and genocide is logically a separate issue from the justness of the ends of war. Confirmed pacifists who take the position that "there are no war crimes: war is the crime," as a poster of the War Resistance League attests, may regard this separation as pointless. On the contrary, if the war alone is the crime, there is no added onus, nor any restraint, on any warring party for the murder, rape, torture, or deportations that its troops inflict, or even for eliminating entire groups at will. Such a position does not serve to inhibit war, war crimes, or genocide.

III. THE GENOCIDE PARADIGM APPLIED

The following tables list the specific genocide charges that have been made against the United States in Vietnam and the Soviet Union in Afghanistan. These charges will be individually evaluated using the previously laid out paradigm.

TABLE 1: CHARGES OF GENOCIDE AGAINST THE UNITED STATES IN VIETNAM (1968)
AND THE SOVIET UNION IN AFGHANISTAN (1988)

UNGC Clause Violated * Acts prohibited in the UNGC	Charges made in Vietnam **	Charges made in Afghanistan **
1. a) Killing members in whole or in part	massive bombing, free-fire zones "indiscriminate shooting, murder, rape, and looting"	massive bombing, unrestricted repeated massacres in villages, roads, refugee caravans; reprisals and summary executions
b) Causing serious bodily or mental harm	anti-personnel weapons, napalm, fragmentation bombs	attacks on religion, mines disguised as toys
c) Deliberately inflicting conditions of life calculated to bring about its physical destruction in whole or in part	defoliation, shooting livestock, transferring populations to refugee camps and hamlets	destruction of food supplies, irrigation canals and wells, depopulation "strategic attacks on society"
d) Imposing measures to prevent births within the group	putting South Vietnamese in refugee camps	
e) Forcibly transferring children of the group to another group		forced transfers back to the USSR
2) Was the "intent to destroy in whole or in part, a national . . . group as such" present?	YES - Sartre NO - Lewy NOT PROVEN - Bedau OTHER INTENT - Miller	YES - Reisman & Norchi YES - Goodwin NO - Rubin

* From the United Nations Convention on the Prevention and Punishment of the Crime of Genocide.

** For charges made by various authors see:

Vietnam: BEDAU, *supra* note 5; LEWY, *infra* note 43; MILLER, *infra* note 70; SARTRE, *supra* note 5.

Afghanistan: AMNESTY INTERNATIONAL, *infra* note 120; GOODWIN, *supra* note 5; HELSINKI WATCH 1984, *infra* note 116; HELSINKI WATCH 1985, *infra* note 116; LABER & RUBIN, *infra* note 116; REISMAN & NORCHI, *infra* note 5; RUBIN, *supra* note 5; SLIWINSKI, *infra* note 136.

Estimates of Effects	Vietnam	Afghanistan
% civilians killed	1.7% ***	
% of total national group killed	3.6% ***	9% ****
% refugees in other countries		33% ****

*** LEWY, *infra* note 43, at 301; percentages based on the 1965 population figures from The UNITED NATIONS DEMOGRAPHIC YEARBOOK (1974), *cited* by LEWY, *supra* at 301.

**** Sliwinski, a demographer, makes estimates based on a "representative sampling of Afghan families inhabiting Pakistan's 318 refugee camps in August 1987 and based on the prewar Afghan population. The USCR estimates that 40% of Afghans were refugees and 15% were internally displaced in 1988 (United States Committee for Refugees, *World Refugee Survey: 1988 in Review* (Washington, D.C.: USCR, 1989).

Note: The reader may observe that the estimate of losses in Afghanistan is based on an actual survey of Afghans while that in Vietnam is based on American estimates of war dead. In order to compare the depopulation of Vietnam that might be attributed to the war with that of Afghanistan, I calculated the difference between the expected population in 1973 (based on the annual rate of increase in 1957) and the actual population, expecting that the deficit could be attributed to war deaths. However, the 1973 population was 2,365,144 greater than that expected from the rate of natural increase in 1957, indicating either that the war had no effect on population or had a paradoxical effect. One must note, however, that the sources indicate the estimates by the governments of Vietnam are either unreliable or of unknown completeness.

A. *Paradigm Applied: Vietnam*

Determining the intent to commit genocide is often problematic in the absence of written authorization. The unstated objectives of actors, in this case the United States and the Government of South Vietnam (GVN), are difficult if not impossible to determine. As a result, before addressing the criteria of intent, one might ask whether a prima facie case for genocide can be made on evidentiary grounds alone — that is, whether intent can be inferred from the pattern of killings.

Much of the data used comes from Guenter Lewy's citation of sources in his defense of the United States' role in Vietnam.[43] Lewy's work, though explicit in its aims, has been noted for its exceptional scholarship by critics who have nevertheless disagreed with his assumptions and conclusions due to its lack of censorship of sources that allows readers to arrive at their own conclusions from the data presented.[44]

The first charge brought is the killing of group members in whole or in part. This corresponds to propositions one and two of the paradigm.

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43. GUENTER LEWY, AMERICA IN VIETNAM (1978).

44. M.W. Browne, Book Review, N.Y. TIMES, Nov. 19, 1978, at 9; Michael Walzer, Book Review, NEW REPUBLIC, Nov. 11, 1978, at 9; William F. Buckley, Jr., N.Y. REVIEW OF BOOKS, Dec. 7, 1978, at 19 (Buckley wrote that "[t]he unfortunate Lewy, trying so hard to defend our war as lawful, has unwittingly written one of the most damning indictments yet of American intervention in Vietnam.").

No one questions that there was a sustained attack by the United States and the GVN that killed hundreds of thousands of people. Nor is there any question that these attacks were authorized by the military and political hierarchy of the United States.

However, Sartre and most other critics failed to note that both sides were responsible for civilian casualties due in part to their targeted killings of non-combatants.[45] These targeted killings included an estimated 36,725 persons in South Vietnam assassinated by the Vietcong and North Vietnamese Army between 1957-1972.[46] Pike argued that the killing of local officials, the "natural leaders" of Vietnamese society, "by any definition . . . amounts to genocide."[47]

This is but one of the many accusations of genocide in that war. For instance, Operation Phoenix, a Central Intelligence Agency program conducted by the GVN and up to 650 U.S. military and civilian advisors to "neutralize" the Vietcong infrastructure, killed an estimated 20,587 South Vietnamese without trial between 1968-1971.[48] During the same period, Pike estimated that the Vietcong and the Army of North Vietnam assassinated about 21,115 Vietnamese.[49]

Lewy purports to demonstrate that Operation Phoenix was not an assassination program because suspects were killed in the course of resisting arrest or during military operations. He argues that the operation was instead a counter-insurgency program designed to capture and interrogate suspected Vietcong.[50] The confusion in the press partly emanated from the use by United States intelligence staff of the word "neutralize" to include both suspects captured, interrogated, and later released as well as suspects who were killed. The fact that up to thirty-nine percent of those suspects were killed belies Lewy's defense.[51] Conceding that between "January 1970 and March 1971 less than 6 percent of those killed (2 percent of all those neutralized) were killed as a result of special targeting" means that 623 persons were targeted and assassinated, and an additional 9,758 persons who should have been released were caught during military operations and experienced extrajudicial executions.[52] "Concern over the increase in the number killed" — from sixteen percent of reported cases in 1968 to thirty nine percent of reported cases in 1971 — led the United States Military Assistance Command to issue new instructions to United States advisors in 1969 and 1970 about the constraints of law; these instructions forbade assassinations.[53]

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45. SARTRE, *supra* note 5.
46. DOUGLAS PIKE, THE VIETCONG STRATEGY OF TERROR 82 (1970).
47. *Id.* at 248.
48. LEWY, *supra* note 43, at 281.
49. PIKE, *supra* note 46, at 454.
50. *Id.* at 279-285.
51. LEWY, *supra* note 43, at 281.
52. *Id.*
53. *Id.* at 282-283, 496 n.38.

According to estimates by the United States of "civilian casualties resulting from enemy-initiated incidents — assassinations, the mining of roads, the shelling of hamlets or refugee camps, etc. . ." — the number of deaths represents thirty-one percent of the 53,730 civilians estimated to have been "killed outright" during 1969 and 1970.[54] All such estimates arouse suspicion because of their false precision and the possible bias activating the source, whether estimating casualties inflicted by their own forces or by their enemies. While the magnitude of casualties inflicted by North Vietnam and the Vietcong is significant, the preponderance of civilian casualties were inflicted by the United States Army or United States trained forces.

Propositions three and four ask whether the Vietnamese were selected as indiscriminate or categorical victims regardless of what they did. Sartre's charge that United States troops were engaged in "indiscriminate shooting, murder, rape, and looting" implies that there was a lack of selection of victims between North and South Vietnamese and therefore an explicit or implicit authorization for slaughter.[55] Two types of charges exist in South Vietnam: 1) acts by individual soldiers of murder, rape, etc.; and 2) the conduct of the war itself — massive bombardment, the use of anti-personnel weapons, and deportations to strategic hamlets and refugee camps, which Sartre termed "concentration camps."[56]

Before examining the inference of intent, the following questions must be answered: What evidence was there of authorization for any crimes committed by individual servicemen? Conversely, what evidence was there that such crimes elicited punishment?

Regarding acts by individual soldiers and units, there is insufficient evidence available from the scattered testimonies compiled by the International War Crimes Tribunal convened by Bertrand Russell in 1967 to make a case.[57] The selective concern of that tribunal, however, was faulted by some antiwar activists, including Staughton Lynd who did not join the Tribunal because it would not investigate the war crimes of both sides. Finally, in 1969 Bertrand Russell "completely broke with Schoenman [the principal investigator of the tribunal] having concluded that the latter had an 'utter incapacity of imparting reliable information' and was suffering from megalomania."[58] Telford Taylor, a severe critic of the United States' policy, noted that the United States massacre at Son My, better known as the My Lai massacre, "pales into numerical insignificance beside the massacre of thousands in Hue during the Tet offensive, when the Vietcong also overran Quang Ngai and

54. *Id.* at 448-449.

55. SARTRE SUPRA note 5, at 73.

56. *Id.*

57. AGAINST THE CRIME OF SILENCE: PROCEEDINGS OF THE INTERNATIONAL WAR CRIMES TRIBUNAL (John Duffet ed., 1970). The Tribunal accepted the Sartre essay as its judgment on genocide. *See* SARTRE, *supra* note 5.

58. LEWY, *supra* note 43, at 313.

raced through the hospital shooting doctors, nurses, and bed-ridden patients."[59] This does not bear on the evidence for charges against the United States, but it does bear on imputations that the United States is alone responsible for the totality of killings of unarmed Vietnamese.

Question one of the paradigm examines whether the United States had in place sanctions for or against murder, other violations of life-integrity, war crimes, and genocide. Evidence indicating that there were sanctions and enforcement mechanisms to protect the lives and human rights of Vietnamese from violations by United States servicemen include two actions undertaken by the United States. First, American officers and servicemen were prosecuted for their roles in the massacre at Son My, which was exposed by a member of the United States armed forces. Second, 288 soldiers and marines were tried and court-martialed for personal crimes against Vietnamese, including murder, rape, mutilation of corpses, and negligent homicide.[60] Therefore murder, including mass murder, was still recognized as murder during the war in Vietnam.

However, questions remain whether such crimes were reported and whether enforcement mechanisms were consistently employed. For instance, company commanders were involved in some cases with abetting, failing to report, or concealing war crimes. The rules for reporting, reformulated after the Calley trial, probably encouraged cover-ups since soldiers were supposed to report war crimes to their commanding officer. Lewy concludes that "[w]hatever the reasons, it is apparent that the rules for reporting war crimes were often violated."[61] The issue is whether violations of the rules were deviations or the norm. Judgment on this issue depends on whether the very conduct of the war —such as the designation of "free-fire zones" for bombing, which accounted for the greatest number of casualties — constituted a war crime or lead to a general attitude among American servicemen of diminished value for Vietnamese lives.

Proposition five explores the issue whether there was premeditated intent and sanctions for genocide implicit in the conduct of the war itself. What evidence is there of sanctions for attack on Vietnamese civilians? The United States Rules of Engagement (ROE) proscribed firing on populated areas except when there was organized resistance from the Vietcong, not just sniper fire. "In an instruction program established in 1965, newly arrived soldiers were taught that respect for civilian life was not only a matter of basic decency and legality but was also essential for winning the hearts and minds of the people."[62]

Both American commanders and members of the United States

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59. TELFORD TAYLOR, NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY 171 (1971).

60. SEYMOUR M. HERSH, MY LAI 4: A REPORT ON THE MASSACRE AND ITS AFTERMATH (1971).

61. LEWY, *supra* note 43, at 347.

62. *Id.* at 302.

armed forces grumbled and resented General William Westmoreland's explication of the ROE in 1965-66. They resented the limitations on bombing, which might have prevented casualties among United States soldiers, and the clearance procedures necessary before artillery fire and air strikes could be authorized. The ROE were denounced in the *Congressional Record* by Senator Barry Goldwater in June 1975.[63] Civilians were supposed to be warned of impending air raids by leafletting and loudspeakers. But these orders were not widely known among field commanders and were interpreted inconsistently. Further, American combat troops were not adequately trained concerning the Geneva Conventions protecting civilians.[64]

Jonathan Schell concluded that the ROE were utterly ineffective in protecting the civilian population.[65] Lewy notes that "Prof. Telford Taylor, formerly chief counsel for the prosecution at the Nuremberg war crimes trials and a critic of many facets of the United States' Vietnam policy, has called the rules of engagement 'virtually impeccable.' "[66] But Lewy omits what Taylor went on to say:

> But of course the question remains whether the picture painted by these directives bears any resemblance to the face of war in Vietnam . . . . Of what use is an hour or two of lectures on the Geneva Conventions if the soldier sent into combat sees them flouted on every side? How does the admonition to the Air Force square with the observations of Jonathan Schell on the way in which tactical air power is actually used, or with the Marine 'ultimatum' that he quotes? How 'real' do the instructions to the ground troops appear in the light of the lieutenants' testimony at the Duffy trial, of the 'mere gook' rule described by the Army lawyers, or of the Army Major's remarks after the destruction of Ben Tre, with heavy loss of civilian life: 'It was necessary to destroy the town to save it?'[67]

The "mere gook" rule refers to the belief by many soldiers "that the lives of Vietnamese were cheap and not protected by the laws of war."[68] "Free fire zones" or "specified strike zones" (SSZ) where the civilian population was supposed to have been warned to move and/or transferred could be bombed with fewer inhibitions than other areas in which the Vietcong were believed to be operating. But the targets were supposed to conform to the laws of war in the SSZs also, with specific targets being chosen by Forward Air Controllers (FACs) who were in a better position to see the targets than were the bombers.[69]

All these assumptions were often negated in fact. For instance, civil-

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63. *Id.* at 303.
64. *Id.* at 235-239.
65. JONATHAN SCHELL, THE OTHER HALF 151 (1968).
66. LEWY, *supra* note 43, at 233.
67. TAYLOR, *supra* note 59, at 168-169.
68. LEWY, *supra* note 43, at 241.
69. *Id.*

ians often moved back to their homes rather than remaining in the SSZs. In addition, Richard Miller charged that the FAC's sometimes called strikes against the wrong targets, prompted in one case by paid Vietnamese informers who targeted a Jesuit mission that refused to put up the NLF flag.[70]

This pattern of anticipatable deaths that were not prevented because of the strategy and tactics chosen, the inadequate specification, communications, and lack of consistent enforcement of norms against war crimes certainly could, and did, elicit charges of war crimes and immoral conduct of the war.[71] However, to make a prima facie case for genocide, we have to return to the question of selection of victims before exploring the question of American intent.

Propositions three and four ask whether the Vietnamese victims were selected because they were Vietnamese and whether they were in fact defenseless victims. Most South Vietnamese civilian victims were not selected. Rather they were killed as a result of the following United States strategies: high firepower; reprisals for suspected VC-NVA fire in order to defeat the Vietcong and to protect American soldiers; officially dividing the population into "loyal" and "disloyal" camps; and instigating the villagers to deny aid to the Vietcong and expel them out of fear of reprisals.[72] The South Vietnamese villagers were vulnerable in most cases because of where they were, not who they were. They were also vulnerable because Vietcong strategy made their villages into "defended places" and because the Vietcong used villagers to launch attacks, leading to the legally-rationalized erosion of protective norms by the United States in the face of military frustration.

According to Lewy's estimate of how civilian deaths were related to military deaths in the Vietnam conflict, between 365,000 and 587,000 North and South Vietnamese civilians were killed by all forces. These dead constitute either twenty-eight or forty-five percent of all deaths, depending on the assumptions one makes about the ratio of combatants to noncombatants among the United States' reported war deaths.[73] Other figures compiled by AID, Lewy, and Senator Kennedy's Senate Subcommittee on Refugees state the highest estimate of civilian deaths attributable to all forces as 430,000.[74] This constitutes 1.7 percent of the population of both Vietnams in 1960, about the same percentage of civilians

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70. RICHARD MILLER, THE LAW OF WAR 192 (1975).

71. *See generally* TAYLOR, *supra* note 59.

72. LEWY, *supra* note 43, at 95-107, 271-374; WALZER, *supra* note 11, at 188-189. If the number of Vietnamese who were murdered by US serviceman who were subsequently indicted were added to the number of Vietnamese killed in Operation Phoenix, the ration of the total number of Vietnamese killed to the number murdered and subject to extrajudicial execution by GVN forces is 11.45:1. Estimates used to arrive at this figure include 542 murdered Vietnamese where an indictment resulted out of 430,000 total number of Vietnamese killed. This figure comes from the Kennedy Committee's estimate.

73. LEWY, *supra* note 43, at 452-453.

74. *Id.*

killed in the two world wars in this century and in the Korean conflict.

The estimate of civilian deaths is not inconsistent with the vague estimate supplied by the Permanent Mission of Vietnam to the United States that "several hundred thousand" were killed in "Southern Vietnam"; no estimate was made for "Northern Vietnam."[75] Paradoxically, we find unexpected population growth during this period (see Table 1), indicating perhaps that the original population may have been higher than estimated and the percent killed less than estimated. The number of Vietnamese wounded is not known. However, the Kennedy Committee estimated that 1,005,000 Vietnamese civilians were wounded, and the official Vietnamese source reports there are 302,000 war invalids in "southern Vietnam," presumably including civilians and combatants.[76]

Estimates of internal refugees, officially recorded and temporarily displaced or unrecorded, range from 4.5 million South Vietnamese to ten million in "Southern Vietnam."[77] This raises the question whether the South Vietnamese who were defenseless victims had any choices when they were unable or unwilling to fight for either side and were unable to expel either the Vietcong or the United States. Was there an alternative that would allow them to evade being killed? Sartre charges that the alternatives presented to the South Vietnamese constituted "conditional genocide," for there were no alternatives other than to "[j]oin the armed forces of Saigon or be enclosed in . . . concentration camps."[78] Such options, he asserts, were an example of "deliberately inflicting conditions of life calculated to bring about [the] physical destruction [of the Vietnamese] in whole or in part."[79]

Question two in the paradigm examines whether the United States deliberately inflicted conditions of life calculated to bring about the physical destruction of the South Vietnamese. The refugee camps did not lead to the physical destruction of the internees but preserved them from physical destruction. However, Sartre makes a case by dwelling on the demoralization and impairment of the social structure as a result of displacement and destruction of the traditional Vietnamese way of life. He also charges that the refugee camps prevented births through the separation of families, shown as charge 1(d) in Table 1. Sartre characterizes the camps by their lack of basic hygiene, malnutrition, separation of families, the lack of any activities for the refugees, and destruction of family and social structures.[80]

Many concur with his judgment of poor conditions in the camps. Lewy cites reports supporting most of Sartre's charges but asserts that the conditions, although "generally dismal," were "not out of line with

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75. SOCIALIST REPUBLIC OF VIETNAM 101-103 (1990) [hereinafter VIETNAM].
76. LEWY, *supra* note 43, at 445-449.
77. *Id.* at 108; VIETNAM, *supra* note 75, at 101.
78. SARTRE, *supra* note 5, at 72-73.
79. *Id.* at 74.
80. *Id.* at 73-75.

the local standard of living and with what one could expect in a wartime situation."[81] Taylor ascribes the failure of the United States to insure that the camps met with basic standards to a more general cause, "undermaintenance." The commitment by the United States to social services was never commensurate with the need in Vietnam and was only a small proportion of the total spent on the war.[82] However, Sartre's model of the Nazi concentration camp, an institution designed for calculated destruction, simply does not fit. In contrast to concentration camps in which people disappear and are systematically tortured and worked to death, the South Vietnamese camps were shelters for refugees displaced from their homes but not denied legal existence. These refugees were not subjected to military discipline, forced labor, or torture.

The Russell Tribunal also charged that the camps were purposely placed in dangerous zones but gave no evidence of how sites were selected.[83] This charge, however, underlines the danger that justified the existence of the camps and of strategic hamlets, a danger which arose from the strategy employed by both sides. The camps were justified by the United States intervenors because they were required by their obligation to protect the civilian population from physical destruction. Thus, it is difficult to infer from the deficiencies of the camps that they constituted deliberate infliction on the group of "conditions of life calculated to bring about its physical destruction in whole
or in part," as defined by Article 2(c) of the Genocide Convention.

Further, some unplanned consequences of camp life, such as dependency, demoralization, and changes in family structure, occur in many refugee camps and administered communities and cannot be plausibly interpreted as physical destruction. Neither Sartre nor anyone else has shown how the camps and strategic hamlets led to physical destruction or a diminishing birth rate. In fact, as Table 1 points out, the population of Vietnam actually increased during the war years.

There are questions about any population transfers by an occupier or an intervenor under international law, but the removal of the civilian population is not prohibited by the Geneva Convention if undertaken for the security of the occupied population. Article 49 of the Geneva Convention states that

> [i]ndividual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive. Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. . .

Charge 1(b) in Table 1 explores whether the United States deliber-

81. LEWY, *supra* note 43, at 228.
82. TAYLOR, *supra* note 59, at 196-202.
83. SARTRE, *supra* note 5, at 48-50.

ately caused "serious bodily and mental harm" to destroy the Vietnamese as a group. This charge, brought by the Russell Tribunal, alleged as evidence the effects of the use of fragmentation bombs — showing the "intention of accomplishing a greater massacre," which is a war crime[84] — and incendiary weapons, such as napalm and white phosphorous.

However, there is an alternative explanation to the use of such weapons. Lewy explains that incendiary weapons, including napalm, do not violate the Hague Convention because the Convention has been interpreted to weigh civilian suffering relative to military effectiveness, and interpretation which only negates the use of weapons that cause suffering but are militarily ineffective.[85] Lewy observes that napalm was used in World War II and Korea, but this argument is partially outdated by restrictions on incendiary weapons in Protocol I of 1977. The tactical justification of incendiary weapons used by both sides is their usefulness in killing enemy forces in underground bunkers. Although the use of napalm is not outlawed in attacks on combatants, international norms may be changing. A 1974 United Nations General Assembly Resolution condemned the use of napalm without any dissenting votes and declared that incendiary weapons, like bacteriological, chemical, and nuclear weapons, should be outlawed.[86]

Lewy further concludes that cluster or fragmentation bombs (CBUs) have legitimate military functions. Lewy observes that "CBUs proved particularly useful in flak suppression over North Vietnam where they could either knock out the anti-aircraft weapons or prevent them from firing by forcing their crews underground."[87] Taylor also argues that antipersonnel bombs might have had legitimate uses in North Vietnam.[88] However, there are serious questions about the proportionality of civilian casualties such weapons inflict. Krepon criticizes the lack of military consideration of the high civilian casualties caused by the CBUs and advocates new protocols to the Geneva Convention banning their use, despite their effectiveness at suppressing flak.

> A Japanese team of experts traveling in North Vietnam and observing the effects has estimated that a single CBU dropped in a linear pattern and detonated at an altitude of 600 feet was able to disperse its fragments so as to kill or wound people at an effective range of 300 meters by 1,000 meters. A report by the International Committee of the Red Cross places the correct figure at 300 by 900 meters. These figures are generally halved by American experts (noting the possible bias of the sources) . . . . CBUs, by literally pockmarking an entire area, could either knock out the anti-aircraft weapon or prevent it from firing, thus providing the maximum amount of cover for U.S.

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84. *Id.* at 20-22.
85. LEWY, *supra* note 43, at 242-43.
86. *Id.* at 247-48.
87. *Id.* at 267.
88. TAYLOR, *supra* note 59, at 141-142.

aircraft, surpassing even napalm in effectiveness.[89]

Article 35 of Protocol I in the 1977 Additional Protocols to the Geneva Convention prohibits "the use of any weapon the primary effect of which is to injure by fragments which in the human body escape detection by X-Rays."[90] Although the use of napalm and fragmentation bombs was not unlawful at the time, it seems likely that many of their uses would now be regarded as war crimes.

The destruction of crops and other methods of defoliation may be construed as the deliberate infliction of "conditions of life calculated to bring about [the] physical destruction [of the Vietnamese] in whole or in part," conditions which could lead to charges of genocide.[91] Crop destruction, applied to 3.2% of South Vietnam's cultivated land between 1965 and 1971, was said to affect less than one percent of the population in areas where food was destroyed, according to Lewy.[92] However, a policy that indirectly curtailed food to the civilian population in those areas might violate the 1977 Protocols to the Geneva Convention outlawing starvation of the civilian population.[93]

Defoliation was intended to clear jungle and forest terrain so troops could operate more effectively. Neither objective is outlawed by the laws of war nor were these tactics calculated to bring about the physical destruction of the Vietnamese. However, the program undermined the existence of the estimated 325,000 villagers involved by 1967, then 1.9% of the estimated population of South Vietnam. Cutting the local food supply led to widespread hatred of the United States and the GVN among the villagers, and a Rand Corporation study in 1967 recommended that the program be discontinued as it was counterproductive.[94] It continued for four more years, due to resistance on the part of the American military command, which commissioned its own reviews.[95] The chemical agents employed to defoliate the jungle were intended to protect the soldiers of the United States. At the time, the long term effects of the agents were not known. When the research on the long-range, harmful effects of Agent Orange on people was established, its use was suspended.[96] Chemical despoliation of the environment has since been prohibited by Protocol I of 1977 Geneva Convention.[97]

Charge 2 in the table accuses the United States of intending to de-

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89. MICHAEL KREPON, *Weapons Potentially Inhumane: The Case of Cluster Bombs, in* 4 THE VIETNAM WAR AND INTERNATIONAL LAW: THE CONCLUDING PHASE 269 (Richard A. Falk ed., 1976).

90. ADDITIONAL PROTOCOLS, *supra* note 23, at 405, 409.

91. SARTRE, *supra* note 5, at 74.

92. LEWY, *supra* note 43, at 258.

93. *See supra* note 23.

94. LEWY, *supra* note 43, at 259-260.

95. *Id.* at 260-262.

96. *Id.* at 263.

97. MCCOUBREY, *supra* note 19, at 117-118.

stroy the Vietnamese people. As already established, there was a sustained attack by United States and GVN forces that led to widespread displacement of and the death of a segment of the Vietnamese people — perhaps less than two percent — and the wounding of perhaps three times that number.[98] The victims most often became vulnerable as a result of a military strategy that increasingly led to patterned deviations from the Rules of Engagement, which were designed to protect Vietnamese civilians. Yet the United States tried and punished perpetrators of individual murders and of the Son My massacre of Vietnamese civilians. No evidence of other wanton massacres was confirmed, despite claims by some soldiers that war crimes and torture were commonplace in Vietnam.[99] Further, no evidence was presented that the South Vietnamese regarded the United States intervention as a threat to their right to life, as opposed to their self-determination or their political autonomy. The major refugee flows from Vietnam were instigated by the postwar governments: first, in 1975 by the military victory of North Vietnam; and second, in 1978-80 by the policy of the new government of pressing ethnic Chinese Vietnamese to flee in boats under conditions that threatened their survival.[100]

The effects of the war on the Vietnamese are scarcely summed up in the second portion of the table. It omits the wounded, the destruction of traditional ways of life, the ecological damage, and the post-war refugee flows. In addition, there was probably widespread social disorganization and adaptation to ways of life scorned by the Vietnamese, including prostitution and mixed marriages. The Socialist Republic of Vietnam lists "several hundred thousand prostitutes and drug addicts" as war damage in Southern Vietnam and 800,000 orphans or children abandoned by departing American soldiers.[101]

Although no prima facie case can be made for genocide under the Genocide Convention, thereby rendering the question of genocidal intent moot, there still remains the question of intent for the indiscriminate killing that did occur. No one has presented evidence of a United States ideology justifying destruction of the Vietnamese qua Vietnamese. On the contrary, official explanations endorsed the United States obligations to guarantee the rights of the South Vietnamese. One approach in showing intent is to infer motives from the attitude of United States servicemen in South Vietnam towards the Vietnamese. Widespread racism, depersonalization, hostility, and cultural misunderstanding were reported. The Vietnamese were demeaned, dehumanized, and excluded from the American universe of obligation by labeling them "gooks," as the Koreans were

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98. *See supra* notes 72-74.

99. LEWY, *supra* note 43, at 313-319.

100. HELEN FEIN, CONGREGATIONAL SPONSORS OF INDOCHINESE REFUGEES IN THE U.S., 1979-1981 44-47 (1987); BARRY WAIN, THE REFUSED: THE AGONY OF THE INDOCHINESE REFUGEES (1981).

101. VIETNAM, *supra* note 75, at 101.

labeled in the Korean War. But the attitudes of American soldiers were a product of the specific situation. No evidence was presented that such attitudes precipitated American involvement or determined the conduct of the war. To blame the enlistees and draftees, who did not choose either to fight the war or the strategy that led them to construe all Vietnamese as possible enemies, would diminish the responsibility of the architects of American policy.

Another approach to explain the mass civilian deaths is to analyze the political and military decisions that led to the destruction. Bedau examines Sartre's case for genocide and the possible methods of establishing intent and exposes Sartre's contradictory statements.[102] "Sartre somewhat grudgingly admits that there is no evidence of a self-conscious United States policy in Vietnam to kill Vietnamese 'merely because they are Vietnamese.' "[103] But, Sartre argues that "genocidal intent is implicit in the facts." He asserted that the United States would have to exterminate part of the Vietnamese in order to show "all of the Third World . . . that guerrilla war does not pay."[104] However, both Thompson and Lansdale, counter-insurgency experts who worked in Malaya and the Philippines where their strategies succeeded, testified that anti-guerrilla warfare does not require mass killing, but it does require patience, respect for the rural population, and discrimination of guerrillas from the peasantry or villagers.[105] Both Thompson and Lansdale advised the United States on strategy in Vietnam in the early 1960's.

Bedau maintains that

> the war the United States actually fought in South Vietnam beginning in 1965 was, by and large, not conducted on any recognizable theory of counter-insurgency at all. The war, insofar as we are concerned with those events . . . with possibly genocidal significance, was actually fought as a function of responses to considerations progressively incompatible with the patience and persistence required by anti-guerrilla warfare."[106]

In other words, the United States relied on air power because of the need to keep American casualties low for domestic political reasons. This strategy led to a war of attrition, designed to destroy Vietcong support by stripping away their protective layer of villagers and driving the villagers into refugee camps to escape bombardment. But after 1968, when the United States realized it could only win by devastating South Vietnam, it began to scale the war down.[107] Bedau concludes that genocidal intent by

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102. *See* BEDAU, *supra* note 5.

103. *Id.* at 32.

104. *Id.* at 19.

105. *See generally* ROBERT THOMPSON, DEFEATING COMMUNIST INSURGENCY: THE LESSONS OF MALAYA AND VIETNAM (1966); EDWARD GEARY LANSDALE, IN THE MIDST OF WARS: AN AMERICAN'S MISSION IN SOUTHEAST ASIA (1972).

106. BEDAU, *supra* note 5, at 36.

107. *Id.* at 37-42.

the U.S. was not proven, but he implies that war crimes and crimes against humanity may have been perpetrated by the United States in Vietnam.[108]

Walzer reaches a similar conclusion, observing that an appropriate anti-guerrilla strategy, which requires a very high ratio of soldiers to guerrillas, does not lead to indiscriminate killing of civilians. However, this sort of anti-guerrilla strategy was not used in Vietnam.[109] Walzer declares that "the American war in Vietnam was, first of all, an unjustified intervention, and it was, secondly, carried on in so brutal a manner that even had it initially been defensible, it would have to be condemned."[110] Taylor, a partisan of the intervention until 1965 by his own account, condemns the choice of a strategy that could not work and that produced mass deaths for expedient reasons, as well as the lack of adequate funding for restitution and social and medical services in Vietnam.[111] He concludes that General Westmoreland and his staff were guilty of war crimes in Vietnam, citing Nuremburg precedents.[112]

Miller concludes further that South Vietnamese civilians were denied the protection of international law by all parties — the United States, the GVN, the Vietcong and the army of North Vietnam — and that the bombing of the North was a war crime but not genocide.[113] Taylor disagreed, on the other hand, concluding that there was ". . . no sufficient basis for war crimes charges based on the bombing of North Vietnam." He believed that General Westmoreland and the United States Army command were indictable for war crimes, but he was not sure who in Washington was indictable for their actions regarding South Vietnam.[114] Lewy, who generally defends the conduct of the Vietnam war against critics, also concludes that General Westmoreland could be indicted for failure to prevent war crimes because of his failure to enforce the Rules of Engagement, "a dereliction which in turn led to war crimes."[115]

B. *Paradigm Applied: Afghanistan*

Again, application of the paradigm begins by examining the evidence of possible genocidal acts in Afghanistan to determine whether a prima facie case exists, as alleged in charges 1(a) and 1(b). Propositions one and two examine the killing of members of groups in whole or in part, the causing of serious bodily or mental harm, and the existence of a sustained attack by an organized political actor.

All sources agree that the destruction of crops, orchards, irrigation,

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108. *Id.* at 43, 46.
109. WALZER, *supra* note 11, at 193-94.
110. *Id.* at 299.
111. TAYLOR, *supra* note 59, at 172-207.
112. *Id.* at 179-82.
113. *Id.* at 157-200, 306.
114. *Id.* at 192-94.
115. LEWY, *supra* note 43, at 241-42.

and terracing systems without limits demonstrates a sustained and massive bombing against Afghan villages and agriculture.[116] This could be attributed to a Soviet strategy intended to destroy the subsistence of the mujahadeen, a legitimate military objective. However, since the anticipatable result is the starvation of the civilian rural cultivators, the attack may be considered a war crime under the 1977 Protocols to the Geneva Convention.[117] Rubin observes that there is "evidence that the destruction of agriculture has created pre-famine conditions in certain regions of the country . . . [and] infant mortality, always high, has skyrocketed to 300 to 400 per thousand."[118] If this destruction was aimed at military objectives, then the bombing might be considered a war crime, but it is insufficient evidence to make a prima facie case for genocide.

Proposition three examines whether the victims were selected by their membership in a group. Soviet soldiers perpetrated repeated indiscriminate massacres of Afghans. Two dozen incidents of corroborated reports are cited by Laber and Rubin as representative of a pattern of massacres.[119] In these incidents, the soldiers entered villages without opposition and slaughtered people by many means, including lobbing grenades into houses; tying, dousing with gasoline, and setting victims afire; setting fire to irrigation tunnels; and bayonetting and machine gunning victims.[120] Victims were apparently picked solely because they were Afghans, demonstrated by the lack of evidence of any interrogation or search process.

Rubin observes that "the Soviets have a clear and consistent policy of taking reprisals against civilians for military actions by the Resistance."[121] Bodansky, relying on the history of Soviet military doctrine, strategy, and the reports of defectors, asserts that the attacks on villagers were purposeful and represented "simply a pragmatic and highly effective tactic" both to punish resistance and "to create collateral terror to produce a massive flight of refugees."[122] Other acts described below also indicate that the Soviet intent was to murder and maim.

Proposition five examines whether the Soviets had a premeditated

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116. HELSINKI WATCH, TO DIE IN AFGHANISTAN (1985)[hereinafter HELSINKI WATCH 1985]; HELSINKI WATCH, "TEARS, BLOOD AND CRIES:" HUMAN RIGHTS IN AFGHANISTAN SINCE THE INVASION 1979-1984 (1984)[hereinafter HELSINKI WATCH 1984]; JERI LABER & BARNETT R. RUBIN, "A NATION IS DYING;" AFGHANISTAN UNDER THE SOVIETS 1979-1987 (1988); *see also* PORTER, *supra* note 3.

117. *See supra* note 23.

118. BARNETT R. RUBIN, *Human Rights in Afghanistan, in* AFGHANISTAN: THE GREAT GAME REVISITED 351 (Rosanne Klass ed., 1990) [hereinafter AFGHANISTAN: THE GREAT GAME REVISITED.]

119. LABER & RUBIN, *supra* note 116, at 351.

120. *See also* HELSINKI WATCH 1984, *supra* note 116, at 34-40; AMNESTY INTERNATIONAL, AFGHANISTAN: UNLAWFUL KILLING AND TORTURE 5-6 (1988); GOODWIN, *supra* note 5, at 2.

121. RUBIN, *supra* note 118, at 340-341.

122. YOSSEF BODANSKY, *Soviet Military Operations in Afghanistan, in* AFGHANISTAN: THE GREAT GAME REVISITED, *supra* note 118, at 258.

intent to murder and to inflict serious bodily harm without alternative explanations. The bombardments that occurred appear to have been purposefully aimed at crowds and aggregates of people unlikely to attack soldiers, such as refugee caravans, weddings, funerals, religious gatherings, and civilian buses. Many reports show that victims and their families tell of mines disguised as toys that they and their children picked up.[123] This tactic obviously serves to maim and disable people, but no one has alleged that such mines have any military purpose whatsoever in fighting a guerrilla war since the design indicates that they target children.

Charge 1(c) addresses the infliction of serious mental harm resulting from sustained attacks. There are discrepancies in the reports of attacks on the Afghans as a religious collectivity. Because many Afghans conceived of the war as an Islamic war against communism, the mujahadeen were literally warriors in a religious war. Reisman and Norchi observe that Islam is of extraordinary importance to the identity of Afghans, and this religious belief was a target of systematic attack during torture. They believe that "[g]iven the Afghan value system, such acts could constitute genocide [under] Article II (b), in that they are acts committed with the intent to destroy a religious group by causing serious mental and physical harm to members of the group." They note that "[t]here is also evidence of the targeting of mosques and religious schools and, in one case, the intentional desecration of a mosque."[124]

Laber and Rubin assert that "there have been no open attacks on Islam." Instead, they claim that leaders of the Democratic Republic of Afghanistan ("DRA") tried to "woo religious Afghans to their side" through public lip-service to Islam and manipulation of religious schools by the secret police. Observance of Islam, they reported, undermined Afghans' chances of succeeding in school and gaining government employment.[125] At worst, however, giving preference to Afghans not practicing Islam and creating a system of positive incentives to ideological conformity constituted a policy of discrimination rather than an attempt to physically eliminate or injure religious practitioners. The Genocide Convention's definition of harm would be stretched beyond usefulness if it included all discrimination and ideological attacks as causes of "mental harm." In addition, Reisman and Norchi's charge that mosques have been purposefully targeted seems hard to prove given the evidence of indiscriminate bombardment and the general targeting of crowds.

Charge 1(e) forbids the forcible transfer of children of the victimized group to another group. Reisman and Norchi report that

> [e]vidence indicates a co-ordinated policy of forcibly transferring children from Afghanistan to the USSR. The objective of this policy ap-

123. *See supra* note 116; RUBIN, *supra* note 118, at 341, 355.
124. REISMAN & NORCHI, *supra* note 5, at 5.
125. LABER & RUBIN, *supra* note 116, at 121-22.

> pears to be a deliberate attempt to deculturate the transferred children from the values of their parents and the group and to forcibly inculcate them in the values of the Soviet Union. According to witnesses, the procedure is as follows: without warning, officials enter a classroom, and with no explanation, choose a certain number of children who must leave with the officials . . . . Several days later, the parents are told that their children have been sent to the Soviet Union."[126]

Helsinki Watch first reported this practice in 1984 and stressed its systematic character in 1985.[127] Government officials drew some students from the Fatherland Training Centers, which were designed for the re-education of orphans. Others were transferred without parental permission from youth organizations. Some parents were induced to give permission by force, deceit, and social pressure.[128] In some cases, children were transferred for short term visits (up to six months). But in 1984, "Babrak Karmal announced a new program under which thousands of children would be sent to the Soviet Union for ten years of education."[129] Members of the Communist Party, Khad (the DRA security service), and communist youth organizations were induced to go, and children of the poor and the fatherless were snatched. A defector from the Kabul government asserted that there was an agreement signed between the Soviet Union and the Afghan trade union organization to send at least 2,000 Afghan children a year to the Soviet Union for ten years.[130]

Question one examines whether sanctions for murder, crime, and genocide were in place. As has been noted, the massacres "are invariably the work of Soviet soldiers, sometimes accompanied by a few Afghan party members who serve as guides."[131] In several instances, Soviet soldiers are reported to have said that "[w]e don't need the people, we need the land!"[132] Not only were there no sanctions against the mass killing of Afghans, individual homicides, rape, or looting, Soviet defectors have said that there were sanctions against not killing civilians. For example, Private Oleg Khlan told the *Christian Science Monitor* on 10 August 1984 that "[w]e were ordered by our officers that when we attack a village, not one person must be left alive to tell the tale. If we refuse to carry out these orders, we get it in the neck ourselves."[133]

In a letter to the Secretary-General of the United Nations, the Independent Council on International Human Rights reported on the human rights situation in Afghanistan. The Independent Council observed that

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126. REISMAN & NORCHI, *supra* note 5, at 5-6.
127. HELSINKI WATCH 1985, *supra* note 116.
128. *Id.* at 71-78.
129. *Id.* at 76.
130. *Id.* at 78.
131. LABER & RUBIN, *supra* note 116, at 22.
132. *Id.* at 10.
133. *Id.* at 35.

"the unremitting pattern of violations of the laws of war by Soviet forces bespeaks [of] a complete lack of awareness of these basic international norms, which the Soviet Union has bound itself by treaty to observe."[134] Bodansky relates the indiscriminate killing of civilians to a long-term Soviet doctrine and strategy previously practiced in Asia.[135] This comparison helps to explain the gap between international norms and the behavior of the Soviet forces.

The effect of these policies has been severe. A Gallup Pakistan survey, designed and analyzed by a Swiss demographer, Marek Sliwinski, showed that nine percent of Afghanistan's pre-war population was killed between 1978 and 1987, another thirty-three percent have become refugees, and eleven percent are internally displaced.[136] The percentage killed, Sliwinski notes, is among the highest in recent history.

Although comparing percentages killed cannot prove culpability, it does suggest how the effects in Afghanistan compare to other instances of genocide aimed at eliminating a people over time. For example, the percentage killed in Afghanistan, a figure that includes an unknown number of combatants, is not far below the percentage of Poles killed by German forces in Poland between 1939 and 1945, where ten percent of the Polish population, excluding the Jews and combat deaths, was killed. Lemkin identified Poles as the victims of Nazi genocide in his seminal work on genocide.[137] The Poles were directly killed in collective reprisals, massacres, and extra-judicial executions on streets and in villages, and indirectly in concentration camps through starvation and medical experimentation.[138] In Afghanistan, forty-six per cent of the Afghans killed were victims of aerial bombardments, and Sliwinski estimates that "non-belligerents constituted approximately [eighty] percent of the victims of aerial bombardment."[139] This is an indirect testimony to either the targeting of civilians or indiscriminate targeting.

Human rights organizations have noted that there were violations of the laws of war on both sides. The Afghan government and the parties of the resistance killed prisoners of war, and they committed extra-judicial executions and torture both preceding the Soviet invasion and during the war.[140] However, the violations committed by the resistance organizations were generally directed against the DRA, Soviet soldiers, and rival resistance groups, and not against unarmed Soviet citizens.

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134. REISMAN & NORCHI, *supra* note 5.

135. BODANSKY, *supra* note 122, at 234, 246-256.

136. MAREK SLIWINSKI, *The Decimation of a People*, 33 ORBIS 39 (1989).

137. *See* BOHDAN WYTWYCKY, THE OTHER HOLOCAUST: MANY CIRCLES OF HELL 39-52, 91 (1980)(discussing the similarity between the pattern of collective punishments in Afghanistan in which Soviet soldiers killed hundreds in reprisal for a single illegal act in the vicinity and German collective punishment in Poland between 1939 and 1945).

138. LEMKIN, *supra* note 1, at 81-88.

139. SLIWINSKI, *supra* note 136, at 44.

140. AMNESTY INTERNATIONAL, *supra* note 120; HELSINKI WATCH 1985, *supra* note 116.

There is no evidence of any generalized sanctions among resistance groups towards the murder of civilians, with the exception of the killing of Afghan government officials believed to be collaborating with the occupiers. However, the practices of the various resistance groups differ substantially. Most of the charges made by Helsinki Watch have been leveled against the Islamic fundamentalist Hezb-e Islami Party.

Propositions four and five and Charge 2 explore whether the Soviet Union intended to destroy the Afghans as a people. There is scarcely any dispute about the facts except those concerning the Soviet attacks against Islam. Reisman and Norchi conclude that both the acts and intent of the Soviet Union and the Democratic Republic of Afghanistan were "to destroy, in whole or in part, a national . . . group, as such," and thus those actions violate the Genocide Convention. The object of the mass bombardments, massacres, and destruction of the countryside was the depopulation of Afghanistan. The refugee flight figures show that this succeeded.

> Where actions with predictable results are taken over an extended period of time, and the consequences of these actions regularly confirm their outcome, one can reasonably infer that those responsible for such actions are committing them with specific intent. [In legal terms this proposition is *res ipsa loquitur*, or, the thing speaks for itself]. . . . There is considerable evidence that genocide was committed against the Afghan people by the combined forces of the Democratic Republic of Afghanistan and the Soviet Union. The repetition and pattern indicates that many of the acts described above were part of a plan.[141]

Sliwinski shows that the ethnic composition of Afghanistan changed significantly between 1978 and 1987. In 1978, Pathans were the largest ethnic group, comprising thirty-nine percent of all Afghans. Yet, they made up only twenty-two percent of the population in Afghanistan in 1987. Tajiks made up twenty-six percent of the population in 1978, but grew to thirty-four percent of the population in 1987. Sliwinski observed that

> [t]he new dominance of Tajiks and other northern ethnic groups is of more than mere ethnographic interest. . . . The proximity of the Soviet Muslim republics populated by Tajiks, Uzbeks, and Turkmens provides the Soviet authorities with the linguistic and cultural means to influence the now-dominant Afghan ethnic populations. At some point, the strong linguistic and ethnic affinities across the Soviet-Afghan border may even furnish a pretext for the annexation of these provinces.[142]

Sliwinski also notes that the depopulation of these provinces "resulted from a conscious, ordered, and planned Soviet policy. . . . These steps could not be achieved without expelling or exterminating the indigenous

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141. REISMAN & NORCHI, *supra* note 5, at 6.
142. SLIWINSKI, *supra* note 136, at 46-47.

population."[143]

Similarly, the decline in the number of agriculturalists from eighty-five percent in 1977/78 to twenty-six percent in 1986/87, coupled with the fact that ninty-seven percent of the refugees were of rural origin

> is probably not coincidental. The disintegration of agricultural communities, traditionally hostile toward communism, constituted the *sine qua non* for the stability of the communist regime. But, as officials in Kabul have been quoted as saying, 'if only 1 million people were left in the country, they would be more than enough to start a new society.'[144]

Thus, "depopulation" is not a voluntaristic or neutral process; rather, it is a strategy for state security that utilizes genocide. An alternative interpretation by Rubin argues that Soviet destruction was an outcome of another goal.

> The Soviet intention in invading Afghanistan and trying to subdue the resistance was not to destroy any group, in whole or in part. Their goal, rather, was to subdue armed opposition to a regime they had imposed on the country. When it became clear, however, that the resistance movement drew sustenance and strength from the support it received from the population, the Soviet military did not shrink from massive reprisals against civilians; this had the foreseeable effect of destroying certain groups and depopulating certain areas.[145]

Rubin's explanation implies that the Soviet reprisals were a consequence of mujahadeen resistance and a means to deter attacks by the resistance. Rubin, however, observed that the Soviet reprisals were purposefully targeted at civilians and not restricted to reprisals against the attackers by targeting the villages in which attackers hid that could be considered defended places.[146] This targeting could be considered a crime of war in itself.

Afghans became victims regardless of whether they fled or surrendered. This is particularly reflected in the indiscriminate Soviet bombing of refugee caravans and villages. Similarly, the victims of massacres were not protected by their surrender to Soviet troops. Thus, the destruction of Afghans was not incidental to military objectives but was a strategic objective in and of itself. This objective fulfills what Bodansky sees as the Soviet military doctrine and strategy of isolating and destroying segments of a society in Muslim areas before attempting to pacify the remainder.[147]

Rubin's denial that the Soviet/DRA destruction of a significant part of the Afghan people is genocide appears to stem from a confusion between intent and motive. He defines intent as a long-range goal rather

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143. *Id.* at 49-50.
144. *Id.* at 50-51.
145. RUBIN, *supra* note 5, at 7.
146. *See supra* note 119.
147. BODANSKY, *supra* note 122, at 234-37.

than the expected end of purposeful action.[148] However, motive and intent are different. Motive describes why an action was taken; intent describes the anticipated goal or purpose of an action. Identical intents, therefore, may be inspired by different motives. The intent to destroy the Afghan people, without distinction between combatants and non-combatants, was demonstrated by the persistent pattern of mass killing and maiming of people in Afghanistan and the destruction of the environment and food producing areas by the Soviet Union and the DRA. This pattern is not attributable to the pursuit of any legitimate military objective and is therefore a violation of sections a, b, and c of Article II of the Genocide Convention. Furthermore, the forcible transfer of children is a clear violation of section e of Article II.

Although conclusions may be drawn about Soviet patterns of behavior in Afghanistan, different interpretations of their motives cannot be confirmed. The pattern discerned may be attributed to a motive to terrorize, to devastate, or to depopulate the nation. The specification of motive lends plausibility to a finding of intent to commit genocide, assuming that the facts fit the criteria of genocide. In that case, as Reisman and Norchi argued, a plausible prima facie case of genocide can be made against the Soviet Union and the DRA in Afghanistan for its action from 1979-1988.

VI. CONCLUSION

Genocide, some have said, is a "fuzzy concept."[149] Similarly, the laws of war, "although a long-established reality with a substantial core of recognized practice, are very fuzzy around the edges."[150] The paradigm proposed earlier provides the criteria necessary to make genocide easier to detect and could be used as a model to devise criteria to probe the existence of war crimes. Such a paradigm might enable us to explore whether lawful ends may lead to the killing of civilians and to clarify the intentions of the perpetrators and the obligations of superior officers.

Sanctions for or against the murder of members of the occupied nation by the intervenor provide clues both to the nature of the obligations of occupiers and to the expectations officers have for actions of their troops. If men are expected to kill members of a group categorically, it is plausible to assume that their superiors would have to both exonerate the perpetrator from punishment for the killing of the victims and to obligate or compel them to kill. The existence of sanctions against murder, if they are enforced, is inconsistent with the execution of genocide. The fact that American soldiers were prosecuted for individual murders in Vietnam, as well as for group massacres, whereas Soviet soldiers were threatened for not participating in massacres in Afghanistan is a vital clue to the differ-

148. RUBIN, *supra* note 118, at 352, 335.

149. Quoting Professor Morton Winston at the Genocide Watch Conference of the Institute for the Study of Genocide in New York City, May 22, 1989.

150. TAYLOR, *supra* note 59, at 32.

ence between the aims and strategies of the United States and the Soviet Union. These differences, both in the scale and toleration of massacres between Vietnam and Afghanistan, lead to the differential impact on population noted in Table 1.

In Vietnam, there were repeated and substantive charges of war crimes that appear well-founded. Charges of genocide, which gained some currency at the time, simply are not supported by the acts cited. In Afghanistan, there were repeated and substantive
charges of "depopulation," massacre, deliberate injury, forced transfer of the children of Aghanis, and occasional charges of genocide, all of which were usually ignored. The evidence of Soviet actions in Afghanistan sustains a prima facie charge of genocide as well as charges of war crimes.

Mixed anti-guerrilla war and wars of intervention may provide provocations and justifications masking genocide for several reasons, but they do not produce genocide without authorization for targeted mass killing at some level. These reasons may include 1) labeling one camp or a whole people as an enemy; 2) the inability of intervenors and state defenders to reliably discriminate between guerrillas and others of the population they come from; 3) the pre-existing racial/ethnic division between the intervenors and the population; 4) the greater force available to the intervenors; and 5) military strategies and ideologies that counter guerrilla strategies of discrete and tactical terror by mass terror and intimidation.

There are, however, warning signs that genocide may be occurring. Careful examination should be made of actions taken by the intervenors. Is a group being labeled collectively? Do the doctrines of the intervenor support the elimination of the group? Even if such clues are not present at the beginning, the situation could change since military problems encountered by the intervenor may evoke the temptation to win by terror and by depopulation of the countryside. Genocide is thus a temptation to intervenors faced with guerrillas drawn from a majority population among whom they can not readily discriminate, control, or segregate. It is not, however, an inevitability.

Both to explain the different outcomes in Vietnam and Afghanistan and to anticipate the possibilities of genocide elsewhere in the future, the international community must look not only at the vulnerability of the victims but at the vulnerability of the perpetrators as well. Some factors to consider are the greater readiness of totalitarian states to use violence and terror as opposed to democratic states, the integration or separation of civilian and military power, and the distance between the society of the victim from that of the perpetrator. Research on genocide since 1945 confirms that perpetrators are much more likely to be revolutionary and authoritarian states than democratic states.[151] Democratic checks, including

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151. BARBARA HARFF, *State Perpetrators of Mass Political Murder Since 1945*, presented to the Conference on State-Organized Terror at Michigan State University, November 2-5, 1988; *see also* Helen Fein, *Accounting for Genocide after 1945: Theories and*

the power of public opinion, the division of powers, and a free press, were among the factors that inhibited American escalation of the war in Vietnam. Conversely, the absence of democratic checks in the Soviet Union was one of the factors that allowed that war, denounced in 1989 by many in Moscow, to escalate to genocide.

Some Findings, 1 INT'L J. GROUP RIGHTS 79 (1993).

Bringing Polluters Before Transnational Courts: Why Industry Should Demand Strict and Unlimited Liability for the Transnational Movements of Hazardous and Radioactive Wastes

ELLI LOUKA*

C'est parce qu'on ne le tient jamais jusqu'au bout que rien n'est obtenu. Mais il suffit peut-être de rester logique jusqu'à la fin

-Albert Camus

This article prescribes an international private liability regime for the transnational movements of hazardous and radioactive wastes. Prescription of such a regime is particularly relevant because the Basel Convention for the transfrontier movements of hazardous wastes[1] has entered

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* Ford Foundation Fellow, New York University School of Law. This article was first presented at a dinner meeting organized by Professor Thomas Franck, Director of the Center for International Studies at New York University School of Law. I would like to thank Professor Thomas Franck for organizing this meeting for me from which this article has immensely benefitted. I am grateful to Professor Richard Stewart for his insightful comments on the preliminary drafts of the manuscript, Professor Michael Reisman for valuable suggestions and unremitting support, and Professor Chet Mirsky for his encouragement. Professor Günther Handl and Ms. Christianne Bourloyannis, legal officer at the United Nations, have been most helpful in providing the most recent bibliography. Ms. Senita Birbal, inter-library loan co-ordinator at the N.Y.U. Law Library has been of tremendous assistance in helping accumulate the necessary bibliography.

1. The Basel Convention on the Control on Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, *reprinted in* 28 I.L.M. 649 (1989) [hereinafter Basel Convention]. The Basel Convention is the first Convention that deals with the problem of transnational movements of hazardous wastes. The Convention establishes prior notification and informed consent as an indispensable prerequisite of international waste transports. The Basel Convention was the international community's response to an accumulation of international incidents in the late 1980's involving waste transfers to developing countries. For example, in June of 1988, drums of mislabeled construction material were dumped in the Nigeria port of Koko. The Nigerian authorities seized the ship and arrested those responsible. In addition, Guinea Bissau was offered three times its GNP in order to accept wastes from the United States and Europe. In Congo the minister for the environment and other top-ranking officials were arrested in two toxic waste dumping deals. *See generally* ELLI LOUKA, THE TRANSNATIONAL MANAGEMENT OF HAZARDOUS AND RADIOACTIVE WASTES 3-6 (Yale Law School, Schell Center Series ed., 1992).

Transfrontier waste movements continue unabated until today. *See infra* notes 280-82. African countries felt that the prior informed consent prescribed by the Basel Convention could not prevent waste exports into Africa and adopted the Bamako Convention that bans waste imports into the African region. *See* Bamako Convention on the Ban of the Import of All Forms of Hazardous Waste Into Africa, Jan 29, 1991, *reprinted in* 30 I.L.M. 773 (1991) [hereinafter Bamako Convention]. For Annexes, *see* 31 I.L.M. 163 (1992). *See generally* LOUKA, *supra* at 9-11.

into force,[2] and a protocol that will deal with liability and compensation issues is under negotiation.[3]

As evidenced by the oil and nuclear liability regimes, strict and limited liability has been the prevailing form of liability in international law. This prevalence is due to the belief that a form of unlimited liability will hamper insurance availability. The purpose of this article is to defeat the myth that strict and unlimited liability is responsible for the lack of insurance for environmental harms. This study demonstrates that strict and unlimited liability cannot be blamed solely for the failure of traditional insurance markets and that the emergence of alternative insurance worldwide will provide waste management and chemical industries with adequate insurance coverage.

The fact that strict and unlimited liability does not hamper insurance is not the only reason why it should be prescribed as the appropriate liability regime for transnational waste movements. Contribution to prevention of accidents caused by waste mismanagement, initiation of direct democratic controls into the international system, and appeasement of social conflicts are additional reasons why the establishment of strict and unlimited liability is imperative.

But strict and unlimited liability, while necessary, is not adequate. When industries are unable to compensate pollution victims, a social insurance mechanism in the form of a fund that would provide immediate relief and residual or full compensation is necessary. Such a fund could be financed by states, industries, or a combination of both. Because of the lack of data of the contribution of each industrial sector to accidents caused by wastes, it would desirable if the fund develops in two stages as analyzed in Section III of this article.

I. INTERNATIONAL LIABILITY REGIMES

A. *The Oil Pollution Regime*

The oil pollution regime is the only comprehensive private liability regime in international law. The oil pollution regime vividly illustrates the preoccupation of the oil industry with limited liability as the type of

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2. *United Nations Officials See Basel Treaty as Limping into Effect with Limited Support*, INT'L ENVTL. DAILY (BNA), May 22, 1992, *available in* LEXIS, Nexis Library, Omni File. The Convention needed twenty ratifications in order to enter into force. At present, the following twenty-two countries have ratified the Convention: Argentina, Australia, China, Czechoslovakia, El Salvador, Finland, France, Hungary, Jordan, Latvia, Liechtenstein, Mexico, Nigeria, Norway, Panama, Poland, Romania, Saudi Arabia, Sweden, Switzerland, Syria, and Uruguay. It is interesting to note that the United States and the member states of the European Community (EC), except for France, have not ratified the Convention. The United States and the European Community countries are the major exporters of hazardous wastes.

3. The current negotiations also involve the creation of an emergency fund. *See* Decisions I/5 and I/14 of the Conference of the Parties to the Basel Convention, UNEP/CHW.1/24, Annex II (Dec. 1992).

liability that will not jeopardize insurance availability. It is essential to mention that the first conventions dealing with oil pollution were conventions on limitations of liability, and that the idea of limiting liability for oil pollution damage preceded the idea of creating a comprehensive regime for oil pollution.[4]

The current international regime of oil pollution is comprised of the 1969 Convention on Civil Liability for Oil Pollution Damage[5] and the 1971 Fund Convention.[6] These Conventions were amended by the 1984 Convention on Civil Liability for Oil Pollution Damage[7] and the 1984 Fund Convention.[8] To be party to a Fund Convention, states must be parties to the respective Liability Convention. The initial Conventions and their amendments co-exist, and states can be parties to one or both of them at the same time.[9]

The oil and tanker industry is anxious to avoid liability under international conventions and has accordingly devised voluntary compensation schemes. One such scheme, the Tanker Owners Voluntary Agreement Concerning Liability for Oil Pollution (TOVALOP), provides for strict and limited liability of shipowners just as the Conventions on Civil Liability do. Another scheme, the Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution (CRISTAL), provides for a fund similar to those prescribed by the Fund Conventions.[10] By adopting

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4. *See, e.g.*, International Convention for the Unification of Certain Rules Relating to the Limitation of Liability of Owners of Sea Going Vessels, Aug. 25, 1924, *reprinted in* INTERNATIONAL MARITIME CONVENTIONS 1383 (Ignacio Arroyo ed., 1991); International Convention Relating to the Limitation of Liability of Owners of Sea-going Ships, Oct. 10, 1957, *reprinted in* INTERNATIONAL MARITIME CONVENTIONS 1389 (Ignacio Arroyo ed., 1991).

5. Convention on Civil Liability for Oil Pollution Damage, Nov. 29, 1969, 973 U.N.T.S. 3, *reprinted in* 9 I.L.M. 45 (1970) [hereinafter 1969 Convention]. *See also* Protocol to the 1969 International Convention on Civil Liability for Oil Pollution Damage, Nov. 19, 1976, *reprinted in* 16 I.L.M. 617 (1977) (the purpose of this Protocol was to amend the "Unit of Account" in which limits of liability are expressed. The initial unit was the gold franc; the Protocol replaced it with "Special Drawing Rights" (SDRs)).

6. International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, Dec. 18, 1971, *reprinted in* INTERNATIONAL CONVENTIONS ON MARITIME LAW 236 (Comité Maritime International ed., 1987)[hereinafter 1971 Fund Convention]. *See also* Protocol to International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971, Nov. 19, 1976, *reprinted in* 16 I.L.M. 621 (1977).

7. Protocol of 1984 to Amend the International Convention on Civil Liability for Oil Pollution Damage, May 25, 1984, *reprinted in* 2 INTERNATIONAL PROTECTION OF THE ENVIRONMENT 1 (Bernd Rüster & Bruno Simma eds., 1990) [hereinafter Protocol of 1984 to Amend 1969 Convention].

8. Protocol of 1984 to Amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, May 25, 1984, *reprinted in* 2 INTERNATIONAL PROTECTION OF THE ENVIRONMENT 21 (Bernd Rüster and Bruno Simma eds., 1990)[hereinafter 1984 Fund Convention].

9. DAVID W. ABECASSIS & RICHARD L. JARASHOW, OIL POLLUTION FROM SHIPS: INTERNATIONAL, UNITED KINGDOM AND UNITED STATES, LAW AND PRACTICE 246-47 (1985).

10. *Id.* at 303.

[T]he two schemes operate together as an integrated whole, but they do not

voluntary compensation schemes, the oil industry has hoped to demonstrate to governments that international treaties are unnecessary or at least to influence the emerging international norms for oil pollution.[11] The industry has failed in both endeavors. The 1969 Convention and the 1971 Fund Convention have entered into force, and the 1984 regime is far more progressive than the one advocated by industry.[12]

The 1969 Convention imposes on shipowners strict and limited liability for oil pollution damage[13] and joint and several liability when two or more ships are involved and the pollution damage is not reasonably separable.[14] Shipowners can limit their liability to a specific amount by creating a limitation fund.[15] However, they are not entitled to limited liability if the incident that caused pollution is the result of their "fault or privity."[16] The concept of "fault or privity" is not further explained in the 1969 Convention. The 1984 Convention clarified it by providing that shipowners are not entitled to limit their liability if it is proved that the pollution damage was the outcome of an intentional act or omission, or from reckless behavior and with knowledge that such damage would probably result.[17] Reckless behavior, however, is a flexible concept providing courts with significant latitude to impose unlimited liability.

The limitation fund established by the owner is distributed among the claimants in proportion to the amount of their claims. The distribution of claims is a smooth procedure when the total amount claimed does not exceed the limitation fund established by the owner, otherwise it may be delayed.[18]

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apply to cases actually covered by their respective international legal counterparts: a claimant cannot recover under both the Fund Convention and CRISTAL, for instance, but he can recover under the Liability Convention and CRISTAL if the Fund Convention does not apply to the case.

Id. See generally CHRISTOPHER HILL, MARITIME LAW 311-16 (1989).

11. ABECASSIS & JARASHOW, *supra* note 9, at 304.

12. *Id.*

13. 1969 Convention, *supra* note 5, art. III(2). According to article III(2), shipowners are exempt from liability in cases of *force majeure*, or when pollution damage is wholly caused by a third party with the intent to cause such damage, or by negligence or a wrongful act of a government or other authority responsible for the maintenance of lights or other navigational aids. The term "navigational aids" is too vague. In an incident involving the oil pollution of Swedish territorial waters by a Soviet tanker, the Soviet tanker was able to prove that the pollution was due to a failure to mark a rock on the navigation chart. *See* HILL, *supra* note 10, at 291.

14. 1969 Convention, *supra* note 5, art. IV.

15. According to article V(1) as amended in 1976, shipowners can limit their liability to an amount of 133 SDRs for each ton of the ship's weight. This amount shall not exceed fourteen million SDRs. *See supra* note 5.

16. 1969 Convention, *supra* note 5, art. V(2).

17. Protocol of 1984 to Amend 1969 Convention, *supra* note 7, art. 6(2).

18. ABECASSIS & JARASHOW, *supra* note 9, at 217. The fund has been involved in sixty cases. In one case, it had not been possible to fully compensate the damage. Another case where claims may exceed the limit is still pending. *See* Günther Doeker & Thomas Gehring, RESEARCH PAPER NO. 32, *in* LIABILITY FOR ENVIRONMENTAL DAMAGE 30 (United Nations Con-

Under the Convention, the plaintiff can bring an action for compensation only in the courts of the contracting state where the damage occurred.[19] Nonetheless, according to conflicts of law rules, a plaintiff can bring an action in the courts of a non-contracting state if the person responsible for the pollution damage is domiciled within that state.[20]

The Convention also provides for compulsory insurance of shipowners registered in a contracting state and carrying more than two thousand tons of oil in bulk.[21] One of the advantages of compulsory insurance is that it drives out of the market those shipowners who do not have adequate assets to cover possible pollution damage. This effect is tempered, however, by the fact that only those shipowners carrying two thousand tons of oil are required to maintain insurance.[22] National governments must enforce the compulsory insurance provision by ensuring that the ships they register maintain insurance and carry an insurance certificate on board.[23] Ships registered in contracting states with no insurance certificate are not allowed to engage in the business of carrying oil.[24] Ships registered in non-contracting states are also required to hold such a certificate whenever they enter or leave ports or off-shore terminals of contracting states.[25] This prevents those shipowners from acquiring a competitive advantage over ships of contracting states.[26] The 1984 Convention further clarifies that contracting states should mutually recognize the certificates they issue and that a ship registered in a non-contracting state can obtain such a certificate from the authorities of any contracting state.[27]

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ference on the Environment and Development ed., 1992) [hereinafter UNCED].

19. 1969 Convention, *supra* note 5, art. IX. Article VIII also provides that the plaintiff has no right to compensation if she brings an action after three years from the date the damage occurred. No action can be brought after six years from the date of the incident that caused the damage.

20. ABECASSIS & JARASHOW, *supra* note 9, at 220-21.

> [T]his has been dramatically illustrated in the *Amoco Cadiz* case off France (a contracting state) in 1978, where French plaintiffs, including the French government, instituted actions in the United States (which was not a contracting state) where the managers of the ship were domiciled. The other defendants included the owner, registered in Liberia (a contracting state) and the ship builder, registered in Spain (also a contracting state). The United States Court of Appeals rejected the plea of *forum non conveniens* made by the ship builder, and the District Court for the Northern District of Illinois proceeded to enter judgment against the owners, the managers, and their parent company.(citations omitted).

Id. *See also* Tullio Scovazzi, *Industrial Accidents and the Veil of Transnational Corporations*, *in* INTERNATIONAL RESPONSIBILITY FOR ENVIRONMENTAL HARM 395, 413-21 (Francesco Francioni & Tullio Scovazzi eds., 1991) [hereinafter ENVIRONMENTAL HARM].

21. 1969 Convention, *supra* note 5, art. VII(1).

22. ABECASSIS & JARASHOW, *supra* note 9, at 224.

23. 1969 Convention, *supra* note 5, art. VII(2), (4).

24. *Id.* art. VII (10).

25. *Id.* art. VII(11).

26. ABECASSIS & JARASHOW, *supra* note 9, at 225.

27. Protocol of 1984 to Amend 1969 Convention, *supra* note 7, art. 7.

The 1969 Convention applies exclusively to pollution damage caused within the territory or the territorial sea of contracting states.[28] Pollution damage is defined as loss or damage caused from the escape or discharge of oil from a ship carrying oil.[29] The loss or damage also includes "the costs of preventive measures and further loss or damage caused by preventive measures."[30] Preventive measures, in turn, are defined as reasonable measures taken *after* the oil spill has occurred for the prevention or minimization of pollution damage.[31] The definition of oil pollution damage has been criticized as vague because only personal injuries are covered under the Convention, while there is no specification for the type and scope of other damages.[32]

To some extent the 1984 Convention has remedied the shortcomings of the 1969 Convention's definition of oil pollution damage. The 1984 Convention establishes that compensation should cover not only personal injuries, but also include property damages and loss of profit.[33] Claims for compensation for impairment of the environment are limited to the cost of reasonable measures actually undertaken or measures to be undertaken for reinstatement of the environment.[34] The Convention does not provide details on causation, which damages are considered remote, or information on how to quantify damages such as loss of future earnings.[35] Instead, the Convention leaves this task to national courts. Yet, lack of details on causation and quantification should not be conceived as a shortcoming of the Convention.[36] Until sufficient national legislation is passed, case-by-case adjudication can address these details better than general treaty provisions. International conventions have to maintain a certain level of flexibility in order to accommodate future developments.

Another innovation of the 1984 Convention is that it establishes liability not only for occurrences resulting in pollution damage but also occurrences creating "a grave and imminent threat of causing such damage."[37] Plaintiffs can now be compensated not only for preventive measures after pollution has occurred but also for measures taken to avert threats of pollution.

The geographical scope of the 1984 Convention includes the exclusive economic zone as well as the territory and the territorial sea of the con-

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28. 1969 Convention, *supra* note 5, art. 2.

29. *Id.* art. I(6).

30. *Id.*

31. *Id.* art. I(7).

32. ABECASSIS & JARASHOW, *supra* note 9, at 209.

33. Protocol of 1984 to Amend 1969 Convention, *supra* note 7, art. 2(3). *See also* ABECASSIS & JARASHOW, *supra* note 9, at 237-38.

34. ABECASSIS & JARASHOW, *supra* note 9, at 237-38.

35. *Id.*

36. *But see id.* at 209, 239.

37. *Compare* 1969 Convention, *supra* note 5, art. I(8) *with* Protocol of 1984 to Amend 1969 Convention, *supra* note 7, art. 2(4).

tracting states.[38] Liability is channelled to the owner, but other people that perform services for the ship such as the manager, charterer, or operator of the ship[39] can be held liable if the damage resulted from a reckless or intentional act or omission and with knowledge that such damage would probably result. As mentioned above, the term "recklessly" provides courts with ample discretion to hold these persons liable. The Convention does not provide for liability of the builder or the repairer of the ship, but the builder or repairer may be held liable under domestic law.[40]

One of the priorities of 1984 Convention was to raise the liability limits of the 1969 Convention. The liability ceilings adopted were considered too high by some states and therefore the final draft of the Convention was adopted with many abstentions.[41] The procedure for revising the liability ceilings adopted in the 1984 Convention does not require a Conference, as did the 1969 Convention.[42] The 1984 Convention merely requires an amendment adopted by the Legal Committee of the International Maritime Organization (IMO). The amendment is considered accepted within eighteen months after notification to all state parties, unless a quarter of the state parties object.[43] Industry's preoccupation with the repercussions of liability on insurance is evident: state parties will consider the potential increase in insurance costs when contemplating any revision of the liability ceiling.[44]

The 1971 Fund Convention supplements the 1969 Liability Convention and provides for compensation of victims of pollution[45] and for indemnification of the owner held liable under the Liability Convention.[46] Indemnification of the shipowner was excessively debated during the drafting of the Convention because of the conflict of interests between states with shipping industry and oil receiving states that finance the Fund.[47] Finally, the indemnification provision was abolished in the 1984

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38. *Compare* 1969 Convention, *supra* note 5, art. II *with* Protocol of 1984 to Amend 1969 Convention, *supra* note 7, art. 3.

39. According to article 4(2) of the Protocol of 1984 to Amend 1969 Convention, *supra* note 7, these people include the following: the servants or agents of the owner or the members of the crew; the pilot or any other person who, without being a member of the crew, performs services for the ship; any person performing salvage operations with the consent of the owner or on the instructions of a competent public authority; any person taking preventive measures; and all servants or agents of persons mentioned above.

40. ABECASSIS & JARASHOW, *supra* note 9, at 233.

41. *Id.* at 240. According to article 4 of the Protocol of 1984 to Amend 1969 Convention, *supra* note 7, shipowners can limit their liability to the three million SDRs for a ship that does not exceed five thousand units of tonnage; for a ship with additional tonnage, an additional 420 million SDRs are required. In any case the amount can not exceed 59.7 million SDRs.

42. Protocol of 1984 to Amend 1969 Convention, *supra* note 7, art. 15.

43. *Id.* art. 15(7).

44. *Id.* art. 15(5).

45. 1971 Fund Convention, *supra* note 6, art. 4(6). The amount of compensation can in no case exceed 900 million francs or be lower than 450 million francs.

46. *Id.* art. 5(1).

47. ABECASSIS & JARASHOW, *supra* note 9, at 261.

Fund Convention.[48]

Compensation is provided for pollution damage[49] only if the claimant is unable to obtain full and adequate compensation under the Liability Convention.[50] The claimant can also recover preventive costs as defined by the Liability Convention.[51] Preventive costs are those costs incurred from measures undertaken *after* the oil spill occurred. The 1984 Fund Convention further improved this definition by providing that the claimant is entitled to compensation for preventive measures taken *before* the occurrence of the oil spill.[52]

Under the 1971 Fund Convention, the amount of damages to which the victims are entitled is unrelated to the amount of indemnification paid to the owner. The provision relating to distribution of Fund resources among claimants is ambiguous.[53] The 1984 Fund Convention[54] clarified this provision by providing that claims against the Fund should be treated as a separate group and distributed *pro rata* disregarding the extent to which they have been satisfied by the limitation fund of the Liability Convention.[55] According to Fund practice, the claims covered under its provisions are restoration of the environment, loss of livelihood, loss of income, and environmental damage.[56] But claims to recover costs for environmental damage can be raised only if economic interests are affected.[57]

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48. 1984 Fund Convention, *supra* note 8, art. 7.

49. Both the 1969 Liability Convention and the 1971 Fund Convention define pollution damage in the same terms. *See* 1971 Fund Convention, *supra* note 6, art. 1(2).

50. The claimant is unable to obtain full and adequate compensation when no liability for damage arises under the Liability Convention, or when the owner liable under the Liability Convention is financially incapable of meeting her obligations, or when the damage exceeds the owner's limitation fund. 1971 Fund Convention, *supra* note 6, art. 4(1).

51. *See* 1971 Fund Convention, *supra* note 6, art. 1(9).

52. 1984 Fund Convention, *supra* note 8, art. 2(3). The 1984 Fund Convention defines preventive measures as the 1984 Liability Convention does. *See id.* art. 2(2).

53. 1971 Fund Convention, *supra* note 6, art. 4(5):

> Where the amount of established claims against the Fund exceeds the aggregate amount of compensation payable under paragraph 4, the amount available shall be distributed in such manner that the proportion between any established claim and the amount of compensation actually recovered by the claimant under the Liability Convention shall be the same for all claimants.

See also ABECASSIS & JARASHOW, *supra* note 9, at 270.

54. The 1984 Fund Convention has also raised the liability limits to 135 million SDRs. *See also* 1984 Fund Convention, *supra* note 8, art. 6(4)(c), which calls for liability limits to be raised to 200 million SDRs in case state parties to the Convention receive oil equal to 600 million tons. This is because oil-receiving states contribute to the Fund. *See infra* at 71. Thus, in practice the limit will be raised only if the United States together with Japan, or with Italy and France, or with Italy and the Netherlands, participate in the Fund. *See* UNCED, *supra* note 18, at 34.

55. ABECASSIS & JARASHOW, *supra* note 9, at 269-70, 295.

56. *See generally id.* at 274-77.

57. It is difficult to quantify harm to the environment when tangible economic loss or personal injury is not involved. *See* Note by the Director General on Claims Relating to Damage to the Marine Environment, IOPC Fund, Exec. Comm., 30th Sess., Agenda Item 3,

The Fund's settlement procedure is quite remarkable. The Fund has developed a Claims Manual that provides a simple procedure for claim settlement.[58] The Fund has a good working relationship with the Protection and Indemnity Clubs (P&I Clubs) of shipowners, and claimants can bring their claims just once to either of these two bodies in order to obtain compensation.[59] Subsequently, the Club and the Fund divide the amount paid to the claimant.[60] P&I Clubs are composed of shipowners who organize to mutually indemnify each other against lawsuits in case of damage to cargo or injuries to third parties. The Clubs started to operate in the nineteenth century when underwriters at Lloyd's of London would cover only three quarters of hull damage.[61] Today P&I Clubs cover ninety percent of the world shipping industry. They provide unlimited coverage in most cases, except for oil pollution and nuclear incidents.[62] P&I Clubs, while considered a traditional form of insurance, are one of the oldest forms of alternative insurance.[63]

The Fund also provides for prepayment of damages after verifying that the shipowner is entitled to liability limits under the Liability Convention. To receive prepayment, one must also demonstrate undue financial hardship on the part of the shipowner.[64] The Fund additionally provides for credit facilities to contracting states "in imminent danger of substantial pollution damage."[65] The 1984 Fund Convention enhanced these provisions by providing for compensation even if the shipowner has not yet established a limitation fund.[66]

The Fund is financed by entities of states that have received in the relevant calendar year more than 150,000 metric tons of oil.[67] Therefore, states with modest oil imports can become parties to the Fund Convention, enjoying its full protection, without imposing on the industry to contribute to the Fund.[68] Enforcement is left to states, which should make sure that industry's financial obligation to the Fund are fulfilled and which should impose sanctions when necessary.[69] The 1984 Fund Convention additionally provides that states can be held liable if their failure to police the contributors results in financial loss to the Fund.[70]

FUND/EXC.30/2 (Nov. 29, 1991); *see also* IOCP Fund Resolution No. 3—Pollution Damage, Annex, FUND/EXC.30/2 (Oct. 1980).

58. ABECASSIS & JARASHOW, *supra* note 9, at 272.

59. *Id.* at 272-73 (mentioning the Fund's internal regulations).

60. *Id.* at 273.

61. BRUCE FARTHING, INTERNATIONAL SHIPPING 49 (1987).

62. *Id.*

63. J. Brady Young, *High Stakes in the Alternative Market: Non-Traditional Risk-Financing Techniques*, BEST'S REV., Jan. 1992, at 47.

64. ABECASSIS & JARASHOW, *supra* note 9, at 273.

65. *Id.*

66. 1984 Fund Convention, *supra* note 8, art. 6(5).

67. 1971 Fund Convention, *supra* note 6, art. 10(1).

68. ABECASSIS & JARASHOW, *supra* note 9, at 278.

69. 1971 Fund Convention, *supra* note 6, art. 13(2).

70. 1984 Fund Convention, *supra* note 8, art. 16(2).

In general, the oil pollution regime is very comprehensive, but it has one important shortcoming: the prescription of limited liability. The inadequacy of liability limits is evidenced by their repeated increases after environmental disasters.[71] After the *Amoco Cadiz* disaster, France, a state party to the 1974 Convention, refused to collect the money deposited in the limitation fund because of limited liability restraints. Instead, France brought an action in the United States, the domicile of the ship's builder and operator.[72]

Except for the prescription of limited liability, the oil pollution regime provides a model private liability system for environmental accidents with international implications.[73] The 1984 Civil Liability and Fund Conventions clarified many of the provisions of the Conventions they have amended. They provide explicitly for compensation for economic loss, and for recovery of expenditures for restoration of the environment. They also provide for compensation even when the shipowner has not established a limitation fund. Because of these progressive provisions, the Conventions have yet to enter into force. The United States Congress refused to ratify the Conventions, and therefore the prospects of the Conventions ever entering into force are slim.[74] For this reason the IMO decided to amend the Conventions in order to ease their ratification.[75]

After the *Exxon Valdez* disaster, the United States enacted legislation[76] that not only increased the liability limits for oil pollution[77] but also provided for unlimited liability in many more instances than do the 1971 and 1984 Conventions on Civil Liability.[78] Even before the Oil Pollution Act, United States courts interpreted the Limitation Liability Act of 1851[79] broadly. According to the Act, shipowners are not entitled to limit their liability if the damage occurred due to their privity or knowl-

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71. UNCED, *supra* note 18, at 37-38 (For example, liability limits were increased by fifty percent after the *Amoco Cadiz* incident).

72. *See* In re Oil Spill by the Amoco Cadiz off the Coast of France on March 16, 1978, 954 F.2d 1279 (7th Cir. 1992).

73. The success of the Conventions is evidenced by the fact that many countries have ratified them. For example, since their entry into force, 71 countries have ratified the 1971 Civil Liability Convention, and 47 countries have ratified the 1971 Fund Convention.

74. *See supra* note 54.

75. Consideration of Draft Protocols with Amendments to the Intergovernmental Oil Pollution Liability and Compensation System Based on the 1969 Civil Liability Convention and the 1971 Fund Convention and Related Issues, IMO Leg. Comm., 66th Sess., Agenda Item 9, at 21-24, IMO Doc. LEG 66/9 (Mar. 26, 1992).

76. Oil Pollution Act, 33 U.S.C. §§ 2701-2761 (1990).

77. 33 U.S.C. § 2704(a).

78. *Compare* 1969 Convention, *supra* note 5, art. V(2) and Protocol of 1984 to Amend 1969 Convention, *supra* note 7, art 6(2) *with* 33 U.S.C. § 2704(c), which provides that polluters are not entitled to limited liability in case of gross negligence, willful misconduct or "*violation of an applicable Federal safety, construction, or operating regulation*" (emphasis added). In addition, according to the Oil Pollution Act, polluters are not accorded as many defenses as under the Civil Liability Convention. *Compare* 1969 Convention, *supra* note 5, art. III(2) *with* 33 U.S.C. § 2703.

79. 46 U.S.C. §§ 181-89 (1982).

edge.[80] Courts initially supported Congress' purpose for the Act — to enhance the competitiveness of the United States shipping industry, which was at that time comprised of small shipowners. But during the 1950's and 1960's, the courts refused to provide the same protection to multinational oil corporations. The courts instead interpreted the statute in favor of pollution victims. More specifically, the courts started imposing unlimited liability not only when shipowners had actual knowledge of an imminent threat of an accident but also when they should have had knowledge of such a threat, such as knowledge of the lack of seaworthiness or faulty condition of the ship.[81] Perhaps the different national courts that will interpret the Liability Convention will follow the same path. As emphasized, the explicit provision for unlimited liability when shipowners recklessly cause damage opens the door for such an interpretation.

In practice, the 1971 regime has functioned smoothly with an amicable resolution of most disputes. This is largely due to the fact that oil spills do not directly affect population centers by causing injuries and deaths. Oil spills have a more subtle effect on the surrounding marine environment. A liability regime for transnational waste movements can build upon many of the provisions of the oil pollution regime.

B. *International Liability of the Carriers of Dangerous Goods*

The Convention on Civil Liability for Damage Caused During Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels (CRTD)[82] was prepared by the United Nations Economic Commission for Europe (ECE), but it is opened for signature to other countries.[83] The Convention places strict and limited liability on operators of railway lines and persons in control of vehicles carrying dangerous goods.[84]

In order to facilitate the identification of the liable person, it is presumed that the person in whose name the vehicle is registered is liable. When such registration does not exist, the owner will be held liable, unless the owner can prove that another person was in control of the vehicle

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80. 46 U.S.C. § 183(a).

81. Linda Rosenthal & Carol Raper, *Amoco Cadiz and Limitation of Liability for Oil Spill Pollution: Domestic and International Solutions*, 5 VA. J. NAT. RESOURCES L. 259, 270-72 (1985).

82. UNITED NATIONS ECONOMIC COMMISSION FOR EUROPE (ECE), CONVENTION ON CIVIL LIABILITY FOR DAMAGE CAUSED DURING CARRIAGE OF DANGEROUS GOODS BY ROAD, RAIL OR INLAND NAVIGATION VESSELS (CRTD), U.N. Doc. ECE/TRANS/84, U.N. Sales No. E.90.II.E.39 (1990) (including Explanatory Report) [hereinafter CRTD Convention]. The Convention has not yet come into force.

83. *Id.* art. 22.

84. *Id.* art. 1(8). When the vehicle on which the dangerous goods are transported is carried on another vehicle the operator of that other vehicle will be considered the carrier. *See* art. 1(8)(a). When damage has resulted from an incident involving two or more vehicles, and the damage is inseparable, both carriers will be held jointly and severally liable. *See* art. 8.

with or without the owner's consent.[85]

The primary concern of the drafters of the treaty was to protect potential victims, while simultaneously minimizing insurance costs. Therefore, the different solutions proposed by the drafters contemplated both of those considerations.[86] The possibility of channeling liability to the owner of goods was excluded because ownership may change many times during transport, making identification of the owner burdensome.[87] Channeling responsibility to the producer of goods was also excluded because the producer has no control over the carriage. Moreover, the carriage may take place many years after production and, consequently, it would be unfair to require the producer to keep insurance just in case of an accident during transportation. Many times dangerous goods are transported together, and it is difficult to distinguish which producer's goods have caused the damage.[88] Imposing liability on the shipper was additionally viewed as impractical. The shipper would have to take out insurance for each and every consignment, and it would be difficult at the time of an accident to decipher which shipper's substance caused the damage.[89]

Placing liability on the carrier seemed the most reasonable solution to most governments since the carrier is in control of the movement of goods, can be easily identified by the victims, and can purchase insurance on an annual basis. Carriers fiercely opposed this proposition. They claimed that accidents occur due to the inherent danger of the goods carried and that imposing liability on the carrier will only increase the cost of insurance, distort competition, and drive many carriers out of business. The carriers proposed joint responsibility of carriers and shippers. However, joint responsibility was rejected because it was considered impractical to place responsibility on the shipper, and because most governments considered joint and several liability too complex. Yet recognizing the inequities of placing responsibility on the carrier when other persons are also responsible, the Convention renders the consignor or consignee liable for accidents caused during loading or unloading without the participation of the carrier. Joint liability is additionally established when both the carrier and another person are involved in loading and unloading.[90] Except for the reasons mentioned above, persons other than the carrier are not required to take out insurance.[91]

The issue of whether liability should be limited or unlimited was a source of contention during the drafting of the treaty. It is interesting to note that a large number of governments favored unlimited liability, arguing that the adoption of unlimited liability in domestic systems has not

85. *Id.* art. 1(8).
86. *Id.* at 6, Explanatory Report.
87. *Id.*
88. *Id.*
89. *Id.* at 7.
90. *Id.* art. 6.
91. *Id.* art. 6(2)(a).

prevented the operation of compulsory insurance.[92] As a compromise, limited liability was adopted,[93] while it was made clear that governments may adopt higher limits or unlimited liability.[94] The Convention also provides that when carriers are entitled to limit their liability, they must establish a limitation fund with the court where an action is brought.[95] Carriers are not entitled to limit their liability when the damage is caused by their intentional or reckless act or omission or by an intentional or reckless act of their servants and agents.[96]

The defenses provided in this Convention are broader than those of the Oil Pollution Convention.[97] Except for *force majeure*, carriers cannot be held liable if they can prove that consignors or other persons did not fulfill their obligation to inform them about the dangerous nature of goods. The carriers must also prove that they did not know, or were not required to know, that the goods carried were dangerous.[98] The carrier is also exonerated from liability if the damage resulted from an intentional or negligent act or omission of the victim.[99] In case the carrier is not liable, other persons may be held liable, but many important provisions of the Convention will not apply to them.[100]

Following the 1969 Oil Pollution Convention, the CRTD Convention provides for compulsory insurance.[101] The insurance covers not only the carrier mentioned in the insurance policy, but it also covers any other person in control of the vehicle at the time of an accident.[102] The participants felt that insurance companies would be able to insure carriers, and

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92. *Id.* at 9, Explanatory Report.

93. For the limits of liability, see *id.* art. 9:

> The liability of the road carrier and of the rail carrier under this Convention for claims arising from any one incident shall be limited as follows: (a) with respect to claims for loss of life or personal injury: eighteen million units of account (b) with respect to any other claim: twelve million units of account. The liability of the carrier by inland navigation vessel under this Convention for claims arising from any one incident shall be limited as follows: (a) with respect to claims for loss of life or personal injury: eight million units of account (b) with respect to any other claim: seven million units of account. *See also id.* art. 37, Explanatory Report. The reason for imposing lower liability limit for inland navigation carriers was the absence of insurance markets for such carriers, and concerns that small such carriers will not be able to insure up to the amounts provided for rail and road carriers.

94. *Id.* art. 24.

95. *Id.* art. 11.

96. *Id.* art. 10.

97. *Compare* 1969 Convention, *supra* note 5, art. III(2) *with* CRTD Convention, *supra* note 82, art. 5(4).

98. *See also* Convention on the Contract for the International Carriage of Goods by Road (CMA), May 19, 1956, art. 22, *reprinted in* 399 U.N.T.S. 189. Servants and agents of a carrier are exonerated from liability as well unless they acted with intent or with knowledge that such damage would probably result. *See* CRTD Convention, *supra* note 82, art. 5(7).

99. CRTD Convention, *supra* note 82, art. 5(5).

100. *Id.* art. 7.

101. *Id.* art. 13.

102. *Id.* art. 13(2).

they believed that, because of the limited amounts of liability, even small carriers would be able to insure. The insurance companies were in favor of such a regime. While they claimed that strict liability may initially lead to an increase in premiums, they maintained that such an increase would be reassessed by taking into account the number and severity of claims.[103] The monitoring of insurance provisions is left to state parties. Each state party must designate competent authorities that will issue or approve certificates verifying that the carriers have obtained insurance.[104] In order to speed the settlement of disputes, claims for compensation may be brought directly against the insurer. No action against the carrier or its insurer may be brought three years after the victim knew or should have known of the damage and the identity of the carrier, or ten years after the incident.[105] Actions may be brought in the courts of the state party where damage occurred, where the incident took place, or where preventive measures were taken. In addition, and contrary to the oil pollution and nuclear liability regimes, an action may be brought where carriers have their habitual residence — the state of registration when the ship entangled in the accident is subject to such registration.[106] Some governments also proposed the establishment of a fund for use when compensation exceeds the liability limits, but the proposal did not gain the support of the majority of governments. It was recognized that the oil importers sponsoring the oil pollution fund were more readily identifiable than industries involved with dangerous goods.[107]

The definition of dangerous goods provided by the Convention is very comprehensive.[108] The Convention refers to the European Agreement Concerning the International Carriage of Dangerous Goods by Road (ADR),[109] which contains extensive lists of dangerous substances subject to frequent updates. This puts carriers on notice about which substances may entail liability under the Convention. The definition of dangerous goods is broad enough to include hazardous wastes as long as there is no specific liability regime for the transfers of hazardous wastes.[110]

The damages covered under the Convention involve loss of life or personal injury and loss of or damage to property.[111] Recovery for pure economic loss is not explicitly covered by the Convention. It should be

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103. *Id.* at 9, Explanatory Report.

104. *Id.* art. 14.

105. *Id.* art. 18.

106. *Id.* art. 19.

107. *Id.* at 10, Explanatory Report.

108. *Id.* art. 1(9).

109. ECONOMIC COMMISSION FOR EUROPE, EUROPEAN AGREEMENT CONCERNING THE INTERNATIONAL CARRIAGE OF DANGEROUS GOODS BY ROAD, U.N. Doc. ECE/TRANS/80, U.N. Sales No. E.89.VII.2 (including amendments up to January 1990).

110. Basel Convention, *supra* note 1, art. 12, provides that state parties must adopt a liability protocol concerning the transfrontier movements of hazardous wastes. *See also supra* note 3.

111. CRTD Convention, *supra* note 82, art. 1(9).

mentioned, however, that during the drafting, many states resisted explicit exclusion of pure economic loss and maintained that because national laws were still evolving such issues must be covered by domestic legislation.[112] Loss or damage from polluting the environment may also be recovered provided that compensation for impairment of the environment, other than loss of profit, is restricted "to costs of reasonable measures of reinstatement actually undertaken or to be undertaken."[113] The costs of preventive measures and loss or damage caused by preventive measures must also be covered.[114] Preventive measures, however, are defined as measures taken after an incident has occurred.[115]

An advantage of the Convention is that, by subjecting reckless carriers to unlimited liability, it leaves open the possibility for application of unlimited liability. In addition, the Convention justifiably renders consignors liable if they fail to inform carriers about the nature of dangerous goods. But unfortunately, the Convention does not go far enough. Establishing limited liability that could be superseded by expansive judicial interpretations or by national laws imposing increased liability limits or unlimited liability fails to bind states to a uniform liability regime. A fund sponsored by consignors or consignees seems also necessary since the aggravation of many accidents is due to improper packing or the inherent nature of dangerous goods. A fund could provide the mechanism through which persons profiting from the trade in dangerous goods will internalize the costs resulting from the transportation of such goods.

Yet attempts to impose liability on the shippers of dangerous substances within the framework of the Draft Convention Concerning the Carriage of Hazardous and Noxious Substances by Sea[116] have been met with strong resistance from the chemical industry. The chemical industry claims that liability should lie with the shipowner according to the traditional rules of maritime law. Another problem is that because many diverse industries are involved in the transportation of dangerous goods, it is difficult to create an effective international body capable of collecting contributions.

Recent proposals involve the establishment of an "International Dangerous Goods Scheme." Under the initial formulation of the Scheme, each shipper and shipowner had to purchase a dangerous goods certificate stating the amount and nature of the cargo, and in which trip it would be

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112. *Id.* at 17-18, Explanatory Report.

113. *Id.* art.1(9)(c).

114. *Id.* art. 1(9)(d).

115. *Id.* art. 1(11).

116. 1991 Draft Convention on Liability and Compensation in Connection with the Carriage of Hazardous and Noxious Substances by Sea, Jan. 25, 1991, IMO Doc. LEG. 64/4 [hereinafter HNS Convention]. The Convention has been recently amended. *See* 1992 Draft International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, Jan. 5, 1993, IMO Doc. LEG 684 [hereinafter HNS Revision].

transported.[117] Later in the negotiations, it was decided that only shippers should sponsor the Scheme[118] because that was more in line with the established law and practice initiated by the oil pollution regime.[119] The certificates purchased by shippers will be issued by "issuing agents" — governments[120] — on behalf of the Scheme.[121] Many problems, however, emerged in trying to identify the contributions of each industrial sector.[122] These problems would be difficult to resolve because of the lack of statistics identifying the rate of involvement of each industrial sector in accidents.[123] The chemical industry has proposed that only shipowners should participate in the Scheme. According to the chemical industry, shipowners must incorporate the cost of contributing to the Scheme into the freight price, and contribute the charge so collected to the Scheme. If they fail to contribute, they should be refused registration until they pay.[124] The proposal of the chemistry industry has been rejected.[125]

C. *The Nuclear Liability Regime*

The nuclear liability regime is comprised of three conventions: the Paris Convention[126] adopted by the Nuclear Energy Agency (NEA) of the

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117. HNS Convention, *supra* note 116, art. 17.

118. It has been proposed that the term "scheme" should be replaced by the term "fund." Consideration of a Draft International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, IMO Leg. Comm. 66th Sess., Agenda Item 9, at 9, IMO Doc. LEG. 66/9 (Mar. 26, 1992) [hereinafter 66th Session Report].

119. HNS Revision, *supra* note 116, art. 17.

120. Norway has proposed that in addition to issuing agents, voluntary "industry associations" should be able to issue HNS certificates. According to Norway's proposal, an industry association may include a trade sector, or part of a trade sector, world-wide or regional. The members of such associations will have to purchase HNS certificates, but the associations will have to contribute to the Scheme based on transport statistics. Shippers will have to reimburse their industry association according to their membership terms. *See* Consideration of a Draft International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, IMO Leg. Comm. 67th Sess., Agenda Item 9, Annex 2, at 6, IMO Doc. LEG 67/9 (Oct.13, 1992) [hereinafter 67th Session Report].

121. HNS Revision, *supra* note 116, art. 12, 14.

122. 66th Session, *supra* note 118, Annex 2.

123. 67th Session Report, *supra* note 120, at 5, 11.

124. Consideration of a Draft International Convention of Liability and Compensation for Damage in Connection with the Carriage of Dangerous Goods by Sea, Submitted by the European Chemical Industry Council (CEFIC), IMO Legal Comm., 65th Sess., Agenda Item 3, at 2, IMO Doc. LEG. 65/3/8 (Sept. 10, 1991). CEFIC reiterated its position in the 67th Session Report, *supra* note 120, at 7.

125. Report of the Group of Technical Experts on the Consideration of a Draft International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, IMO Leg. Comm. 67th Sess., Agenda Item 3, at 8, IMO Doc. LEG 67/WP.7 (Oct. 1, 1992).

126. Convention on Third Party Liability in the Field of Nuclear Energy, July 29, 1960, 1041 U.N.T.S. 358 [hereinafter Paris Convention].

Organization for Economic Co-operation and Development (OECD),[127] the Vienna Convention[128] adopted by the International Atomic Energy Agency (IAEA),[129] and the Brussels Convention, which supplements the Paris Convention.[130] State parties to the Paris Convention are not parties to the Vienna Convention. For this reason, the Joint Protocol Relating to the Application of the Vienna and Paris Conventions[131] provides that a state party to the Vienna or Paris Conventions and the Protocol can recover damages from the operator of a nuclear facility installed in a state that is party to either Convention.[132]

Both the Paris and the Vienna Conventions impose strict[133] and limited liability on the operator of a nuclear installation[134] and joint and several liability when more than one operator is liable and the damage is not reasonably separable.[135] Limited liability was considered preferable because it was protective of the relatively new nuclear energy industry.[136] Channelling liability exclusively to the operator avoided the excessive administrative and insurance costs related with inquiries into the liability of the other actors such as suppliers and transporters.[137] The Conventions

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127. Seventeen OECD countries have signed the Convention: Belgium, Denmark, Finland, Germany, Greece, Italy, Netherlands, Norway, Portugal, Spain, Sweden, Turkey, and United Kingdom.

128. Vienna Convention on Civil Liability for Nuclear Damage, May 21, 1963, 1063 U.N.T.S. 265 [hereinafter Vienna Convention].

129. The state parties to the Vienna Convention are as follows: Argentina, Bolivia, Cameroon, Chile, Cuba, Egypt, Hungary, Mexico, Niger, Peru, Philippines, Poland, Trinidad & Tobago and Yugoslavia. Only Argentina and Yugoslavia are, however, nuclear power states.

130. Convention Supplementary to the 1960 Convention on Third Party Liability in the Field of Nuclear Energy, Jan. 31, 1963, 956 U.N.T.S. 264 [hereinafter Brussels Convention].

131. Joint Protocol Relating to The Application of the Vienna Convention and the Paris Convention, Sept. 21, 1988, *reprinted in* 42 NUCLEAR LAW 56 (NEA ed., 1988).

132. All these Conventions are concerned with liability issues regarding peaceful uses of nuclear power. The only Convention that touches on the military uses of nuclear power has never entered into force because of the sensitivity of national security issues. *See* Convention on the Liability of Operators of Nuclear Ships, May 25, 1962, *reprinted in* INTERNATIONAL CONVENTIONS ON MARITIME LAW, *supra* note 6, at 138. The Convention provides for strict and limited liability of the operators of nuclear ships (art. 2-3). No other person except for the operator can be held liable (art. 2). Operators of warships are also held liable (art. 1(11)).

133. According to Paris Convention, *supra* note 126, art. 9 and Vienna Convention, *supra* note 128, art. IV(3), operators are not held liable in cases of *force majeure*.

134. Paris Convention, *supra* note 126, art. 3, 6; Vienna Convention, *supra* note 128, art. IV(1), II(5).

135. Paris Convention, *supra* note 126, art. 5(b); Vienna Convention, *supra* note 128, art. II(3).

136. Norbert Pelzer, *Concepts of Nuclear Liability Revisited: A Post-Chernobyl Assessment of the Paris and the Vienna Conventions*, *in* NUCLEAR ENERGY LAW AFTER CHERNOBYL 97, 99 (Peter Cameron et al. eds., 1988).

137. *Id.* at 102. As far as the carriage of nuclear material is concerned both Conventions impose liability on the operator who sends and the operator who receives the material. *See* Paris Convention, *supra* note 126, art. 4; Vienna Convention, *supra* note 128, art. II. *See also* Convention Relating to Civil Liability in the Field of Maritime Carriage of Nuclear

also impose compulsory insurance on the operators of nuclear facilities. The specification of the amount, type, and terms of such insurance is left to each state party.[138]

The Conventions apply in cases that involve, inter alia, transportation and disposal of radioactive wastes.[139] Nuclear damage under the Conventions comprises loss of life, personal injury, and damage to property.[140] It does not include economic loss and loss of future earnings unless the courts of the competent state so provide.[141] The Brussels Convention prescribes a compensation scheme for damages caused by an incident at a nuclear installation whose operator is liable under the Paris Convention: a portion is provided by the operator's insurance, another by the installation state, and the balance by contracting states, according to a special formula based upon the GNP and the nuclear power of the installation state.[142] Victims can bring claims under the Conventions only in the courts of a state where the incident that caused nuclear damage occurred.[143] However, under the general rules of private international law, any state that suffers damage because of a nuclear incident has jurisdiction over such claims, and plaintiffs can engage in forum shopping.[144]

The nuclear liability regime does not address nuclear accidents as comprehensively as the oil pollution regime does with oil spills. The liability prescribed is limited, and the liability ceilings are ridiculously low[145] in light of a disaster such as Chernobyl. In addition, the Conven-

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Material, Dec. 17, 1971, *reprinted in* INTERNATIONAL CONVENTIONS ON MARITIME LAW, *supra* note 6, at 230. The purpose of the Maritime Carriage Convention is to ensure that operators of nuclear installations are exclusively liable for damages caused by a nuclear incident during the transport of nuclear material. More specifically, article 2 of the Convention provides that any person who could be held liable, according to international or national law applicable in maritime transportation, is exonerated from such liability if an operator of a nuclear installation is liable under the Paris or Vienna Convention or national law.

138. Paris Convention, *supra* note 126, art. 10; Vienna Convention, *supra* note 128, art. VII.

139. Paris Convention, *supra* note 126, art. 1(a)(ii), (iv), (v), and art. 8. *See also* Vienna Convention, *supra* note 128, art. I(g), (h), (j), and art. VI(2).

140. Paris Convention, *supra* note 126, art. 3.

141. Vienna Convention, *supra* note 128, art. I(k). *See also id.* art. VIII; Paris Convention, *supra* note 126, art 11.

142. Brussels Convention, *supra* note 130, art. 3.

143. Paris Convention, *supra* note 126, art. 13; Vienna Convention, *supra* note 128, art. XI.

144. Pelzer, *supra* note 136, at 103-04.

145. Under article 7 of the Paris Convention, *supra* note 126, the liability ceiling is fifteen million European Monetary Agreement Units of Account. National laws can set lower liability ceilings after examining the opportunities that operators have to obtain insurance, but in no case can liability limits be less than five million European Monetary Agreement Units of Account. Under article III of the Brussels Convention, *supra* note 130, the liability ceiling was increased to 120 million European Monetary Agreement Units of Account. The 1982 protocols to the Paris and Brussels Conventions that entered into force in 1988 have replaced the unit of account with SDRs. The Vienna Convention, *supra* note 128, does not set upper liability limits. Under article V(1), it just sets a minimum liability ceiling of five million dollars.

tions do not provide mechanisms to update liability limits and to compensate for preventive measures and economic loss as does the 1984 Liability Convention for Oil Pollution. Moreover, the ten year time frame within which the plaintiff can bring an action does not take into account that the effects of exposure to radiation may not appear for decades. Also there is no international fund to provide for immediate or residual relief after a nuclear disaster.[146] In other words, the particular nature of nuclear accidents makes the nuclear liability regime appear disconnected from reality. Only lately have there been efforts to update the conventions and specify their liability limits. The revision process requires close cooperation between OECD and IAEA.[147]

II. DOMESTIC SYSTEMS OF LIABILITY: THE EXPERIENCE OF THE UNITED STATES AND THE EUROPEAN COMMUNITY

A. *CERCLA and the Price-Anderson Act: Evidence of Linkage Between Liability and Insurance?*

This section analyzes United States legislation concerning the liability of generators, transporters and disposers of hazardous wastes, and operators of nuclear plants. The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)[148] governs the liability of hazardous waste generators, transporters, and disposers concerning the clean-up of hazardous waste sites. Yet the statute does not deal with personal injuries caused by hazardous waste sites. CERCLA represents a vivid illustration of the tensions surrounding the subject of liability and insurance. The same tensions are apparent in the Price-Anderson Act,[149] the statute governing nuclear liability.

1. CERCLA

While the Resource, Conservation and Recovery Act (RCRA)[150] sets the standards for waste disposal, CERCLA prescribes strict, unlimited, and retroactive[151] liability for actors involved in waste management. CERCLA also creates an 8.5 billion dollar fund, the Hazardous Substance

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146. Paris Convention, *supra* note 126, art. 8; Vienna Convention, *supra* note 128, art. VI(1).

147. UNCED, *supra* note 18, at 17.

148. The Comprehensive Environmental Response, Compensation and Liability Act was amended by the Superfund Amendment and Reauthorization Act in 1986 (SARA). Both these Acts are referred to as CERCLA or as CERCLA as amended by SARA, 42 U.S.C. §§ 9601-9675 (1986).

149. 42 U.S.C. §§ 2210-2214 (1988 & Supp. I 1990).

150. Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6991(k) (1982 & Supp. I 1984).

151. Retroactive liability extends liability to past mismanagement of hazardous wastes when no regulations regarding sound disposal were existing. *See, e.g.*, United States v. Northeastern Pharmaceutical & Chem. Inc. Co., 810 F.2d 726 (8th Cir. 1986); New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985).

Superfund, to clean up hazardous waste disposal sites.[152] The Superfund is financed by taxes on chemical and oil importing companies and by taxes on general revenues. It is frequently replenished because each time the Environmental Protection Agency (EPA) cleans a hazardous waste site it recovers its expenditures from private responsible parties.[153] Many times, however, the discovery and apportionment of liability among responsible parties entail time-consuming and very expensive settlement[154] and litigation procedures with hundreds of parties involved.[155]

Under CERCLA, four categories of persons are strictly liable for releases or threatened releases of hazardous waste from a disposal facility: the current owner of a disposal facility, the owner or operator of a facility at the time of disposal,[156] the generators of hazardous wastes disposed of at a facility, and the transporters of hazardous wastes.[157] Their liability includes all costs of removal or remedial action at hazardous waste sites[158] incurred by the federal or state government and all other necessary costs of response assumed by any other person. The costs of removal and remedial action must be consistent with the National Contingency Plan (NCP).[159] Liability also includes all damages resulting from the destruc-

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152. 42 U.S.C. § 9611(a).

153. 42 U.S.C. § 9604.

154. 42 U.S.C. § 9622 (this section specifies that the government can enter into a Consent Decree according to which Potential Responsible Parties (PRPs) have to reimburse it for response costs incurred or under which the PRPs agree to undertake response measures themselves. In extraordinary circumstances, these settlement agreements may include a covenant not to sue the PRPs).

155. OFFICE OF TECHNOLOGY ASSESSMENT (OTA), COMING CLEAN: SUPERFUND PROBLEMS CAN BE SOLVED 28-29 (1989).

156. *See* 42 U.S.C. § 9601(20)(A). The term "owner or operator" according to the act does not include "a person, who, without participating in the management of a . . . facility, holds indicia of ownership primarily to protect his security interest in the facility." Despite this provision, courts have held lenders liable under the act. In United States v. Maryland Bank & Trust Co., 632 F.Supp. 573. (D. Md. 1986), the court found a foreclosing lender liable under the act. *But see* United States v. Mirabile, 15 Envtl. L. Rep. (Envtl. L. Inst.) 20994 (E.D. Pa. Sept. 4, 1985), holding lenders that foreclosed not liable because they did not participate in the operation of the facility but only in the financial decisions. *But see* United States v. Fleet Factors Corp., 901 F. 2d 1550, 1557-8 (11th Cir. 1990), holding:

> [I]t is not necessary for the secured creditor actually to involve itself in the day-to-day operations of the facility in order to be liable . . . [n]or is it necessary for the secured creditor to participate in management decisions relating to hazardous waste. Rather, a secured creditor will be liable if its involvement with the management of the facility is sufficiently broad to support the inference that it could affect hazardous waste disposal decisions if it so chose.

See also New York v. Shore Realty Corp., 759 F. 2d 1032 (2d Cir. 1985), holding a stockholder and corporate officer individually liable for the continuing release of hazardous wastes. The security interest exemption was not applicable because the stockholder as a corporate officer had participated in the management of the facility.

157. 42 U.S.C. § 9607(a)(1)-(4).

158. Removal costs cover the short-term responses in cases of emergency at a disposal site. Remedial costs are the long-term clean-up costs. *See* 42 U.S.C. § 9601(D)(23), (24).

159. 42 U.S.C. § 9605. The NCP establishes procedures and standards for responding to releases of hazardous substances. The EPA is required to employ a hazard ranking sys-

tion or injury of national resources.[160] Consequently, liability under CERCLA covers damage to property and to the environment but not personal injuries.[161] Liability under CERCLA can be characterized as absolute due to the fact that the defenses provided are very limited.[162] Furthermore, the courts take an expansive approach interpreting those defenses. According to the interpretation of the courts, the government's burden of proof entails the following: the existence of a "facility;" a release of hazardous wastes from the facility; and a defendant that can be one of the persons — generator, transporter, owner, or disposer — that can be held liable under CERCLA.[163] The courts also have imposed joint and several liability on defendants when the harm caused is indivisible.[164] This is the case in most hazardous waste disposal sites where, because drums are crowded together, it is virtually impossible to identify the extent to which a particular defendant has contributed to the contamination of the surrounding environment and groundwater.

The RCRA provides for compulsory insurance of owners and operators of hazardous waste facilities[165] during the time of operation and thirty years subsequent to the facility closure. The insurance must cover all property damage and personal injury claims resulting from sudden accidental occurrences and non-sudden accidental occurrences.[166] In case insurance is not available, letters of credit, surety bonds, trust funds, corporate guarantees, or self-insurance can be used to demonstrate financial accountability.[167]

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tem in determining the facilities to be added to the National Priority List.

160. 42 U.S.C. § 9607(a)(4).

161. Despite the fact that the statute does not cover personal injuries, certain courts have allowed medical monitoring damages to be recovered as response costs. *See, e.g.*, Brewer v. Ravan, 680 F. Supp. 1176 (M.D. Tenn. 1988). *See also* Keister v. Vertac Chemical Corp., 21 Envtl. L. Rep. (Envtl. L. Inst.) 20,677 (E.D. Ark. 1990).

162. In order not to be held liable, the defendant should establish by preponderance of evidence that the release or threat of release was a result of an act of God, an act of war, or an act or omission of a party with which the defendant had a contractual relationship other than an employee or agent of the defendant. In the latter case, the defendant has to prove that she exercised due care, and that she took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions. *See* 42 U.S.C. § 9607(b).

163. FREDERICK R. ANDERSON, ET AL., ENVIRONMENTAL PROTECTION: LAW AND POLICY 616 (1990).

164. *See, e.g.*, United States v. Chem-Dyne Corp., 572 F.Supp. 802 (S.D. Ohio 1983); Colorado v. ASARCO, Inc., 608 F. Supp. 1484 (D. Colo. 1985).

165. RCRA § 3004(a), 42 U.S.C. § 6924. The RCRA concerns active waste facilities and not abandoned waste sites. However, the RCRA provides for corrective action for releases of hazardous waste constituents from disposal facilities independent of the time wastes were placed at the facility. *See* RCRA § 3004(u), 42 U.S.C. § 6924(u). Also, the EPA is authorized under the RCRA to issue an order or bring an action against past and present waste generators, transporters, and disposers involved in facilities that may present an imminent and substantial endangerment to health and the environment. *See* RCRA § 7003(a), 42 U.S.C. § 6973(a).

166. 40 C.F.R. § 264.147(a)-(b).

167. *Id.* § 264.147(a)-(b), (f), (g).

2. The Causes and Aftermath of the Insurance Crisis

By the mid to late 1980's, the imposition of strict and retroactive liability, and joint and several liability, in combination with an excessive number of environmental claims led many insurance companies to withdraw comprehensive general liability (CGL) policies, covering both accidental and gradual environmental harm.[168] Instead, the insurance companies started providing insurance only for one year, and only for sudden pollution arising out of an incident during that year.[169] In this manner, the insurance companies hoped to evade liability for the past mishaps of their policy holders. In most cases, however, courts interpreted the letter of insurance contracts broadly and held insurers liable for all types of pollution, sudden as well as gradual, as long as the harm was not intentional.[170] The uncertainty created by the broad judicial interpretation of insurance contracts rendered insurance virtually unavailable.[171] However, it was not only insurance availability for hazardous waste that declined. Simultaneously, insurance premiums for medical malpractice and products liability soared.[172] As a result, corporations were forced to self-insure through "industry wide mutuals"[173] or "go bare," that is, operate without any insurance.[174]

The insurance crisis has provoked severe criticism of the tort system, but critics do not attribute the insurance crisis to the doctrine of strict and unlimited liability. Instead, they maintain that the insurance crisis is rooted in the uncertainty created by the broad interpretation of insurance policies by courts.[175] Critics claim that courts have failed to distinguish between liability levels that deter irresponsible corporate behavior by forcing industry to engage in prevention and high liability levels that do

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168. ANDERSON, *supra* note 163, at 610.

169. *Id.* at 611.

170. Kenneth S. Abraham, *Environmental Liability and the Limits of Insurance*, 88 COLUM. L. REV. 942, 963-73 (1988).

171. *See id.* at 944. *See also* UNITED STATES GENERAL ACCOUNTING OFFICE, HAZARDOUS WASTES: THE COST AND AVAILABILITY OF POLLUTION INSURANCE 4 (GAO/PEMD-89-6 1988).

172. Some commentators have attributed the insurance crisis to the alteration of hard and soft markets that are characteristic of the insurance industry. According to this view, limiting liability or caps on awards will not alter insurance availability. *See, e.g.*, Linda Lipsen, *The Evolution of Products Liability as a Federal Policy Issue*, *in* TORT LAW AND THE PUBLIC INTEREST 247 (Peter Schuck ed., 1991) [hereinafter PUBLIC INTEREST].

173. *See* George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L. J. 1521, 1570, 1577 (1987) (Priest calls the mutuals created because of unavailability of insurance, for example, in the area of hazardous waste and railroad transportation as high-risk mutuals. On the contrary, "low-risk mutuals are formed because their members find being pooled with the high-risk more costly than its worth.").

174. Frank Sommerfield, *Going Bare*, INSTITUTIONAL INVESTOR, Mar. 1990, at 99.

> Uninsured companies are coping with the situation simply by trying to make their internal environmental controls failsafe. Although some say they are self-insuring, they usually mean that they feel their cash flow is strong enough to charge damages to profits, not that they are reserving against potential losses.

175. *See*, e.g., KIP VISCUSI, REFORMING PRODUCTS LIABILITY 28, 50 (1991).

not deter,[176] render insurance unavailable, drive useful companies out of the market, hamper innovation[177] and international competitiveness,[178] and possibly spur illegal practices.[179] In other words, critics do not blame the insurance crisis on the doctrine of unlimitied liability per se. Rather, they blame the interpretation by U.S. courts that awarded large amounts of compensatory and punitive damages, increasing uncertainty in the insurance market.

According to the critics of the tort system, because strict and unlimited liability is not at the source of the insurance crisis, its abolition cannot be the remedy. Therefore, state statutes that attempt to set limits on liability, or reinstate the fault principle are bound to fail to relieve the uncertainty of the insurance market.[180] In addition, liability limits for each type of injury would be extremely inflexible and would make it difficult to consider the particularities of individual cases. Even the most vehement critics of the tort system consider liability ceilings "desperate responses impelled by juridical inflation that has exceeded all bounds that private insurance can accommodate."[181]

In fact, state efforts to stimulate the insurance market in response to the insurance crisis by establishing caps on liability awards have not significantly affected the availability of insurance. For example, empirical studies have demonstrated that measures to limit liability, such as caps on awards or granting immunities to defendants, have reduced insurance costs in medical malpractice cases.[182] But in the case of general liability,

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176. *See* Priest, *supra* note 173, at 1538.

> [T]he economic effects of steadily increasing provider liability thus are quite simple in structure. A liability rule can compel providers of products and services to make investments that reduce the accident rate up to the level of optimal (cost-effective) investments. After providers have invested optimally in prevention, however, any further assignment of liability affects only the provision of insurance.

177. Peter W. Huber & Robert E. Litan, *Overview, in* LIABILITY MAZE 16 (Peter W. Huber & Robert E. Litan eds., 1991)[hereinafter LIABILITY MAZE]:

> [statistical analysis has] found that for industries with relatively low liability costs the liability system appeared, if anything, to enhance innovation. But in industries such as general aviation, in which liability costs rose sharply during the early 1980s and became a significant share of total costs, liability does seem to have dampened innovation.

178. Douglas Besharov, *Forum Shopping and Forum Skipping, and the Problem of International Competitiveness, in* NEW DIRECTIONS IN LIABILITY LAW 139 (Walter K. Olson ed., 1988).

179. PETER HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES 165 (1988)("[P]roviders who are illegal, anonymous, or too small to bother with also gain a competitive edge over established and reputable providers every time the liability vise is tightened.").

180. Priest, *supra* note 173, at 1532-4. *See also* Abraham, *supra* note 170, at 976.

181. HUBER, *supra* note 179, at 202.

182. Glenn Blackmonn & Richard Zeckhauser, *State Tort Reform Legislation: Assessing Our Control of Risks, in* PUBLIC INTEREST, *supra* note 172, at 272, 279; Michael J. Trebilcock et. al., *Malpractice Liability: A Crosscultural Perspective, in* PUBLIC INTEREST, *supra* note 172, at 207, 217 (caps on awards reduced claims severity by about twenty-three

it is not caps, but restrictions on noneconomic and punitive damages and modifications of the joint and several liability doctrine that have reduced insurance costs.[183] The fact that limits on liability have affected malpractice insurance, but not general insurance, has been attributed to the fact that malpractice insurance crisis was a crisis of price, while the general liability insurance crisis was a crisis of availability.[184]

Moreover, in the empirical studies mentioned above, for both medical malpractice and general liability, reduction of insurance costs does not always result in an actual decrease of insurance premiums. Rather, it results in less dramatic increases of insurance premiums in states where tort reform has been enacted.[185] The inability of statutory tort reform to induce an actual decrease of insurance premiums has been attributed to the insurers' conviction that the success of statutory reforms depends on judicial interpretation.[186]

Additionally, predictions that the tort system would harm innovation and the competitiveness of American industry in international markets have not proven true. The performance of the United States chemical industry in international markets has not been affected by the allegedly excessive liability costs.[187] On the contrary, the American chemical industry is much more innovative[188] than Japanese and Western European chemical industries.[189] Products liability does not appear to preoccupy American corporate executives as much as do the general economic environment, taxation, the stigmatizing effects of punitive damages, and haz-

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percent).

183. Blackmonn & Zeckhauser, *supra* note 182, at 277 (the authors do not make clear what kinds of insurance are included in the broad category "general liability insurance." The study makes it difficult to identify what exact type of reform caused what reduction of insurance costs. This is because it frequently includes similar, but not identical tort reforms under one general category).

184. Patricia Danzon, *Malpractice Liability: Is the Grass on the Other Side Greener*, *in* PUBLIC INTEREST, *supra* note 172, at 176, 180.

185. Blackmonn & Zeckhauser, *supra* note 182, at 287.

186. *See* Roberta Romano, *Corporate Governance in the Aftermath of the Insurance Crisis*, *in* PUBLIC INTEREST, *supra* note 172, at 151, 158.

187. Rollin B. Johnson, *The Impact of Liability on Innovation in the Chemical Industry*, *in* LIABILITY MAZE, *supra* note 177, at 428, 431-34:

> [A]ccording to a recent report, "while the U.S. has posted massive overall trade deficits for many years, this country's chemical trade surplus reflects the technology, research and marketing expertise that give the industry competitive advantage in many high valued products." The report goes on to say that American chemical companies are very attractive to foreign investment . . . and that foreign chemical companies view the American market as the biggest and most promising for chemical products.

188. In other industries like pharmaceuticals and industries that produce small aircrafts, liability has dampened innovation. *See, e.g.*, Louis Lasagna, *The Chilling Effect of Product Liability on New Drug Development*, *in* LIABILITY MAZE, *supra* note 177, at 334; Robert Martin, *General Aviation Manufacturing: An Industry Under Siege*, *in* LIABILITY MAZE, *supra* note 177, at 478.

189. *See* Johnson, *supra* note 187, at 433.

ardous waste regulations.[190] However, even in the area of hazardous wastes, the chemical industry has started to realize that the regulatory and liability rules of hazardous waste management will provide it with a competitive advantage over other industries that have little experience with handling chemical substances.[191] Fluor, for instance, a uranium mining company, uses a modification of its computer program for mining to determine how to excavate underground contaminants, while removing as little soil as possible, and how to extract and treat contaminated groundwater.[192] Betcht is another company that once constructed oil refineries but now assists in cleaning them up. Betcht was hired by Saudi Arabia to clean up the Gulf spill.[193]

It has been determined that the existence of liability or of a particular standard of liability — strict liability or negligence — does not by itself influence deterrence. Concerns about reputation and a mix of liability and regulatory rules often have more effective deterrent effects.[194] Many times strict liability and regulations have forced industry to invest in products that are environmentally benign and have fostered industrial safety and innovation. The efforts of the industry to develop alternatives to chlorofluorocarbons (CFCs) are well known. After the Bhopal disaster, certain chemical companies reduced the amount of hazardous chemicals they store on site or the amounts they use.[195] Other times, stringent legislation has driven polluting industries out of the market and has spurred the development of new industries willing to produce safer products or services.[196]

Despite the chemical industry's increased investment in safety, it has been estimated that the existing liability system grossly underdeters corporations. For immediately manifested injuries due to chemical exposure, the overall liability costs of the chemical industry represent no more than seventy percent of the corresponding social costs.[197] For chronic diseases due to chemical exposure, liability costs represent no more than five percent and often less than one tenth of a percent of the corresponding social costs.[198] The causes of this excessive underdeterrence are, inter alia, the

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190. *Id.* at 435.

191. *Id.* at 444.

192. Sonni Efron & James M. Gomez, *Cleaning-Up on Clean-Ups*, L.A. TIMES, Sept. 15, 1991, at D1.

193. *Id.*

194. LIABILITY MAZE, *supra* note 177, at 12. *See also* Johnson, *supra* note 187, at 449. However, while concerns about reputation can influence transnational corporations and small reputable firms, they cannot influence speculative small enterprises. *See* BRENT FISSE & JOHN BRAITHWAITE, THE IMPACT OF PUBLICITY ON CORPORATE OFFENDERS 242 (1983).

195. Nicholas Ashford & Robert F. Stone, *The Impact of Liability Law on Safety and Innovation*, *in* LIABILITY MAZE, *supra* note 177, at 367, 400 (the authors mention numerous examples where industries changed practices because of public outcry after disasters or more stringent legislation). *See also* Johnson, *supra* note 187, at 444.

196. Ashford & Stone, *supra* note 195, at 417-18.

197. *Id.* at 417.

198. *Id.*

difficulties of identifying chemical exposure and the difficulties of verifying, by preponderance of evidence,[199] the causal linkage between exposure and disease when there is a long latency period between exposure and manifestation of the disease.[200] Even in circumstances where courts have relaxed the causation standard,[201] the amount of compensation awarded is very small.[202] What actually preoccupies courts is that relaxing the causation standard when reliable epidemiological studies do not exist would over-compensate plaintiffs at the expense of the defendants.[203] On the other hand, denying damages because of lack of epidemiological studies may undercompensate accident victims given the current absence of scientific knowledge on many hazardous substances and their effects on humans. Because of the reluctance of courts to relax the causation standard, and the ensuing blatant underdeterrence of the chemical industry, it has been claimed that caps on awards will eventually discourage the creation of safer products and services,[204] and that tort reform should be

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199. In the notorious Agent Orange litigation, the court ruled that the linkage between exposure and disease must be proven by a probability of greater than fifty percent. *See* In re "Agent Orange" Prod. Liab. Litig, 597 F. Supp. 740 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 145 (2nd Cir. 1987). *See also* Parker v. Employers Mutual Liability Ins. Co. of Wisconsin, 440 S.W.2d 43 (Tex. 1969). Courts also have refused to grant awards where other synergistic factors could have contributed to the disease. Gardner v. Hecla Mining Corp., 431 P.2d 794 (Utah 1967). In addition, courts have been reluctant to award damages for increased risk of future injury because of exposure to harmful substances at waste sites. This is because science is not advanced enough to quantify the degree of susceptibility to a future illness due to chemical exposure. *See, e.g.*, Sterling v. Velsicol Chemical Corp., 855 F.2d 1188 (6th Cir. 1988); Wilson v. Johns-Mansville, 684 F.2d 111 (D.C. Cir. 1982); Anderson v. W.R. Grace & Co., 628 F. Supp. 1219 (D.Mass. 1986).

200. Ashford & Stone, *supra* note 195, at 414.

201. For example, courts have been willing to award damages for fear of future illness ("cancerphobia") due to present injury from chemical exposure. *See* Payton v. Abbott Labs, 437 N.E.2d 171 (Mass. 1982). Certain courts have even relaxed the standard of "present injury" and simply demand "present impact" or "reasonable fear" of developing a disease, Stites v. Sundstrand Heat Transfer, 660 F. Supp. 1516 (W.D. Mich. 1987), or serious emotional distress that is both "severe and debilitating," Paugh v. Hanks, 451 N.E.2d 759 (Ohio 1983). Courts also are increasingly willing to grant damages for costs of medical monitoring when there is a relative increase in the chance that the disease will occur and early diagnosis will mitigate its effects. *See* Ayers v. Jackson Township, 525 A.2d 287 (N.J. 1987). *See also* In re Paoli Railroad Yard PCB Litigation, 916 F.2d 829 (3rd Cir. 1990). In awarding damages courts have relied on medical expert testimony, Ferebee v. Chevron Chemical Co., 736 F.2d 1529 (D.C. Cir. 1984), and epidemiological studies, but, for example, courts have rejected medical testimony and epidemiological evidence based on animal studies. *See* In re "Agent Orange", *supra* note 199. *See also* Richardson v. Richardson-Merrell, Inc., 857 F.2d 823 (D.C. Cir. 1988).

202. Sterling v. Velsicol Chemical Corp., 855 F.2d 1188 (6th Cir. 1988). The district court granted damages ranging from $50,000 to $250,000. The court of appeals reduced a $250,000 award to $18,000 and the highest award granted was $72,000.

203. Even commentators supporting probabilistic causation —that courts should rely on statistical analysis based on the facts of the particular and previous similar exposures — concede that such an approach may over-compensate or under-compensate pollution victims. *See* Glen Robinson, *Probabilistic Causation and Compensation for Tortious Risks*, 14 J. LEGAL STUD. 779, 786 (1985).

204. Ashford & Stone, *supra* note 195, at 398.

oriented more towards expanding rather than limiting liability.[205]*

As demonstrated, the insurance crisis has been attributed to the uncertainty created by court decisions that have made damage awards unpredictable rather than to the absence of liability ceilings. Moreover, empirical studies have demonstrated no direct linkage between caps on liability and insurance availability. Furthermore, the claim that the tort system grossly underdeters the chemical industry compels reconsideration of the position that limited liability will boost insurance markets. Today, after the insurance crisis, while traditional insurance for environmental damage is still unavailable, industries have started to participate in alternative forms of insurance. In fact, alternative insurance is on the rise worldwide, and it is believed that it will eventually replace traditional insurance.[206]

The lack of causal linkage between unlimited liability and insurance availability illustrated by the experience of the U.S. should dissipate concern about establishing an unlimited liability regime at the international level. This is especially true because of the development of alternative forms of insurance that may be better suited to cover environmental harm.

3. The Price-Anderson Act

The experience of the nuclear industry underscores the view that liability ceilings cannot guarantee insurance availability and financial viabil-

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205. *Id.* at 419.

> [T]he recent demands for widespread tort reform . . . tend to miss their mark since significant underdeterrence in the system already exists. Thus proposals that damage awards be capped, that limitations be placed on pain and suffering and punitive damages, and that stricter evidence be required for recovery should be rejected. On the contrary, the revisions of the tort system should include relaxing the evidentiary requirements for recovery, shifting the basis of recovery to subclinical effects of chemicals, and establishing clear causes of action where evidence of exposure exists in the absence of manifest disease. Other tort claims may also be entertained, but they must increase the amount of deterrence in the system, not further weaken the signals sent to the firm.

206. *See Alternative Insurance*, ECONOMIST, Sept. 26, 1992, at 94. Lack of traditional insurance has created booming international markets for alternative insurance. Companies increasingly discover that because they know their risks better than insurers, they can better insure for risks giving rise to big claims. Rather than paying premiums to traditional insurance companies, they hire consultants to advise them on how to manage their risks. Many alternatives to traditional insurance are currently available. One is to pay claims as they arise. Another is to create reserves by establishing subsidiary companies, the so-called captives, into which premiums are paid. A third alternative used mostly by small enterprises is to form mutual insurance companies. Commentators believe that by the year 2000, self-insurance in the form of captives or mutuals will be the prevailing form of insurance worldwide. It is estimated that captives all over the world have assets worth twenty-three to twenty-four billion dollars. Premiums paid to mutuals were estimated to be $270 million by the end of 1988 and double that amount by the end of 1991. *See also* Richard M. Page, *The Business of Insurance; Someone Has To Pay; Special Global Report*, FINANCIAL EXECUTIVES INSTITUTE, Jan. 1991.

ity for corporations. The Price-Anderson Act as amended in 1988[207] provides for limited liability of operators of commercial nuclear power plants and completely shields Department of Energy contractors from any form of liability in the event of a "nuclear incident."[208] When first enacted, the act contained a liability ceiling of five hundred million dollars, sixty million dollars contributed by private insurance companies and the remaining by public funds.[209] This unique arrangement was undoubtedly due to the United States' eagerness to explore the peaceful and military uses of nuclear power combined with the reluctance of private insurance companies to undertake the full costs of compensation in the event of a nuclear disaster.[210] The 1988 Amendment of the Act did not eliminate the liability limit. Despite the significant setbacks of the nuclear industry and the termination of the cold war, the liability ceiling remains, although it has been increased significantly to seven billion dollars.[211]

In spite of the liability ceilings prescribed by the Price-Anderson Act, insurance for nuclear power plants in traditional insurance markets remains unavailable. Limited liability has been unable to prevent the decline of the nuclear industry.[212] In the United States, the nuclear industry is in retreat.[213] The fierce public opposition against the construction of nuclear power plants has annulled any possible incentive provided by limited liability. Additionally, insurance industries have suggested that nuclear liability limits discourage demand for liability coverage and that as long as utilities are protected by liability limits, they do not have incentives to purchase more coverage.[214] Despite the absence of traditional

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207. 42 U.S.C. §§ 2210-2214 (1988). The United States Supreme Court has upheld the constitutionality of limits on the liability of nuclear power plants. According to the Court, liability limits

> accompanied by an express statutory commitment to 'take whatever action is deemed necessary and appropriate to protect the public from the consequences of' a nuclear accident [are] fair and reasonable substitute for the uncertain recovery of damages of this magnitude from a utility or component manufacturer, whose resources might well be exhausted at an early stage.

Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978).

208. Nuclear incident is defined as an occurrence including an extraordinary nuclear occurrence taking place within the United States and causing bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property within or outside the United States. *See* 42 U.S.C. § 2014(q).

209. 42 U.S.C. § 2210(e).

210. Dan Berkovitz, *Price-Anderson Act: Model Compensation Legislation? The Sixty-Three Million Dollar Question*, 13 HARV. ENVT'L L. REV. 1, 6 (1989).

211. *See* 42 U.S.C. § 2210(e); 42 U.S.C. § 2210(b). *See also* Marcie Rosenthal, Note, *How the Price Anderson Act Failed the Nuclear Industry*, 15 COLUM. J. ENVT'L L. 121, 123 (1990).

212. *Nuclear's Fall from Favour*, ECONOMIST, Nov. 21, 1992, at 18.

213. *See, e.g.*, DANIEL BORSON ET AL., A DECADE OF DECLINE (Public Citizen ed. 1989). *See also Nuclear Power: Losing its Charm*, ECONOMIST, Nov. 21, 1992, at 21 ("In the United States, where a quarter of the world's nuclear plants operate, no new plant has been ordered without subsequently being canceled, since 1974.").

214. Dan R. Anderson, *The Dangers of Nuclear Liability Limits*, BEST'S REVIEW 12 (Property-Casualty Insurance ed., Mar. 18, 1987).

insurance for nuclear power plants, the nuclear industry has been able to secure coverage through alternative forms of insurance, such as insurance pools and mutuals.[215] Today nuclear plant operators are able to obtain over two billion dollars per reactor in coverage.[216]

B. *The Draft Waste Liability Directive and the European Insurance Market*

The Commission of the European Community, following in the steps of the United States, has proposed strict and unlimited liability for actors involved in hazardous waste activities.[217] According to the Commission, strict liability for environmental harm is becoming increasingly prevalent in both international[218] and domestic law.[219] The purpose of the Directive is to establish a uniform liability system within the European Community in order to ensure that a product's price reflects the full costs of its production, including the costs of environmental damage.[220] The proposed Directive, however, differs from CERCLA in that it does not explicitly address the problem of abandoned waste sites and covers personal injury cases. In contrast to CERCLA, it explicitly incorporates a cost-benefit analysis for estimating which damages should be recovered for cleaning up the environment.

The Directive imposes strict, unlimited,[221] and joint and several liability[222] on the "producer of wastes."[223] For the purposes of the Directive,

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215. Three insurance pools provide insurance for the nuclear industry: American Nuclear Insurers (ANI) (pool of 90 member insurance companies, insuring one-half of 110 nuclear plants), Mutual Atomic Energy Liability Underwriters (MAELU), and MAELRP Reinsurance Association which reinsures 100% of the MAELU policies. Utility companies have also formed mutuals: Nuclear Mutual Ltd. and Nuclear Electric Insurance Ltd. *See* Christopher Dauer, *ANI Unveils New Nuclear Power Covers*, THE NATIONAL UNDERWRITER COMPANY, May 13, 1991, at 23. *See also* Mercedes M. Perez, *Nuclear Energy Touted as Long-Term Option*, BEST'S REV. 112 (Property-Casualty Insurance ed., May 1989); NUCLEONICS WEEK, April 6, 1990, at 12.

216. This is a significant increase in comparison with $300 million insurance coverage used to be provided in 1979 when the Three Mile accident occurred.

217. Proposal for a Council Directive on Civil Liability for Damage Caused by Waste, COM(89)282 final [hereinafter Proposal]. It was further amended by COM(91)219 final [hereinafter Amendment].

218. *See* Proposal, *supra* note 217, at 2 (the Commission refers to the products liability Directive, the international conventions on nuclear energy and oil pollution, and the draft convention on compensation for damage caused by the carriage of dangerous goods by rail, road or inland waterway).

219. *Id.*

> [T]he same trend is becoming increasingly established in national legislation. Germany and Belgium have already introduced the principle of no-fault liability. In France, it is well established by case law. Case law in the Netherlands is moving in the same direction, and the law is being drafted to introduce the principle in the new Civil Code. In Spain, strict liability has been introduced in the waste management sector.

220. *See* Proposal, *supra* note 217, at 1.

221. Amendment, *supra* note 217, art. 8.

222. *Id.* art. 5.

producers of wastes are considered those persons who import wastes into the European Community from non-Community countries,[224] waste disposers,[225] and persons in control of wastes when they cannot identify the producer.[226] In the latter case, producers are held liable only for a limited amount if the incident that caused the damage falls within the scope of the liability Convention concerning the carriage of dangerous goods.[227] The Directive does not specify whether generators that transport their wastes to a permitted disposal facility are still be held liable.

Damages under the Directive include harm resulting from death or physical injury, and damage to property.[228] Plaintiffs can bring an action against polluters under national law. National law also determines whether lost profits may be recovered and who may bring an action in the event of impairment of the environment.[229] In the latter case, plaintiffs can claim compensation for costs to prevent impairment to the environment, for costs to restore the environment, and for damage caused by preventive measures. The entitlement to compensation, however, is subject to a cost-benefit analysis: there is no entitlement to compensation when the costs of restoration substantially exceed the benefits or if substantially cheaper restoration measures are available.[230] Impairment to the environment is defined as significant physical, chemical, or biological deterioration of the environment.[231]

Despite the claims of the Commission that the purpose of the Directive is to establish a uniform liability system, the precise remedy[232] and the standard of proof[233] are left to national legislation. The Directive also

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223. A producer of wastes is anyone who in the course of commercial or industrial activity produces wastes and anyone who engages in processing, mixing, or other operations resulting in a change of the nature or composition of waste. *Id.* art. 2(1)(a).

224. Importers are not held liable when wastes were previously exported from the Community and their nature or composition were not substantially changed prior to reimportation. *Id.* art. 2(2)(a).

225. *Id.* art. 2(2)(c).

226. *Id.* art. 2(2)(b).

227. *Id.* art. 3(1). *See also supra* Section I(B).

228. *Id.* art. 2(1)(c).

229. *Id.* art. 4(1)(a).

230. *Id.* art. 4(2).

231. *Id.* art. 2(1)(d).

232. *Id.* art. 4(1)(b).

> The national laws of the Member States shall determine . . . the remedies available to [plaintiffs] which shall include: (i) an injunction prohibiting the act or correcting the omission that has caused or may cause the damage and/or compensation for the damage suffered; (ii) an injunction prohibiting the act or correcting the omission that has caused or may cause impairment of the environment; (iii) an injunction ordering the reinstatement of the environment and/or ordering the execution of preventive measures and the reimbursement of costs lawfully incurred in reinstating the environment and in taking preventive measures (including costs of damage caused by preventive measures).

233. *See Id.* art. 4(1)(c). *But see* Proposal, *supra* note 217, art. 4(6). It was provided that a plaintiff should show "overwhelming probability of the causal relationship between

provides that, in addition to pollution victims and public authorities, non-governmental organizations can bring action against polluters under conditions specified by domestic legislation.[234]

Polluters are exempt from liability only when they can prove that the damage or injury to the environment was the result of *force majeure*[235] or the result of an intentional act or omission of a third party.[236] Their liability can also be reduced or totally abolished when the damage is caused in part by the injured party.[237] Finally, waste disposers are exempt from liability if they can prove that they were not negligent and that the producer failed to fully disclose information regarding the nature of the wastes.[238]

The scope of the Directive includes hazardous and non-hazardous wastes[239] but not nuclear wastes.[240] The Directive does not distinguish between recyclable and non-recyclable wastes. The Economic and Social Committee has praised the Commission for including recyclable wastes in the definition of wastes.[241] The Economic and Social Committee has also recommended that carriers should be able to use a distinctive sign to in-

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the producer's wastes and the damage . . . or the injury to the environment suffered."

234. Amendment, *supra* note 217, art. 4(3). The 1989 version of the proposed directive provided that public-interest groups could bring an action only if national law so provided. *See also* Proposal, *supra* note 217, art. 4(4).

235. Amendment, *supra* note 217, art. 6(1)(b).

236. *Id.* art. 6(1)(a).

237. *Id.* art. 7(2).

238. *Id.* art. 7(1).

239. *Id.* art. 2(1)(b).

240. The justification is that there already exist international conventions prescribing liability for activities involving nuclear wastes. Proposal, *supra* note 217, at 2. Most European countries have signed the Paris Convention. However, international regulation of other issues has not prevented the Commission from proposing appropriate legislation. In addition, the Paris Convention has many inadequacies that could be addressed by European Community legislation.

The reluctance of the Commission to regulate radioactive wastes stems from the European Community's support for nuclear energy. This position is reflected in the Euratom Treaty, which is more preoccupied with facilitating the development of nuclear industry than with establishing safeguards for the operation of nuclear power plants or for the disposal of radioactive wastes. As a result, the Commission has adopted a position of non-intervention in domestic nuclear energy programs. *See, e.g.*, Leigh Hancher, *1992 and Accountability Gaps: The Transnuklear Scandal: A Case Study in European Regulation*, 53 MOD. L. REV. 669 (1990). The lack of genuine supervision and the absence of safeguards for the military uses of nuclear power has left radioactive waste management unregulated and has corrupted the nuclear energy industry. The nuclear industry has been frequently involved in illegal transfers of radioactive materials and wastes. After the Transnuklear scandal that involved illegal waste exports to Belgium, Transnuklear, the private company entangled in the scandal was dissolved. It was replaced by a government company that soon started to engage in illegal waste transfers as well. Nuclear Energy: West Germany Confirms Irregularities in Transport of Nuclear Material, European Report, No. 1555, Jan. 15, 1990, *available in* LEXIS, Nexis Library, Omni File.

241. Opinion on the Proposal for a Council Directive on Civil Liability for Damage Caused by Waste, CES(90)215.

dicate whether the wastes they carry are for recycling or final disposal.[242] Finally, the Committee has suggested that waste carriers should be held primarily liable because of the difficulty victims will encounter in identifying the producer before the expiration of the statute of limitations.[243] The Commission has yet to include this recommendation in the amended Directive.[244]

The Directive provides for compulsory insurance of waste generators and disposers[245] and also provides that the Commission will study the feasibility of establishing a "European Fund for Compensation for Damage and Impairment of the Environment Caused by Waste."[246] The imposition of compulsory insurance has intensified the insurance industry's opposition to the Directive.[247] The insurance industry fears that the vague language of the Directive could be interpreted broadly to include liability for past misdeeds and compulsory insurance for both accidental and gradual pollution.[248] In other words, it fears the creation of a type of liability scheme believed to be responsible for the litigation and insurance crises in the United States. Nevertheless, the fear that the United States precedent will be repeated in the European Community is unfounded. This is due to the differences between the legal systems of European Community countries and the United States. The rules of civil procedure of many European countries often compel the losing party to pay the legal costs of the winning party. Most European systems also do not provide for jury trials, broad discovery, and noneconomic and punitive damages. Thus, even if the final formulation of the waste Directive contains language similar to that of the United States tort doctrine, it does not follow that its implementation will spur litigation or that it will affect the availability of insurance.[249] In fact, it has been suggested that precisely because of the legal systems of the Community and aversion to confrontation, Europeans will not resort to litigation to resolve their disputes.[250]

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242. *Id.*

243. *Id.* A plaintiff can bring an action within three years from the date the damage or injury to the environment occurred. *See* Amendment, *supra* note 217, art. 9. The right to compensation expires after thirty years. *See* Amendment, *supra* note 217, art. 10.

244. *See* Amendment, *supra* note 217.

245. Amendment, *supra* note 217, art. 11(1).

246. *Id.* art. 11(2).

247. Gavin Souter, *E.C. Insurers to Scramble to Avoid Clean-Up Liability*, BUSINESS INSURANCE, Oct. 21, 1991, at 30.

248. *Id. See also* Roger Scotton, *European Marketplace Faces Crisis: Insurer*, BUSINESS INSURANCE, June 10, 1991, at 44.

249. Gary T. Schwartz, *Product Liability and Medical Malpractice in Comparative Context*, in LIABILITY MAZE, *supra* note 177, at 28 (the author emphasizes that differences in doctrine cannot explain why significantly more suits are brought in the United States than in Europe, Japan or Canada because these countries have doctrines similar to the United States liability doctrines. He demonstrates that jury trials, liberal rules of discovery, contingency fees, and punitive damages make the United States tort system more unpredictable and costly).

250. R. Patrick Thomas, *"New" Europe is Years Away; Cultural Traditions, Not E.C. Directives, Shape Risk Functions*, BUSINESS INSURANCE, May 27, 1991, at 27.

An additional indication that the European Community is unlikely to experience an insurance crisis is that in Europe insurance contracts providing for sudden and accidental pollution have been interpreted narrowly and have not been the subject of extensive litigation.[251] Despite the narrow interpretation of insurance contracts, British insurers have been reluctant to provide pollution coverage. However, insurance is readily available from Swiss and American insurers who claim to make significant profits from environmental premiums.[252] In other parts of Europe strict liability and environmental regulations have intensified the trend toward alternative types of insurance through captives or mutuals.[253]

III. THE LIABILITY REGIME FOR THE TRANSNATIONAL MOVEMENTS OF HAZARDOUS AND RADIOACTIVE WASTES

Before prescribing the elements of a private liability system for transnational waste movements, it is necessary to examine the potential functions of such a system and whether it can be successfully replaced by more efficient and fairer systems. Such systems could include an international social insurance system that would be in the form of a government-sponsored international fund.

A. *The Theoretical Debate*

In the 1920's and 1930's, workers' compensation statutes gradually replaced the tort system of the United States and Europe.[254] At that time, there was significant debate in academic circles as to whether enterprise liability should replace the fault principle in torts.[255] This debate was reflected in court decisions that began shifting the burden of proof from plaintiffs to defendants. Under the fault principle, the plaintiff must prove that the defendant caused the harm, thus the costs of accidents are more likely to be borne by the plaintiff. Under an enterprise liability system, the defendant carries the burden of proof, and the costs of accidents are more likely to be imposed on the defendant. The movement favoring

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251. *Id.*

252. *Green Insurance: Missing Market*, ECONOMIST, Sept. 19, 1992, at 94.

253. *See, e.g.*, Wilhelm Zeller, *European Solutions to EIL Coverage; Environmental Impairment Liability Insurance*, A.M. BEST COMPANY INC. 14 (Property-Casualty Insurance Edition, March 1991), *available in* LEXIS, Nexis Library, Omni File; *but see also* Carolyn Aldred, *Pollution Crackdown in Europe; EIL Insurance Increasingly Scare*, BUSINESS INSURANCE, Oct. 8, 1990, at 35, *available in* LEXIS, Nexis Library, Omni File (mentioning a French insurance pool that provides insurance for both accidental and gradual pollution damage, German general insurance liability policies that provide coverage for bodily injury resulting from both sudden and accidental as well as gradual pollution, and a Swedish insurance consortium that has created a fund to indemnify third parties for pollution caused by insolvent or unknown polluters).

254. *See generally* Lawrence Friedman & Jack Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50 (1967).

255. GUIDO CALABRESI, THE COSTS OF ACCIDENTS 3, 4 (1970) (citing extensive related literature in the United States and Europe).

enterprise liability, as its name indicates, was inspired by indignation against corporate power and advocated placing liability, irrespective of fault, on those with "deep-pockets."[256] Contemporary proponents of enterprise liability urge adoption of strict liability and view the tort system as a social security mechanism whose primary function is to adequately compensate accident victims.[257]

The theory of enterprise liability has been enriched by what is called the "economic theory" of tort law. The economic theory concludes that "deep-pockets" should bear the cost of accidents, but it bases this conclusion on a different rationale. The primary goal of tort law is not to compensate accident victims but to reduce accident costs. Accident costs can be reduced by deterring tortfeasors from engaging in accident-prone activities.[258] However, harmful activities are only deterred if the costs of accidents exceed the costs of preventing them.[259] This determination is left to the cheapest cost-avoider who is the person in the best position to assess more cheaply the dangers of certain activities.[260] Frequently, the cheapest cost-avoiders are corporate entities or insurance companies that have or can obtain first-hand information on the safety of products and services. The public, on the other hand, cannot be the cheapest cost-avoider because it can easily underestimate the dangers involved.[261] For this reason, advocates of the economic analysis argue that the costs of accidents should not be externalized in the form of general taxes because this would compromise the primary goal of deterrence.[262] Accident costs should be incorporated in the price-system, informing the public on the safety of products and services.[263]

The two goals of tort law as designated by both enterprise liability and economic theories — victim compensation and corporate deterrence — have been criticized as conflicting. Lavish compensation awards may over-deter corporations, deprive society of valuable services, and impede innovation.[264] These predictions, however, have not proven true. As ana-

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256. George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461 (1985).

257. RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 5 (1987).

258. CALABRESI, *supra* note 255, at 16. *But see also* E. Donald Elliott, *Why Punitive Damages Don't Deter Corporate Misconduct Effectively*, 40 ALA. L. REV. 1053 (1989).

259. CALABRESI, *supra* note 255, at 17.

260. *Id.* at 164-65.

261. *Id.* at 55

> [F]irst, individuals choosing between insurance and taking their chances often do not have the data necessary to determine how great the risk is . . . . Second, even if individuals had adequate data for evaluating the risk, they would be psychologically unable to do so . . . people cannot estimate rationally their chances of suffering death or catastrophic injury.

262. *Id.* at 143.

263. *Id.* at 134. However, Calabresi concedes that in real life many decisions are made politically or collectively without the intervention of the market. This is particularly true when a decision made through the market would be considered unfair. *See id.* at 24.

264. For example, in the case of pharmaceuticals and industries that produce small air-

lyzed above, despite the imposition of enterprise liability, chemical industries are still underdeterred because it is difficult to establish the causal link between exposure and disease.[265]

Opponents of the tort system also contend that the tort system cannot deter environmental accidents because such accidents are unforeseeable events, even for the corporations involved.[266] They are "normal accidents," or unpredictable outcomes of interactions of complex systems.[267] The critics claim that adding safety devices to complex systems will not necessarily reduce the likelihood of accidents. On the contrary, in many circumstances, safety devices may stimulate the interactive complexity of a system, ultimately resulting in more accidents.[268] This is particularly evident in nuclear energy production where the potential for unexpected interactions of trivial failures substantially increases the likelihood of accidents.[269] It is also evident in maritime transportation where navigational aids have contributed to an increase rather than a reduction of accidents. Due to high-tech navigational devices, captains feel more in control of their ships and take greater risks than they normally would if the technology had not been available.[270] The nature of certain accidents makes the primary goal of corporate deterrence look futile.[271] The tort system as a compensation mechanism has also been criticized for being too expensive and too ineffective when the advantages of a social security system are considered.[272] The advantages of a social security system involve, inter alia, speedy and less costly dispute resolution.[273]

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crafts. *See supra* note 188; *see also* HUBER, *supra* note 179, at 12-15.

265. *See supra* notes 199-201 and accompanying text.

266. *See generally* RICHARD H. GASKINS, ENVIRONMENTAL ACCIDENTS: PERSONAL INJURY AND PUBLIC RESPONSIBILITY 59-62 (1989).

267. CHARLES PERROW, NORMAL ACCIDENTS: LIVING WITH HIGH-RISK TECHNOLOGIES (1984).

268. *Id.* at 23.

269. *Id.* at 60-61.

270. RICHARD PETROW, IN THE WAKE OF TORRY CANYON 206 (1968).

271. GASKINS, supra note 266, at 94.

272. The advantages of the social security system are as follows: "expert" administrative tribunals that deal with similar cases so they can dispose of them relatively quickly; the lack of adversariness that saves time and money during discovery; and the possibilities of making provisional assessments of the injury and review them when there is future aggravation. One of the disadvantages of the social security system is that it is vulnerable to fraudulent claims. *See generally* PATRICK S. ATIYAH, ACCIDENTS, COMPENSATION AND THE LAW 401-07, 509-11 (1980); *see also* Peter Kerr, *Vast Amount of Fraud Discovered in Workers' Compensation System*, N.Y. TIMES, Dec. 29, 1991, at 1. Even advocates of the economic theory of law have suggested that the tort system is incapable of dealing with cases of catastrophic accidents or excessive pollution and that it should be replaced by a social insurance system. *See* RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 390 (1991) (Posner suggests that in cases of catastrophic accidents that cannot be attributed to the negligence of another, a social insurance system might be preferable).

273. ATIYAH, *supra* note 272.

B. *An Evaluation of the Debate*

1. Liability and Minimum Standards as an Accident Prevention Mechanism

The first argument of the opponents of the tort system is that environmental accidents are inherent in the systems that generate them, and consequently no one can legitimately be held responsible for the occurrence of an accident. Accidents are bound to happen and will happen, as statistical charts indicate. However, upon closer scrutiny, the picture is not as bleak as the opponents of the tort system indicate. The systems that generate accidents are generally capable of improvement. Even the "normal accident theory" suggests that prevention of accidents depends on factors such as political will, collective action,[274] and a change in corporate attitude.[275] Often a simple change in a decision making procedure can minimize the frequency and seriousness of accidents. For example, in the area of marine transportation, replacing the captain with a team of officers that can check each other's decisions can reduce the likelihood of accidents.[276] Environmental accidents, therefore, are often preventable and, as demonstrated by the domestic systems analyzed above, strict and unlimited liability in combination with appropriate international standards will deter corporate polluters, especially large corporations concerned with their reputation. These standards for the purpose of waste movements should include standards for land disposal.[277]

However, it is highly unlikely that strict and unlimited liability and land disposal standards will deter smaller hauling companies penetrated by organized crime[278] from engaging in illegal waste trafficking.[279] These companies are often involved in international illegal waste shipments such as the illegal waste transfers across the United States-Mexican border.[280] In Europe, organized crime has penetrated waste exports to

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274. PERROW, *supra* note 267, at 172. Perrow attributes the lack of effort to prevent marine accidents to the fact that victims are unidentifiable, "low status, unorganized or poorly organized seamen." The same is true for the victims of toxic spills and pollution.

275. In marine transportation corporate pressure to keep to schedules despite the ship's condition or the weather forecasts is at the source of most accidents. *See id.* at 118. Such pressure could certainly be lessened.

276. *Id.* at 230.

277. It is better to allow waste exports for disposal than prohibit them, and consequently entice industries to engage in illegal dumping. In contrast to oil and other dangerous goods, wastes are considered materials without further use, thus industry is always tempted to illegally dump them. *See* LOUKA, *supra* note 1, at 20.

278. For the involvement of organized crime in the United States transportation industry, see MAURICE D. HINCHEY, REPORT TO THE NEW YORK STATE ASSEMBLY ENVIRONMENTAL PRESERVATION COMMITTEE, ORGANIZED CRIME'S INVOLVEMENT IN THE WASTE TRANSPORTATION INDUSTRY (1984). *See also* MAURICE HINCHEY, REPORT TO THE NEW YORK STATE ASSEMBLY COMMITTEE ON ENVIRONMENTAL CONSERVATION, ILLEGAL DISPOSAL OF WASTES IN THE HUDSON VALLEY (1991).

279. *See* FISSE & BRAITHWAITE, supra note 194.

280. *See Californian Pleads Guilty to Transporting Hazardous Waste to Mexico Ille-*

France[281] and Somalia.[282]

Even if strict and unlimited liability does not affect the behavior of companies penetrated by organized crime, it is likely that, in combination with clear and specific land disposal standards, it will limit the clientele of those companies.[283] Clear and specific international standards will be instrumental in avoiding the confusion and uncertainty of industry about expected behavior concerning waste management and transfers. Developing clear and specific international standards and legal assurances that severe penalties will be imposed if violated will encourage industry's compliance and make waste generators less willing to entrust waste shipments to enterprises infiltrated by organized crime. Levying severe penalties when a violation occurs is particularly crucial due to the difficulties in detecting illegal waste traffickers. Violators must know that once discovered they will endure severe punishment.

2. Liability as a Catharsis and Instrument of Democratic Control

The second argument made by the opponents of the tort system is more compelling. Opponents argue that a social security system would be less time-consuming and less costly. However, the tort system presents an undoubtable advantage: in the domestic arena, suing polluters potentially not only prevents accidents and provides victims with compensation, it also empowers the *individual*[284] to force industry to change its negligent practices. The tort system enables individuals to send a signal to govern-

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gally, DAILY REPORT FOR EXECUTIVES (BNA), May 28, 1991, at 1, *available in* LEXIS, Nexis Library, Current File. *See also* Michael S. Barr et al., *The Labor and Environmental Rights in the Proposed Mexico-United States Free Trade Agreement*, 14 HOUS. J. INT'L L. 1 (1991).

281. The German Environment Minister, after the scandal of illegal waste transfers to France, warned against the dangers of an international network of illegal waste traffickers similar to the one involved in illegal arms and drug deals. *See Criminals "Trading in Toxic Waste,"* THE INDEPENDENT, Aug. 19, 1992, *available in* LEXIS, Nexis Library, Omni File; *Alarming Spread of Illegal Waste Dumping*, AGENCE FRANCE PRESS, Aug. 19, 1992, *available in* LEXIS, Nexis Library, Omni File; Tony Catterall, *Crime in Germany Spreads to Trash*, Aug. 22, 1992, *available in* LEXIS, Nexis Library, Omni File.

282. The Executive Director of UNEP claimed also that organized crime was involved in the waste transfers from Italy and Switzerland to Somalia. The interim government of Somalia participated in the deal hoping to make profits that would be used to buy more weapons. When the deal was uncovered, the directors of the company involved had already disappeared. *See Contract to Dump Toxic Waste in Somalia Linked to Firm in Small Village Outside Geneva*, INT'L ENVTL. DAILY (BNA), Oct. 2, 1992, *available in* LEXIS, Nexis Library, Omni File; *Somalia, European Firms Dumping Wastes, UNEP To Probe*, INTER PRESS SERVICE, Sept. 10, 1992, *available in* LEXIS, Nexis Library, Omni File; Aidan Hartley, *Contract Shows Plan to Dump Toxic Waste in Somalia*, THE REUTER LIBRARY REPORT, Sept. 9, 1992, *available in* LEXIS, Nexis Library, Omni File.

283. For more details on the international system that must govern transnational waste movements, see ELLI LOUKA, OVERCOMING NATIONAL BARRIERS IN INTERNATIONAL WASTE TRADE (forthcoming).

284. *See* ATIYAH, *supra* note 272, at 554.

ments that legislative action is imperative.[285] Certainly, in a democracy, interest groups can always lobby and participate in public hearings. The advantage that the tort system offers, as opposed to a social security system, is that each individual citizen can initiate action and voice concerns in an adversarial setting. This advantage is very critical because only by personally initiating action before an impartial judge can accident victims be persuaded that justice is served. The catharsis of a public trial is especially important in cases of catastrophic accidents when victims demand some sort of vindication.[286] Thus, the tort system serves a dual function. It acts as a tension release mechanism of social passions. It also introduces an element of direct democracy in corporate boardrooms and within government bodies where the decisions that affect people are made. In other words, the tort system instills democratic controls in a society where democracy is limited to periodic elections.[287] In this respect, the tort system is undoubtedly superior to any social insurance system.

The advantages of a tort system over a social insurance system are also evident in international law. The international community, despite patterns of cooperation, is still deeply divided between the privileged and underprivileged, and this division is often the cause of dissention and conflict. A private liability system can assuage confrontations by empowering the citizens of developing countries to sue multinational corporations in national courts. This is especially pertinent when social dichotomies are inflamed by catastrophic accidents of international dimensions, such as the Bhopal incident, that entail not only economic suffering and property damage but physical injuries and death. In such cases, the public often considers a settlement between the state and the corporate entity as unsatisfactory.[288] Only the entitlement to compensation through settlement with the threat of litigation, or through adjudication, can convince victims that justice has been served. It is only through this method that individuals can be relieved from the helplessness they experience when confronted with the unexpected consequences of an environmental accident.

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285. *See* LIABILITY MAZE, *supra* note 177, at 16 (liability may play a role in "helping regulators identify potentially unsafe products and encouraging them to take action.").

286. *See, e.g.*, ATIYAH, *supra* note 272, at 553 (the author emphasizes that the tort system is instrumental in appeasing social divisions after catastrophic accidents, as, for example, in the case of an accident that involved the collapse of coal tip onto a school that caused the deaths of 116 children and 28 adults).

287. *See* JETHRO K. LIEBERMAN, THE LITIGIOUS SOCIETY (1981).

288. *India Seeks to Reopen Bhopal Case*, N.Y. TIMES, Nov. 21, 1990, at D8. *Indian Government Ends Speculation, Announces Support for Bhopal Challenge*, 13 INT'L ENV'T REP. (BNA) 551 (1990). *See also* Wil Lepkowski, *Union Carbide-Bhopal Saga Continues as Criminal Proceedings Begin in India*, CHEMICAL & ENGINEERING NEWS 7, May 16, 1992 (the $470 million settlement between India and Union Carbide mediated in 1989 by the Indian Supreme Court encompassed both civil and criminal charges. "But public outcry was so strong that the court agreed to review its decision. It completed its review last December, upholding the settlement but restoring the criminal charges it had thrown out as part of the 1989 ruling.").

The notion that private liability can work as a tension release mechanism in international fora stems from the domain of human rights. For example, after *Filartiga v. Pena-Irala*,[289] citizens of developing countries started bringing suits against human rights violators in the courts of the United States. The purpose of the suits is vindication as opposed to compensation.[290]

Citizen participation in the international arena achieves something more fundamental. In pursuit of justice in transnational fora, citizens essentially join in the formation and strengthening of international rules. Their cases establish precedents that define acceptable corporate or state behavior. The importance of citizen participation is that it is not effectuated through state representation but through direct citizen involvement in affairs of international dimension. In this fashion, international law is infused by elements of direct democracy and is transformed from an instrument at the disposal of governments to an instrument in the hands of those truly affected by it.

Viewing the tort system as an instrument capable of introducing direct democracy in the international system could be criticized as unrealistic given the fact that citizens in many countries are not that litigious. However, this reality is changing at a rapid pace. Environmental groups in developing countries have started bringing suits against corporate and government polluters. For example, in Korea, the contamination of groundwater supplies resulted in criminal charges brought against top corporate officials.[291] In Malaysia, an environmental group brought an action against a corporation for the alleged harm to pregnant women and children caused by radioactive waste dumping.[292] There also have been suits on behalf of future generations and suits for failing to comply with environmental impact assessments.[293]

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289. 630 F.2d 876 (2nd Cir. 1980) (the case involved a suit of two Paraguayan citizens against Pena, another Paraguayan citizen and former Inspector General of the Police in Paraguay. According to the plaintiffs, Pena had tortured to death their son and brother. The court concluded that it had subject matter jurisdiction based on the Alien Tort Statute, 28 U.S.C. § 1350, which provides: "The district courts shall have original jurisdiction on any civil action by an alien for tort only, committed in violation of the law of nations or a treaty of the United States.").

290. *See* Larry Rohter, *Ex-Ruler of Haiti Faces Human Rights Suit in the US*, N.Y. TIMES, Nov. 15, 1991, at B10 (the objectives of these lawsuits are political and psychological. As a lawyer for six Haitians formulated it: "There is a message here to other military thugs and human rights violators, which is that you're not going to get away with it."). Relying on the Alien Tort Claims Act, human rights groups have filed claims against the Serbian leader in Bosnia, Radovan Karadzic, on behalf of the women raped during the civil war in the former Yugoslavia. Because of the lawsuit, Karadzic asked the United States administration to grant him immunity in order to participate in the peace talks held at the United Nations headquarters in New York. Paul Lewis, *Immunity Sought for Bosnian Serb: Atrocities Suit in a U.S. Court Cited as Barrier to Talks*, N.Y. TIMES, Feb. 23, 1993, at A8.

291. Michele Corash & Robert Falk, *Through a Cleaner Looking Glass*, LEGAL TIMES, May 11, 1992, at 16, *available in* LEXIS, Nexis Library, Omni File.

292. *Id.*

293. *Id.*

The growth of national litigation renders an international tort system for environmental harms extremely relevant. Building such a system would not necessarily be a panacea for all the procedural hurdles of private international law.[294] It could, however, lay the foundation for a more coherent action when the circumstances arise. These circumstances are very likely to develop, given the lack of success of the current international system in controlling the international transfers of hazardous and radioactive wastes. For example, the ban of waste imports into the African region[295] has not stopped illegal waste transfers to that area. In fact, waste exports to impoverished African countries such as Somalia are on the increase.[296] Waste exports to Latin America and Eastern Europe are also on the rise.[297]

C. *A Proposal for a Liability Regime*

1. The Liability Component

Strict liability has been established, nationally and internationally, as the appropriate type of liability for environmental harms—ultra-hazard-

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294. *See* Hans Ulrich Jessurum d'Oliveira, *The Sandoz Blaze: The Damage and the Public and Private Liabilities in Environmental Harm*, *in* ENVIRONMENTAL HARM, *supra* note 20, at 429, 442. *See* Scovazzi, *supra* note 20, at 395-96. These procedural hurdles stem from the fact that different countries adopt different conflict of law rules. For example, in the Sandoz disaster many problems emerged because the countries affected by the disaster — France, Germany, Netherlands, and Switzerland —have different rules of private international law. In addition, corporate subsidiaries not having many assets are often involved in severe accidents. In these cases, plaintiffs have tried to pierce the corporate veil and sue the parent company in the courts of the state where it is located. An example is the Bhopal case. The success of these lawsuits has been mixed and the law on this subject needs further clarification.

In response to the above concerns, certain countries have signed agreements that provide equal access to national remedies. The principle of equal access agreements is that plaintiffs suffering damages in a country other than the country where the environmental accident originated enjoy in the country where the accident originated the same legal treatment as the citizens of that country. However, these agreements are very few and do not solve the problem that the laws of the country of origin of environmental accident may be inadequate to deal with such accidents. *See* Alan E. Boyle, *Making the Polluter Pay? Alternatives to State Responsibility in Allocation of Transboundary Environmental Costs*, *in* ENVIRONMENTAL HARM, *supra* note 20, at 363, 370-73.

295. *See supra* note 1.

296. *See supra* note 281-2.

297. For example, banned German pesticides that were labeled as humanitarian aid were shipped to Romania and Albania without the consent of the governments of these countries. *See Federal, State Environmental Ministers Approve Steps to Curb Illegal Waste Trade*, INT'L ENVTL. DAILY (BNA), Sept. 28, 1992, *available in* LEXIS, Nexis Library, Omni File; *Greenpeace Finds Loopholes in EC Waste Trade Laws*, INTER PRESS SERVICE, Oct. 19, 1992, *available in* LEXIS, Nexis Library, Omni File; *see also* David Clark Scott, *Central American Presidents Seek Regional Solution to Toxic Wastes*, THE CHRISTIAN SCIENCE MONITOR, Mar. 10, 1992, at 5, *available in* LEXIS, Nexis Library, Omni File; *Colombia: Government Bans Ship Loaded with Toxic Waste*, INTER PRESS SERVICE, July 30, 1992, *available in* LEXIS, Nexis Library, Omni File.

ous activities posing non-reciprocal risks to others. The generation, transportation, and disposal of hazardous wastes are such activities. Unlimited liability, although not yet established in international law, has many procedural advantages over limited liability. Unlimited liability makes unnecessary periodic revisions of liability ceilings in order to take into account cost of living adjustments or in case of unexpected environmental disasters. In addition, the lack of adverse effects of this type of liability on insurance, in combination with its function as a tension release mechanism, an instrument of democratic control, and an accident prevention mechanism, renders its adoption imperative. Pollution victims should be able to negotiate a settlement or bring an action free of prearranged limitations on the amount of liability they may demand.

Imposing liability on generators for accidents occurring during transportation and disposal is supported by both domestic and regional legislation as a method that would induce generators to internalize the costs of producing wastes. Disposers must also be held liable for accidents occurring during disposal. Waste disposers must have the facilities and equipment to verify the quantities and categories of wastes they receive in order to ensure that they are suitable for the type of services they provide. Disposers must also be held liable for accidents taking place during transport, except in cases where they can prove that they did not have any control over the transporter or did not participate in her selection.

Imposing liability on transporters is not a common practice. The Conventions on nuclear liability avoid placing liability on transporters of nuclear materials — including wastes. The Draft European Community Directive specifies that waste transporters are liable only for a limited amount and not liable when they can identify the waste producer. Only the Convention on the Carriage of Dangerous Goods holds carriers exclusively liable, but only for a limited amount. Exonerating transporters from liability for accidents during transportation and disposal has yet to be adequately explained. Waste transporters must examine and verify the identity and package of wastes. They should refuse delivery if the wastes are improperly identified in the consignment note or if the package appears faulty. It is important to establish such a duty because otherwise transporters would have an incentive to engage in high-risk transfers. At the same time, waste transporters should be allowed defenses if they can identify the generator and demonstrate that, under the circumstances, further examination of wastes was infeasible or that the generator did not disclose the nature of wastes. However, the negligence of the waste transporter should not be a defense. Other defenses for waste transporters may be appropriate. This is because generators will often force transporters to expedite waste shipments and because there is significant room for fraud when wastes are already packaged and ready for transportation.

In addition, generators, transporters, and disposers must not be held liable when they have complied with the clear and specific national and international standards, or when the damage is the result of *force majeure*, intentional acts, or omissions of a third party or the victim. Lia-

bility must be joint and several when more than one person is liable.[298] All actors involved in waste management must have a right of recourse or subrogation against each other. Such a right will be particularly useful when waste disposal facilities are situated in developing countries and operated by small or state companies, and the deep-pocket generators are multinational corporations from a developed country with stricter environmental legislation. Such rules would provide generators with incentives to select responsible transporters, for transporters to verify the types of wastes they transport, and for disposers to make sure that the wastes they dispose of are actually the wastes mentioned in the manifest. Liability should cover personal injuries, property, loss of profits, costs of preventing environmental harm, and the costs to clean the environment. The costs to be recovered for preventing environmental harm and for cleaning the environment may be subject to a cost-benefit analysis after considering the circumstances of each case. Compulsory insurance must also be imposed, including traditional as well as alternative types of insurance. Moreover, given the particular nature of waste management, the statute of limitations should be extended to twenty or thirty years after the incident occurs. Finally, the geographical scope of an international liability regime must include the territory, the territorial sea, and the exclusive economic zone.[299]

Securing such provisions in an international convention should not be difficult since most national and international tort law contains similar provisions for environmental accidents.[300] It will be difficult, however, to establish an international standard of proof because national legislation is still evolving. This standard, because of the long latency periods between exposure and disease, should allow for reliable epidemiological studies to be considered. On the other hand, the standard should be flexible enough to allow courts to adjudicate cases according to the particularities of each individual case. Claims for emotional distress or for fear of cancer must also be given careful consideration. Finally, plaintiffs must be able to choose between the forum where the damage occurred, the forum where the environmental accident originated, or the place of business of the generators, transporters, and disposers. Existing conventions that limit the fora to the place where the incident or damage occurred only encourage defections from the established liability regimes when accidents actually happen and the forum designated does not serve the plaintiffs'

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298. Joint and several liability has been adopted by the Draft Convention on Liability from Activities Dangerous to the Environment. *See* The Council of Europe, Draft Convention on Civil Liability for Damage Resulting form Activities Dangerous to the Environment, July 31, 1992, DIR/JUR (92) 3, art. 6(2)-(3). After closure of the site it is provided that the last operator shall be liable and then the operator can have recourse against any third party. *See id.* art. 7.

299. The application of strict and unlimited liability cannot be extended to actions that take place in the high seas since there is no national or international jurisdiction over the high seas.

300. *See supra* sections I & II.

interests.

It will be difficult to include in a single international instrument those issues already covered by other international conventions and under the jurisdiction of different international organizations. As emphasized, there exist international conventions that deal with the transportation of toxic and radioactive wastes along with the transportation of dangerous and nuclear material.[301] There is also a fragmentation of international institutions that deal with the transportation of hazardous and radioactive wastes. In the case of maritime transportation of wastes, waste shippers may resist the imposition of liability by invoking the traditional rules of maritime law that place liability on shipowners.[302] Consequently, given the existing international legislation and different modes of waste transportation, it will be useful if the protocol to the Basel Convention is drafted with the cooperation of IMO, IAEA, and NEA.[303] Such cooperation would elucidate many issues.

2. The Social Insurance Component

Additional funding mechanisms should be provided in cases where businesses are not able to shoulder the full amount of compensation, cannot be held liable, do not exist anymore, or the settlement or adjudication procedures take too long because of the nature of the dispute or the overloading of national courts. These concerns can best be addressed by a mixed system comprised of private liability and social insurance components. The social insurance component of such a regime may take the form of a fund. The fund could be modeled after the 1971 and 1984 Fund Conventions and provide for residual compensation and immediate relief. It may also provide full compensation in cases where industries are not liable or do not exist anymore or in cases where national courts rejected compensation claims because there was no apparent linkage between exposure and disease. In the latter case, plaintiffs may be allowed to file claims against the fund at least two times after the initial claim if they can demonstrate with stronger evidence the linkage between exposure and disease. The fund could additionally provide immediate assistance during catastrophic accidents and sponsor international relief efforts in case of environmental disasters in the high-seas.

The Fund could be financed by waste exporting and importing states

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301. In addition, during the discussion of the HNS Revision, there was agreement that the Convention should cover "damage occurring during the carriage of hazardous and noxious substances to the dumping site." *See* 66th Session Report, *supra* note 118, at 13. However, the state parties to the London Dumping Convention have emphasized that the HNS Convention should apply only to "accidental spillages and loss of waste cargo" and not to "deliberate disposal at sea of wastes." The latter should be covered by a liability protocol to the London Dumping Convention. *See* 67th Session Report, *supra* note 120, at 17.

302. *See supra* notes 4-8.

303. It appears that such cooperation already exists. *See* Discussion of the Protocol to the Basel Convention, 67th Session Report, *supra* note 120, at 25.

in proportion to their wealth and the volumes of wastes they import or export.[304] States can, in turn, tax waste generators, transporters, or disposers. Direct industry financing under the supervision of states should not be excluded, but it will be more difficult to establish because industries that generate wastes, unlike industries involved in the oil business, are very diverse. An alternative approach would be to establish a preliminary fund involving mandatory contributions of states and voluntary contributions of industry. After the termination of the preliminary period, the performance of the fund will be evaluated and states will be required to submit proposals concerning industry's direct contributions to the fund. For this purpose, during the first stage of the fund, states will have to accumulate data and sponsor statistical analysis concerning waste production, waste exports, and accidents due to waste mismanagement and transportation for each industrial sector. The advantage of the two-stage approach is that it would entice industry to contribute to the fund under the threat that if voluntary contributions are inadequate, they will become mandatory. As evidenced by CRISTAL and TOVALOP, industry is more willing to contribute to voluntary schemes than to obligatory ones. The fund could be administered temporarily by an existing international organization such as the United Nations Environment Programme, the IAEA, the World Bank, or preferably by an international agency specializing in waste management.[305]

CONCLUSION

It is the conclusion of this article that both justice and efficiency propagate the establishment of an international liability regime for accidents due to waste mismanagement. A strict and unlimited liability system will prevent accidents and simultaneously democratize the international system without causing any adverse effects on insurance.

304. LOUKA, *supra* note 1, at 26.
305. *Id.* at 22-23.

Public Participation in Economic and Environmental Planning: A Case Study of the Philippines

EDWARD E. YATES*

I. INTRODUCTION

In the Phillipines, Aboriginal, Malay, Chinese and mixed-blood peoples live among unique and productive biological ecosystems. However, environmental degradation threatens socio-economic development in this resource rich but environmentally fragile country. Destruction of forest and marine ecosystems severely affects local economies dependent on traditional fishing and agriculture. The quality of urban air and water is degradated daily, causing major health problems. The increased pollution and natural resource degradation are clearly related to the country's drop in food production and its difficulties raising the national standard of living.[1] Indigenous peoples and rural poor often bear the brunt of this resource degradation. The increased pollution and natural resource erosion are clearly related to the country's drop in food production and its difficulties in developing an economy capable of raising the national standard of living.[1]

The traditional western response to difficulties in economic development has been to throw both money and concrete at the problem. Yet the large industrial and infrastructure projects in the Philippines, as in other countries, cause tremendous environmental repercussions.[2] While the pursuit of socioeconomic development does not necessarily conflict with a strong environmental policy,[3] rapid industrial based development with little public scrutiny or involvement has clearly increased damage to the environment and human suffering in the Phillipines.

Non-governmental organizations and some political leaders recognize the problems caused by this resource degradation and have stressed the

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1. *See generally* THE WORLD BANK, FORESTRY, FISHERIES, AND AGRICULTURAL RESOURCE MANAGEMENT IN THE PHILIPPINES (Sept., 1989); U.S. AGENCY FOR INTERNATIONAL DEVELOPMENT, SUSTAINABLE NATURAL RESOURCE ASSESSMENT — PHILIPPINES (Dames and Moore Int'l, et. al., 1989); GARETH PORTER & DELFIN GANAPIN, WORLD RESOURCES, INSTITUTE, RESOURCES, POPULATION AND THE PHILIPPINES FUTURE (1989).

2. *See* SIERRA CLUB, BANKROLLING DISASTERS (1987); ROBIN BROAD & JOHN CAVANAUGH, PLUNDERING PARADISE: THE STRUGGLE FOR THE ENVIRONMENT IN THE PHILLIPINES (1993).

3. Studies of economic growth in Europe and the United States clearly show that environmental protection does not slow down or interfere with economic growth. *See* THE COUNCIL ON ENVIRONMENTAL QUALITY, WASHINGTON D.C., 21st ANNUAL REPORT, MAKING THE ENVIRONMENT COUNT (1990).

urgency of the problem.[4] As these leaders and groups point out, little has been done to address the problem because the wealthy classes in the Philippines benefit from rapid resource exploitation, and the political power of this economic elite has effectively eliminated any serious political restructuring, such as land reform.[5] Further, the inability of the Philippine government to effectively fund and carry out environmental protection has thwarted genuine efforts to regulate and manage resources. To sustain its resources the Philippines must confront and overcome both the political power of those exploiting resources and the scarcity of administrative funding and capacity.

To address unjust and inadequate economic and environmental policies, citizens and governments in many countries have attempted to open up information control and development planning, through the environmental impact assessment (EIA) process.[6] EIA, along with open meetings and freedom of information acts, opens proposed programs and projects to external review and criticism.[7] In the 1970s, the Philippines, along with other countries, established EIA in order to provide an objective, analytical approach to project planning. Although many countries established EIA, only those nations that incorporated extensive external review, coordination, and public involvement — the United States, Canada and the Netherlands[8] — succeeded in using EIA to avoid and reduce the environmental and socio-economic impacts caused by large scale development.[9]

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4. *See Our Threatened Heritage (Proceedings from the Solidarity Seminar on the Environment)*, 124 SOLIDARITY (Oct.-Dec. 1989)[hereinafter SOLIDARITY].

5. PHILIPPINE CENTER FOR INVESTIGATIVE JOURNALISM, SAVING THE EARTH: THE PHILIPPINE EXPERIENCE (1991).

6. Most environmental statutory mechanisms need a substantial regulatory framework and are often applied after the pollutant or development has altered the environment. EIA is a study process used to predict and prevent the environmental and socio-economic consequences of development programs and projects and avoid costly regulation and enforcement. Projects can include establishing a forest management plan or building a hydraulic dam. Programs such as water use management plans can also utilize the EIA process. EIA concentrates on natural resource constraints that can effect the success of a program or project. It also sets out how projects might cause harm to people, their homeland or their livelihoods, or to other nearby development projects. EIA then identifies ways to minimize the problems and outlines ways to improve the project so that it better meets its proposed goals. The people who participate in the process include other government agency officials, technical specialists, local leaders and perhaps most importantly, the local citizens of the area for which the program or project is planned. United Nations Environment Program, ENVIRONMENTAL IMPACT ASSESSMENT: BASIC PROCEDURES FOR DEVELOPING COUNTRIES, U.N. ENVIRONMENTAL PROGRAM, at 2, 3 (1988).

7. MICHAÉL D. AXLINE, ENVIRONMENTAL CITIZEN SUITS (1991).

8. National Environmental Policy Act, 42 U.S.C. §§4321-4347, (1988); Government Organization Act, 1979, P.C. 1984-2132, CAN. GAZ., 118(14) SOR/84/467 (Nov. 7, 1984); Environmental Protection Act, Act of April 23, 1986 (General Provisions), Bulletin of Acts, Orders and Decrees 211 (The Netherlands).

9. W. Kennedy, *Environmental Impact Assessment in North America and Western Europe: What has Worked Where, How, and Why, Int'l Env. Rep.* (BNA) 257-262 (Apr. 13, 1988); U.S. COUNCIL ON ENVIRONMENTAL QUALITY, WASHINGTON D.C., 20TH ANNUAL REPORT ON ENVIRONMENTAL QUALITY, THE NATIONAL ENVIRONMENTAL POLICY ACT; A MODEL FOR

Those EIA systems, including Asian systems, that did not establish coordination or oversight mechanisms, have had serious implementation problems.[10]

The Philippine EIA system incorporated many elements of various other EIA systems and established some indigenous, innovative concepts. The Philippines implemented their EIA system, however, in an uneven manner, emphasizing technical and regulatory aspects and largely ignoring the more important external review aspects such as inter-governmental coordination and public participation.[11] Since establishment of the EIA system fifteen years ago, the government has eliminated its inter-agency coordination, granted hundreds of exemptions and, in some cases, simply failed to carry out the planning required by the EIA system. Public scrutiny and oversight could have prevented much of this abuse. Further, the EIA system never adequately utilized a very valuable resource: the input and knowledge of local citizens and organizations.

This paper will briefly set out the more serious problems in the Philippine EIA system, problems which are representative of the economic and environmental planning problems faced in many developing countries.[12] Next, it will show how citizen participation and external review of government planning could produce an effective development planning process that would avoid projects that damage the environment. The last section will suggest a minor revision of The Phillipine EIA process by which public involvement is established as an integral part of development project planning in the Philippines and in other developing countries.[13]

II. NATURAL RESOURCES AND ECONOMIC POWER IN THE PHILIPPINES

The commerce and culture of the Philippines has traditionally been

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OTHER COUNTRIES 42-51 NOTE (1990).

10. N. Htun, *The EIA Process in Asia and the Pacific Region*; I. Moreira, *EIA in Latin America in Environmental Impact Assessment: Theory and Practice* (P. Wathern, ed., 1988).

11. The period of dictatorship of Ferdinand Marcos seriously affected all Philippine citizen and non-governmental efforts to participate in the economic development process. EIA was viewed as a technical tool under Marcos and that view has not changed in the seven years since his overthrow. For a general history of recent Philippine politics see CLARK NEHER, SOUTHEAST ASIA IN THE NEW INTERNATIONAL ERA 55-85 (1991).

12. For a review of EIA in developing countries, see *Symposium: EIA for Developing Countries: Progress and Prospects*, 5 ENVTL. IMPACT ASSESSMENT REV. 3 (Sept. 1985).

13. This paper will not attempt to analyze the analytical or quantitative processes utilized in the Philippine EIA system; e.g. mitigation, alternatives, monitoring, cumulative impact assessment, etc. This paper attempts to assess why the current system is not effective. For another view of the Philippine EIA system see Abracosa & Ortolano, *Environmental Impact Assessment in the Philippines: 1977-1885*, 7 ENVTL. IMPACT ASSESSMENT REV. 293-310 (1987) [hereinafter Abracosa]; PHD. DISSERTATION, DEP'T OF CIVIL ENGINEERING, STANFORD UNIVERSITY, THE PHILIPPINE ENVIRONMENTAL IMPACT STATEMENT SYSTEM: AN INSTITUTIONAL ANALYSIS OF IMPLEMENTATION, (1987)(Available at Stanford Engineering Dept. and the University of the Philippines, Manila School of Urban and Regional Planning).

closely tied to the land and the sea. In recent years the Philippines has put great demands on these natural resources in order to support its rapidly growing population and its need for economic development. Yet these resources, agricultural land, forests and marine ecosystems, are deteriorating rapidly. For instance, forest cover has declined in the Philippines from 75 percent in 1950 to only 25 percent in 1988, and only 980,000 acres of virgin forest remain.[14] The once productive fisheries of the Philippines are being decimated by the destruction of the coral reefs and the pollution of coastal waters by industrial and human wastes.[15] Given that fish and other seafood provide 54 percent of the protein for the average Filipino household, the destruction of marine resources could result in economic disaster and possible famine.

Destruction of the natural resource base results in the breakdown of the socioeconomic and cultural foundation of Filipino rural society. The loss of that base causes the mass migration of rural peoples to the vastly overcrowded, polluted cities of the Philippines. In urban areas, buses and factories emit huge clouds of black smoke into small, highly populated areas where health care for the poor often does not exist. Open sewers and lack of zoning regulations allow processing of toxic substances and hazardous waste in thickly populated, lower-income areas.

For years, government agencies or rapid growth oriented political appointees have dominated the agencies charged with managing the nation's natural resources. The Aquino administration initially attempted to change this dynamic by establishing the Department of Environment and Natural Resources (DENR) and appointing more enlightened administrators. Unfortunately, the laws intended to control air and water pollution and wanton destruction of the country's natural resources remain only rarely enforced. The belief prevails in much of industry that the Philippines must follow a "pollute and grow" approach.

Access to natural resources and economic benefits from the extraction of resources creates political and economic power. The traditional land-holding elite and foreign multinationals, who have little interest in the type of planning that encourages sustainable development of resources, hold most of this power.[16] Citizens and local communities in the

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14. PHILIPPINE MINISTRY OF NATURAL RESOURCES, REPORT OF THE TASK FORCE ON FOREST PRODUCTS UTILIZATION 1 (1987); DANTE B. GATMAYTAN, LEGAL RIGHTS AND NATURAL RESOURCES CENTER, MANILA, IT'S TOO EARLY FOR CONSERVATION: TOKENISM IN THE ENVIRONMENTAL IMPACT ASSESSMENT SYSTEM OF THE PHILLIPINES (1993).

15. Delfin J. Ganapin & Gareth Porter, *Philippine Fisheries: Who Benefits? in* RESOURCES, POPULATION AND THE PHILIPPINES FUTURE (1988). *See also The Philippines Marine Wealth: Who Owns It?, in* SARILAKAS, Sept, 1987 (The authors describe how fishery resources that are supposedly open access are often destroyed by large scale fish and shrimp farming enterprises aimed at export).

16. *See generally* Delfin J. Ganapin, TOWARDS MORE EFFECTIVE REGULATION: A CASE STUDY OF THE PHILIPPINES (Presented to the Conference on Environmental Management in Developing Countries, Organization for Economic Cooperation and Development, Paris, France, Oct. 2-5, 1990) [hereinafter GANAPIN]; PHILIPPINE CENTER FOR INVESTIGATIVE JOUR-

Philippines have few tools with which to manage or protect natural resources.

A panel of natural resource policy experts, including Sen. Orlando Mercado and noted Filipino economist Sixto Roxas, declared that "decision making and responsibility over the natural ecosystem should belong to local communities whose livelihoods are most directly affected by its protection."[17] Given the Philippine government's record managing resources and regulating polluters, this policy recommendation may provide the only alternative for long term resolution of the environmental crisis in the Philippines. The panelists also acknowledged the need for government-community partnerships where large scale projects receive public support. Regional and national infrastructure projects such as highways, ports, and energy facilities could provide excellent vehicles for development of such partnerships through both regional planning and EIA processes. Yet EIA, and most development planning in the Philippines, failed during the first fifteen years.

III. EIA IN THE PHILIPPINES: A BRIEF HISTORY

A. *Intergovernmental Coordination Aspects*

The regulatory system[18] set up to implement the EIA system in the Philippines stressed two elements: (1) the technical and procedural review required prior to the granting of permits; and (2) the interdisciplinary approach and coordination needed for development planning. All project proponents (other federal agencies or local governments) were required to carry out this process and obtain "Environmental Compliance

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NALISM, SAVING THE EARTH: THE PHILIPPINE EXPERIENCE (1991).

17. Many large scale policy changes are currently being advocated by Philippine leaders and activists to address environmental protection and economic development. Most, however, require either huge policy changes by governments or costly and ambitious (but necessary) regulatory apparatus. In the Philippines the most far reaching yet basic reforms would be to change the land tenure system and to allow its citizens democratic access to natural resources. *See* SOLIDARITY, *supra* note 4. Many of these reforms can only be implemented after extensive changes in property and even Constitutional law. This paper does not address those reforms but instead will identify immediate steps to improve the present planning processes which could build toward and complement more far reaching reforms when they are in place.

18. Presidential Decree No. 1151 set out the general administrative framework for environmental protection in the Philippines. Presidential Decree No. 1586 (June 11, 1978) set out the statutory framework for the environmental impact statement system including the establishment of the Environmental Critical Projects and Areas concept. The National Environmental Protection Council issued specific Rules and Regulations to implement Presidential Decrees No. 1151 and No. 1586 on July 22, 1983. Presidential Proclamation No. 2146 (Dec. 14, 1981) identified the environmentally critical areas and projects called for in Presidential Decree No. 1586. In 1983 the NEPC issued guidance regarding Presidential Proclamation No. 2146. Office Circular 3, *Technical Definitions and Scope of the Environmentally Critical Projects and Areas Enumerated in Proclamation 2146 (1990); see also* Legal Assistance Center for Indigenous Filipinos, *Commission on Ancestral Domain: The Legislative Agenda*, PANLIPI HORIZONS, Jan. 1989, vol. 1, no. 2.

Certificates" (ECC).[19] The ECC system established a list of environmentally critical projects or areas that trigger the requirement to draft an Environmental Impact Statement (EIS).[20] This list system usually provides for an assured minimal level of planning for those projects and areas listed.[21] As in many EIA systems around the world, the Philippine system emphasizes the technical, quantitative methodologies of EIA. The Philippines and India, where well developed higher education systems existed, assumed that technical analysis could provide the objective scrutiny that would reform narrowly focused, inefficient, or corrupt government programs.

The designers of this EIA system correctly predicted that the line agencies approving the projects were narrow, mission oriented entities not interested in broad based planning. Therefore, the designers attempted to create an environmental awareness and expertise in government ministries. They required the establishment of environmental units within all government agencies involved in planning development projects. This system proposed to develop environmental expertise and awareness in the very officials who design and oversee projects. The National Environmental Protection Council's (NEPC) original task was simply to give advice, oversee the EIA system, and review the EISs for adequacy.[22] However, neither the NEPC nor the public had the power to enforce the EIA system.[23]

When the Department of Environment and Natural Resources (DENR) took over the functions of the NEPC in 1986,[24] the line agencies had stopped complying with the intended system, and DENR's Environment and Management Bureau (EMB) was charged with drafting all the EISs for the entire country! As in many other environment ministries worldwide,[25] other government departments who want little scrutiny of their projects often block officials at DENR.[26] These departments do not

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19. Presidential Proclamation No. 2146 (1981).

20. *Id.*; Letter of Instructions No. 1179 (1981); NEPC Council Special Order No. 1 (1982).

21. JOHN HORBERRY, WORLD CONSERVATION UNION, STATUS AND APPLICATION OF ENVIRONMENTAL IMPACT ASSESSMENT FOR DEVELOPMENT 68, (1984).

22. These two processes are performed by two different government agencies in the U.S.; under the National Environmental Policy Act, 42 U.S.C. §4321 (1988), the Council on Environmental Quality is charged with oversight of the EIA process, while section 309 of the Clean Air Act, 42 U.S.C. §7609 (1988), charges the Environmental Protection Agency with the duty to review EISs for substantive and technical adequacy.

23. Abracosa, *supra* note 13, at 293.

24. President Aquino issued Presidential Order No. 192, which mandated a reorganization of government agencies dealing with environmental and natural resources issues. Oversight of the EIA process was transferred from the now defunct National Environmental Protection Council (NEPC) to the Environmental Management Bureau of the newly formed Department of Environment and Natural Resources.

25. *See generally* Jaro Mayda, *Environmental Legislation in Developing Countries: Some Parameters and Constraints*, 12 ECOLOGY L.Q. 997 (1985).

26. In the last two years DENR has addressed some of these coordination issues by

report their projects to DENR until the funds have been appropriated or the project has already started in order to avoid intervention.

For example, in order to exploit the "ecotourism" boom, the Philippine government has made extensive investment inroads on the thickly forested, sparsely inhabited island of Palawan. An EIS is being drafted for one such road from the airport in Puerto Princesa to Sabong on the beautiful and little visited west coast. This road passes through the watershed that feeds the unusual underground river at St. Paul National Park, a park that the Philippine government has recently spent millions of Pesos to protect. Road construction, however, has already started and has brought settlers practicing "kaingin," or slash and burn agriculture, to the watershed and to the ancestral domain of the traditional Batak and Tagbanue peoples. By not adequately complying with the coordination process, the municipality building the road ignored the knowledge of the national government entity that manages the park.[27] The rush to ignore planning and coordination will not only stunt economic development but will also threaten the survival of two indigenous cultures.

B. *External Oversight*

Public scrutiny makes government agencies uncomfortable. Yet, as the noted international environmental legal scholar Nicholas Robinson points out, public involvement and oversight of project planning have helped eliminate or reassess poorly planned projects. From the citizen suits by inner city workers in New York to outreach in rural Russia, EIA allows people to participate in and improve planning.[28]

Unfortunately, the Philippines' attempt to ensure some oversight lacked force and application. Review panels made up of governmental and academic technical specialists convened to examine the adequacy of the environmental analysis.[29] This process unfortunately became a somewhat closed, technical, and eventually meaningless exercise. Further, the

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establishing agreements with other government agencies, such as the National Economic Development Agency, that attempt to reestablish coordination between line agencies and DENR. DENR has also issued Administrative Order No. 38-A (September 12, 1990) and Special Order No. 589 (June 27, 1991), which set out internal procedures for EMB in implementing the EIA system. None of these above measures are legally binding but instead set up an institutional framework.

27. The Protected Areas and Wildlife Bureau of the DENR. Exec. Order 192 (1987). Admin. Code of 1987, Tit. XIV, Ch. 2, § 19.

28. Nicholas Robinson, The National Environmental Policy Act: Today's Law for the Future, address at the Council on Environmental Quality sponsored Conference (September 22, 1989) (transcript available in Pace University School of Law Center for Environmental Legal Studies); *see* GATMAYTAN, *supra* note 14, at 9-14.

29. Section 5 of the Regulations for implementing Presidential Decree No. 1586 establishes the mandate for the EIS Review Committee. Yet these panels are rarely convened and are generally made up of technically oriented government and ex-government officials. Broader systemic and socio-economic issues are not addressed and the panels are not viewed as independent.

implementing regulations permitted the government to grant exemptions for certain projects or areas, with little or no basis. Even more disappointing, a large quantity of projects were never reviewed because the line agencies failed to inform EMB that these projects existed. Dr. Ramon Abracosa, a Philippine EIA expert, notes that the regulations provide for too much discretion for government decision makers and do not clarify the enforcement process.[30]

Even worse, powerful political patrons have cut short EIA processes.[31] For example, little documentation preceded the massive Japanese funded Philippine Associated Smelting and Refining Corporation project in Leyte. Similarly, the Ortigas-EDSA Overpass, a critical urban transportation link in Manila, was never the subject of EIA documentation. This overpass cannot accommodate public transit, leaving the overpass an expenditure of public funds that will only benefit the auto owning upper classes.

Inconsistent implementation of the EIA system in the Philippines has resulted in a dearth of environmental or socio-economic safeguards for a large majority of the major development programs and projects in the Philippines. Agency statistics show that between 1983 and 1990 DENR denied only five Environmental Compliance Certificates out of the hundreds of projects subject to the EIA system.[32] Hundreds of large scale projects escaped needed scrutiny.

Even more troublesome, project proponents fail to bring countless projects to the attention of DENR, and other projects receive exemptions, legally or illegally, from high level politicians.[33] For example, senior officials at DENR and the Department of Public Works cut off environmental analysis of the Manila Light Rail Transit (LRT) project. The results of that illegal interference could prove catastrophic to the Filipino taxpayer. The LRT is now sinking in unstable ground. A thorough hydrogeological investigation of an EIS could have helped predict and avoid a fiasco that may waste millions of Philippine Pesos.

No process exists to halt the undue influence by industry and politicians that derails the EIA system. Public hearings and public oversight that could have provided the scrutiny necessary to enforce an effective EIA system were never implemented. The system has generally excluded

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30. Interview with Ramon Abracosa, Engineer with the Philippine Department of Agriculture (August 15, 1991).

31. This includes attempts by the Congress to delegate additional political powers to local governments set out in the Local Government Act, Rep. Act No. 7160 (1991). This law includes, among other decentralizing mandates, the requirement that all national agencies "conduct periodic consultations with appropriate local government units, nongovernmental and people's organizations" before projects are implemented. Tit. I, Ch. 3, § 2. This notice requirement has not been effective, however, as it does not require any involvement or consultation with the public.

32. *Statistical Summary of EIA Projects: 1983-1991, Department of Environment and Natural Resources, Environmental Management Bureau* (1991).

33. GANAPIN, *supra* note 16, at 3.

local citizens and officials, thereby omitting the participation of those who have the most relevant experience and knowledge concerning projects. Only EIAs on selected, highly controversial projects give citizens an opportunity to express their views. Yet these hearings occur late in the process, if they occur at all.

For example, a huge EIS was drafted for the internationally debated Mount Apo geothermal development project. Phillipine National Oil Company officials knew that substantial opposition existed to destruction of a bioregion that contains the Philippines' most important national park, the only habitat for the highly endangered Philippine Eagle and an area sacred to many indigenous tribes.

Local citizens were allowed to comment on the eleven volume EIS only after the sponsor, the Philippine National Oil Company, had invested millions of pesos and after approval and completion of virtually all the feasibility studies. For all practical purposes the decision had already been made based on incomplete information.[34] Requirements for early and effective public participation would have uncovered the inappropriateness of such a project and avoided the national and international controversy and embarrassment suffered by the Philippines.[35]

IV. OVERCOMING RESTRAINTS: PUBLIC PARTICIPATION AND OVERSIGHT CAN WORK

EIA systems do not generally work as their designers plan. Often the problems result from a theoretically faulty legislative framework or inadequate regulatory measures.[36] For example, other national EIA systems currently in use have been criticized for lack of regional planning tools such as carrying capacity.[37] But more often than not, the basic legislative/regulatory system suffers from functional inadequacy rather than theoretical inadequacy. The system is quite simply not implemented. In the Philippines, documents are drafted late in the planning process, the gov-

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34. For an extensive discussion of the socio-economic impacts and the EIA process regarding Mt. Apo National Park, see C. Fay, A. Royo & Dante B. Gatmaytan, *The Destruction of Mt. Apo: In Defense of Bagobo Ancestral Domain*, 2 PHILIPPINE NATURAL RESOURCES LAW JOURNAL 18-25 (May 1990).

35. The most recent revision of the Phillipine EIA process came in the form of an administrative order pushed through by DENR Secretary Fulgencio Factoran before a change in administration. DENR Administrative Order 21, § 1992 generally streamlines and decentralizes the Rules and Regulations of Presidential Decree 1586. DENR regional offices now have greater flexibility in regard to requiring ECCS and issuing exemptions. Art. 2, § 5. In regard to public involvement, little has changed except that the requirements have been lessened. Public hearings are not required except for projects that are "environmentally critical" and where there is "mounting public opposition." Art. IV, § 4.2.4. For a more in-depth review of this administrative order, see GATMAYTAN, *supra* note 14, at 18-25.

36. *See generally* R. COENEN & J. JORISSEN, ENVIRONMENTAL IMPACT ASSESSMENT IN THE MEMBER COUNTRIES OF THE EUROPEAN COMMUNITY 39 (1989).

37. *See* William Rees, *A Role for Environmental Assessment in Achieving Sustainable Development*, 8 ENVTL. IMPACT ASSESSMENT REV. 273 (1988).

ernment environment agency does not have the capabilities to carry out its responsibilities, and many projects never face review due to political pressure or political debts known as "utang na loob."

How can these restraints be overcome? One approach is to adjust or "tinker" with the analytical process (e.g. improve mitigation analysis) or reorganize the government administrative functions. These types of adjustments, however, do not address the basic lack of implementation. The Philippine government is not able to carry out and enforce an EIA system on its own.[38] For that matter, no government is capable of such a task without both public participation and external oversight.

A. *Public Participation*

The necessity of a local knowledge base to the completion of successful project planning has become clear to many countries.[39] The European experience is instructive. As W.R. Sheate stated, regarding EIA in the United Kingdom, "[i]f sufficient public involvement occurs in the early stages it may be possible to identify the priority issues and thereby explore ways of addressing and hopefully removing or mitigating their worst effects."[40]

Economic and environmental planning requires the mobilization of those people most familiar with the environmental and socio-economic factors in question. Environmental planning and management demands a broader base of support and knowledge from universities, economic enterprises, and those most familiar with local resource constraints, the local communities.[41] Filipino citizens, including civic leaders and local businessmen, all have knowledge of the potential and limits of local resources, normally not ascertainable from scientific or economic studies.[42]

The public participation processes utilized in EIA can be implemented without extensive training or restructuring of local government laws. Two methods of public participation are "scoping" and public comment and access to documents.

Under scoping, those parties with special or particular knowledge concerning a project or its site are given the opportunity to comment

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38. Dames and Moore, *supra* note 1, at vi.

39. HORBERRY, *supra* note 21, at 67-70; THE WORLD BANK, MAKING BETTER DECISIONS: INFORMATION, INSTITUTIONS, AND PARTICIPATION 83-97 (1992).

40. W.R. Sheate, *Public Participation: The Key to Effective Environmental Assessment*, 21 ENVTL. POL'Y & LAW 3, 4 (1991); CELIA MOHN, BARRY BREEN & WILLIAM FUTRELL, ENVIRONMENTAL LAW FROM SOURCE TO RECOVERY 88 (1993).

41. HORBERRY, *supra* note 21, at 69.

42. Article four of the Regulations promulgated under P.D. 1151 provided a framework for the invocation of public hearings. P.D 1151 §4 (1977). These regulations, however, do not specifically require that public hearings or other public participation mechanisms be incorporated into the EIA process. Hearings are often held only where great public controversy has arisen over the project, and they are generally held late in the planning stage solely in order to allow the irate public to blow off steam.

early in the planning process. This method encourages participants to indicate major issues and discard unimportant issues making future efforts more focused and efficient. Public access to and comment on project documents opens up the decision making process to necessary public light and scrutiny.[43]

By allowing public comment and access to documents, agencies can benefit from the additional expertise that only the public can provide.[44] Public comment overcomes the inherent bias by government agencies in favor of the projects and industries that they regulate. Where the government agency holds all the information secretly, the opposition cannot verify the EIS's underlying base analysis.

Public comment on documents in the Philippines is not required nor used efficiently. The Philippines could adapt or expand both processes, scoping and public comment, to meet their specific needs. For example, the Philippine National Irrigation Administration has successfully incorporated public participation in many of its projects.[45] The Philippines cannot afford to waste local knowledge.

B. *External Review/Enforcement*

Just as environmental planning needs the expertise and participation of the affected local communities, the government agencies that implement the projects need oversight. The unwillingness of Philippine government line agencies to establish environmental units, the narrow mindset of mission-oriented agencies, and the politicians' continued support of special interests clearly demonstrate the barriers to the EIA system's ability to enforce itself. Indeed, the problem of enforcement of the EIA process is not unique to the Philippines.

Numerous works have detailed the problems in implementation and enforcement of the various governmental and institutional EIA processes worldwide.[46] Lack of external review makes correcting these deficiencies difficult. Those systems established without adequate provisions for environmental review have faltered.[47] Much of the success of the EIA systems

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43. U.S. COUNCIL ON ENVIRONMENTAL QUALITY, MEMORANDUM FOR GENERAL COUNSELS, NEPA LIAISONS, AND PARTICIPANTS IN SCOPING (1981).

44. Several military base closure programs in the U.S. use an even more proactive model of public participation. Advisory panels made up of community representatives and local government officials work closely with base commanders on issues of cleanup and reuse of the bases. *See* U.S. Environmental Protection Agency, Interim Report of the Federal Facilities Environmental Restoration Dialogue Committee (1993).

45. F. KORTEN AND R. SIY, TRANSFORMING A BUREAUCRACY: THE EXPERIENCE OF THE PHILIPPINES NATIONAL IRRIGATION ADMINISTRATION (1989).

46. ENVIRONMENTAL IMPACT ASSESSMENT: THEORY AND PRACTICE (Peter Wathern, ed., 1988); JOHN HORBERRY, STATUS AND APPLICATION OF ENVIRONMENTAL IMPACT ASSESSMENT FOR DEVELOPMENT, CONSERVATION FOR DEVELOPMENT CENTRE, GLAND (1984); Mayda, *supra* note 25; COENEN, *supra* note 36.

47. UNITED STATES COUNCIL ON ENVIRONMENTAL QUALITY, TWENTIETH ANNUAL REPORT ON ENVIRONMENTAL QUALITY 42-51 notes (1990).

in the U.S. and the Netherlands flows from independent review commissions or direct citizen suits that shed light on government processes and ensure their implementation.[48] Even Canada, which developed an efficient review panel system, has recognized the need for expansion of public participation and oversight.[49]

C. *International Movement on EIA and Public Involvement*

For several years international institutions, such as the United Nations and the Association of Southeast Asian Nations,[50] have recognized the problems caused by poorly planned, large scale development projects with little outside scrutiny. These institutions have called for the revamping and/or establishment of EIA in member countries. However, the unwillingness of international banks to require environmental feasibility studies, alongside economic and engineering studies, has provided little incentive for governments to revise their planning systems. In recent years, non-governmental organizations have been pressuring the international financial institutions to adopt more stringent environmental review requirements for large scale development projects. International NGOs succeeded in pushing the Pelosi Amendment, a bank reform bill,[51] through the U.S. Congress. This law requires the U.S. Executive Directors at the four multilateral development banks to vote against any project that significantly affects the environment that has not been the subject of an EIS.[52]

Banks, while scrambling to revise their own project cycle,[53] have not aggressively or effectively communicated their mandate to assist borrower countries in developing and/or revising such procedures. Even more important, the banks have refused to require their borrower countries to

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48. *See* THE COUNCIL ON ENVIRONMENTAL QUALITY, TWENTIETH ANNUAL REPORT 42-46 note (1989); S. TAYLOR, MAKING BUREAUCRACIES THINK (1984). Taylor's study found that judicial enforcement of EIA norms is the only effective way to insure their implementation. Taylor does note that many government officials feel that EIA would be more effective as a standard, non-regulatory planning tool. Interview with Dr. Ramon Abracosa, Philippine Department of Agriculture (Aug. 15, 1991) (Dr. Abracosa cites cost-benefit analysis as a successful example of non-regulatory planning).

49. *See* CANADIAN ENVIRONMENTAL ADVISORY PANEL, REVIEW OF THE PROPOSED ENVIRONMENTAL PROTECTION ACT (1987).

50. *Goals and Principles for Environmental Impact Assessment*, United Nations Environment Programme, UNEP/GC14/17, Nairobi, 1987, Principle #7; Association of Southeast Asian Nations, *Agreement on the Conservation of Nature and Natural Resources*, Article 14(1) (1985).

51. 13 International Financial Institutions Act § 1307(a); Pub. L. No. 101-240; 22 U.S.C. § 262(m) (1990).

52. The four multilateral banks clearly covered by this law are the World Bank, the Asian Development Bank, the Inter-American Development Bank, and the African Development Bank. It is not clear whether the Pelosi Amendment applies to the newly formed European Bank for Reconstruction and Development.

53. THE WORLD BANK, OPERATIONAL DIRECTIVE 4.00 (1989); THE INTERAMERICAN DEVELOPMENT BANK; PROCEDURES FOR CLASSIFYING AND EVALUATING ENVIRONMENTAL IMPACTS OF BANK OPERATIONS (1990).

carry out the public participation process. For example, the Asian Development Bank (ADB) has developed a complex and extensive set of environmental planning guidelines that do not strictly follow the EIA process.[54] ADB's environment chief, Bindu Lohani, notes that ADB's requirements go beyond EIA by requiring resource assessment and regional planning. Yet the ADB does not require public participation. Instead, it uses mathematical formulas to determine social impacts.[55] The technical prowess of environmental planners will not, as has been shown in the Philippines, prevent funding of unsound projects.

V. AN EXTERNAL/INTERNAL APPROACH

In many countries, citizens have the legal standing to challenge an agency action that abuses administrative discretion[56] or violates a Constitutional right to a clean environment. Other countries reject the use of litigation to settle social disputes or challenge government action. While small environmental disputes do sometimes go to trial in the Philippines, the conservative courts discourage the use of litigation to achieve social change.[57] Effectuating social change in the Philippines through statutory reform proves even more difficult. The Philippine Congress spends its time on fractious politics and has passed fewer than ten major laws in the last ten years. Many political activists have more faith in administrative reform than in congressional or court mandated social change.[58]

Oversight of governmental processes by quasi-governmental commissions could provide an alternative. This approach may provide a more theoretically preferable or culturally acceptable method of dispute resolu-

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54. ASIAN DEVELOPMENT BANK, ENVIRONMENTAL GUIDELINES FOR SELECTED INFRASTRUCTURE DEVELOPMENT PROJECTS (1986, revised 1988); ASIAN DEVELOPMENT BANK, ENVIRONMENTAL GUIDELINES FOR SELECTED INDUSTRIAL AND POWER DEVELOPMENT PROJECTS (1987, revised 1988); ASIAN DEVELOPMENT BANK, ENVIRONMENTAL GUIDELINES FOR SELECTED AGRICULTURAL AND NATURAL RESOURCES DEVELOPMENT PROJECTS (1987)(the above documents are available through the Asian Development Bank in Manila).

55. The Asian Development Bank has developed a "Mathematical Formulation of the Human Development Index," yet does not require community involvement as an aspect of their social analysis. ASIAN DEVELOPMENT BANK, GUIDELINES FOR SOCIAL ANALYSIS OF DEVELOPMENT PROJECTS (June 1991).

56. Sierra Club v. Morton, 405 U.S. 727 (1972); U.S. Students Challenging Regulatory Procedures (SCRAP), 412 U.S. 669 (1973). Many U.S. environmental statutes also include "citizen suit" provisions which grant citizens a right of action against a government agency for enforcement of the statute. For example, The Clean Air Act, 42 U.S.C §7604 (1990); The Endangered Species Act, 16 U.S.C. §1540(g) (1973); The Emergency Planning and Community Right-To-Know Act, 42 U.S.C. §11046 (1986).

57. In a case brought on behalf of children and future generations against the DENR for granting timber concessions, the Judge dismissed the case stating that "the Court firmly believes that the matter before it, being impressed with political color and involving a matter of public policy," violates the Separation of Powers clause of the Philippine Constitution. *Tony Oposa, et. al v. Fulgencio Factoran, The Department of the Environment and Natural Resources, et. al,* Civil Case 90-777, July 18, 1991.

58. Interview with Marvic Leonen and Tony LaVina, Philippine Legal Rights and Natural Resources Center, Inc., in Manila (Aug. 1991).

tion than litigation. The Philippine EIA law holds the basic framework for both the coordination and external review needed for a workable development planning process. The system, however, lacks much needed public oversight and enforcement. As in the Canadian system, this public oversight role could be taken on by the Review Commission.

The Philippines have not successfully implemented such a method of external review. An Executive Order based on the current EIA law could allow the DENR to seat representatives from NGOs on the Review Commissions, require the Commission to hold public hearings, and grant citizen groups the right to administratively appeal Commission decisions. Such an approach avoids expensive confrontation through the courts and yet allows for extensive public involvement.

VI. CONCLUSION

The rapid destruction of soils, watersheds, marine life, and forests in the Philippines threatens its ability to achieve just and sustainable development. The lack of funds to regulate and monitor environmental degradation and pollution strongly suggests the need for strengthened environmental planning. Yet the government clearly lacks the resources to do so. The lack of reliable information and the failure to enforce environmental laws in the Philippines demonstrate the strong need for a planning system that includes both public participation and external review.

For many years, NGOs have recognized the problems inherent in programs and projects planned without public involvement and external review. Government and industry have recently begun to recognize the need for sustainable economic development and the further democratization of government decision making. Asia Week reports that, regarding pollution, Asian governments are "indeed beginning to take notice — and take action."[59] Now is an opportune time to reassess the making of development decisions and how to increase citizen involvement in natural resource planning.

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59. *The Green Crusaders*, ASIA WEEK, June 21, 1991, at 58; *see also* National Power Corporation v. Vera, G.R. No. 83558, 170 CSCRA 721 (1989), in which the Phillipine Supreme Court interpreted Presidential Decree 1818 (1974) to continue to prohibit courts from issuing injunctions on infrastructure or natural resources development projects.

INTERNATIONAL CAPITAL MARKETS SECTION

Securities Regulation in Japan: An Update

SHEN-SHIN LU*

§ 1. INTRODUCTION

The Japanese overhauled their Securities and Exchange Law (S.E.L.) in 1988[1] in order to accomplish the following goals: (1) liberalize and internationalize their securities market; (2) regulate the securities futures, index, and option trade; (3) develop a healthier securities issue market; (4) change disclosure regulations; (5) encourage investor trust in the fairness of the Japanese securities market; and (6) reinforce the prevention of "insider trading."[2] In 1992, Japan further amended the S.E.L. to extend the restrictions on insider trading to the over the counter market as well as listed securities.[3] The 1992 amendments also created a Securities and Exchange Surveillance Commission with authority to investigate securities law violations, but, unfortunately, its powers are limited to reporting its findings to the Ministry of Finance.[4] This article focuses on the revised disclosure regulation and the effort to prevent insider trading addressed in the 1988 and 1992 amendments.

In 1988, the Japanese created an entirely new system of disclosure regulations. The major changes were as follows: (1) three types of registration procedures, including a shortened form of the registration procedure, whereas previously there was only one; (2) a new shelf registration

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1. Securities and Exchange Law No. 25 of 1948, *amended by* Law No. 75 of 1988.

2. WATARU HORIGUCHI, KAISEIHO NO ZENPANTEKI KOSATSU [A General Study of the Amendment], 806 KINYU SHOJI HANREI [FINANCIAL AND COMMERCIAL CASES] 7 (1988).

3. Securities and Exchange Law No. 25 of 1948, *amended by* Law No. 73 of 1992 [hereinafter S.E.L.].

4. See *infra* § 4.02.

system;[5] (3) a shorter waiting period; (4) reinstatement of disclosure requirements for secured bonds; (5) an increased offering amount exempt from registration; (6) an extended requirement for filing current reports; and (7) a required disclosure of segmental and geographic financial information. In 1992, the Ministry of Finance (M.O.F.) also amended the Disclosure Rule (D.R.).[6] These changes in the disclosure system are explored below.

§ 2. NEW DISCLOSURE REGULATIONS

§ 2.01 *Three Kinds of Registration*

The Japanese disclosure system is similar in many respects to that under the Securities Acts in the United States. An issuer must register securities with the M.O.F. and prepare a prospectus for the investors if the issuer wants to publicly offer securities.[7] The issuer, underwriter, or securities firm offering the securities must deliver a prospectus to the purchasers of securities in a public offering.[8] A public company must file periodic reports (annual, semi-annual and current) with the M.O.F. as well.[9] The registration statements relating to a securities offering and the periodic reports constituting the continuous disclosure system require some of the same information. Under the new system, companies that have filed periodic reports for three years may file a simplified registration statement incorporating periodic reports.

Under the current law, there are three types of registration disclosure: complete disclosure (kanzen kaizi), combined disclosure (kumikomu), and reference disclosure (sansho), which is the simplest.

[1] Complete Disclosure

An issuer must file a registration statement with the M.O.F. before publicly offering or selling securities if the amount offered exceeds 500 million yen (4.2 million U.S. dollars).[10] Offerings of less than 500 million yen are exempt from registration.[11] Some securities are exempted - for example, government and municipal bonds.[12] The issuer must complete and file Form 2 (Japanese companies) or Form 7 (foreign companies).[13] Complete disclosure is the most burdensome type of registration.

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5. 17 C.F.R. § 230.415 (1992) (Rule 415 of the U.S. Securities Act of 1933). *See generally* COX, HILLMAN & LANGERVOORT, SECURITIES REGULATION: CASES AND MATERIALS 269 (1991); LOUIS LOSS, FUNDAMENTALS OF SECURITIES REGULATION 135 (1988).

6. Ministry of Finance Order No. 53 (1992) [hereinafter M.O.F.].

7. S.E.L., *supra* note 3, art. 13.

8. *Id.* art. 15.

9. *Id.* arts. 24, 24-5.

10. *Id.* art. 4 (based on an exchange rate of one U.S. dollar to 120 yen, which will fluctuate with the market).

11. See *infra* § 2.05 for the procedures relating to offerings of less than 500 million yen.

12. S.E.L., *supra* note 3, art. 3.

13. Kaijirei [Disclosure Rule], art. 8 (1992) [hereinafter D.R.].

[2] Combined Disclosure

A company that has been filing periodic reports for the previous three years can use combined disclosure if the company wants to issue or sell securities through a public offering.[14] The issuer completes the registration form to include all events that have taken place since the filing of the last periodic report. The issuer submits the registration form to the M.O.F. with copies of the most recent annual, semi-annual, and current reports. Combined disclosure enables the issuer to avoid duplicating information previously filed. The issuer must use either registration statement Form 2-2 (Japanese companies) or Form 7-2 (foreign companies).[15]

[3] Reference Disclosure

An issuer qualified for reference disclosure need only submit a list of the previously filed reports and the location of the reports before issuing or selling securities.[16] This is the simplest registration format. The eligibility criteria for reference disclosure are the same as those for shelf registration described below.[17] The issuer must use either registration Form 2-3 (Japanese companies) or Form 7-3 (foreign companies).[18]

§ 2.01 *Shelf Registration System (Hako Toroku)*

The two types of disclosure requirements that existed before the 1988 amendment — public offering registration disclosure and continuous disclosure — remain. The new shelf registration system integrates these two requirements, reduces the cost of issuing securities to large listed companies, and enables companies to issue securities within certain time periods, giving them the chance to select the most opportune time.

[1] Issuer's Qualification

In order to qualify to file a shelf registration, an issuer must satisfy the following conditions:[19]

1) the issuer must be a listed company and have filed disclosure reports for the three previous years; and

2) the issuer's average stock trading amounts on exchanges in the last three fiscal years must exceed 100 billion yen (830 million U.S. dollars),[20] AND the average market value of its listed stock in the last three years must exceed 100 billion yen; OR the average market value of its listed

14. S.E.L., *supra* note 3, art. 5; D.R., *supra* note 13, art. 9-2.
15. D.R., *supra* note 13, art. 9-2.
16. S.E.L., *supra* note 3, art. 5; D.R., *supra* note 13, art. 9-3.
17. See *infra* § 2.02[1].
18. D.R., *supra* note 13, art. 9-3.
19. S.E.L., *supra* note 3, arts. 5, 23-3; D.R., *supra* note 13, art. 9.
20. If the issuer's securities have been traded on an exchange for less than three years, the average trading amount or market value of the longer period (one or two years) should be used. M.O.F., *supra* note 6.

stock in the last three years must exceed 500 billion yen (4.2 billion U.S. dollars); OR the issuer must have issued bonds that constitute a secured privilege payment under law;[21] OR the issuer must have issued bonds that are rated at least single A by one rating institution.[22]

[2] Filing the Shelf Registration

An issuer proposing to offer securities on a delayed basis can file a shelf registration statement with the Ministry of Finance (M.O.F.). The registration statement must state the planned issuing or selling period, kind and price of the securities, and name of the major underwriter or securities firm selling the securities.[23] The registration must be on Form 11 (Japanese companies), or Form 14 (foreign companies), and include the same information required by the reference registration.[24]

The registration becomes effective fifteen days after it is filed.[25] The M.O.F. can shorten the waiting period to seven days at the issuer's request.[26] The planned offering or selling period must not exceed two years after the effective date.[27] The issuer may choose a one or two year period.[28] If the issuer has issued or sold the planned amount before the effective period expires, the issuer must file a statement terminating the shelf registration.[29] The issuer may cancel the shelf registration anytime by filing a cancellation statement.[30] If the issuer is no longer listed on the exchange, it is not eligible for the shelf registration and must file a cancellation statement with the M.O.F.[31] The shelf registration then loses effect immediately.[32] The issuer must also send copies of the cancellation statement to the exchanges with which the issuer was listed.[33]

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21. For example, both the Public Electricity Law and the Nippon Telephone & Telegram Corporate Law authorize the power and telephone companies to issue bonds with secured privilege payment. "Bonds with secured privilege payment" are bonds guaranteed by the government.

22. In 1992, the M.O.F. adopted a rating system and designated Standard and Poor's, Moody's, the Japan Investment Service, Japanese Bond Research Institution, and two other organizations as acceptable rating organizations for this purpose. M.O.F. Bulletin, No. 131 (1992).

23. S.E.L., *supra* note 3, art. 23-3.

24. D.R., *supra* note 13, art. 14-2. See *infra* § 2.01[3] for a discussion of reference registration.

25. S.E.L., *supra* note 3, arts. 8, 23-5.

26. Toriatsukai Tsudatsu [Administrative Guidance], arts. 8-1, 23-5-1 (1992) [hereinafter A.G.].

27. S.E.L., *supra* note 3, art. 23-6.

28. D.R., *supra* note 13, art. 14-5.

29. S.E.L., *supra* note 3, art. 23-7.

30. A.G., *supra* note 26, art. 23-7-2.

31. *Id.* art. 23-7-3.

32. S.E.L., *supra* note 3, art. 23-7.

33. A.G., *supra* note 26, art. 23-7-4.

[3] Amendments

After filing the shelf registration, the issuer must file an amended registration statement with the M.O.F. under the following conditions:[34]

(1) the entire planned amount of securities cannot be issued in the planned offering period;[35]

(2) the issuer selects a different underwriter or securities firm to sell the securities;[36] or

(3) the issuer delays the effective date.[37]

In addition, when the issuer deems any other change significant, an amended registration should be filed.[38] However, the issuer may not amend the registration statement to increase the amount offered, change the planned issuing period, or change the kind of securities.[39] The M.O.F. may suspend the shelf registration for up to fifteen days after the issuer files an amendment if such action is necessary in order to protect public investors.[40]

[4] Ordered Amendment

The M.O.F. may order the issuer to file a supplemental shelf registration statement, suspending the offering until the filing occurs.[41] The filing should be made on supplemental shelf registration Form 12 (Japanese companies) or Form 15 (foreign companies).[42]

The M.O.F. can order the issuer to file additional documents if it finds the issuer's statements are defective, misleading, or inconsistent with the disclosures required by the appropriate forms.[43] The M.O.F. may also suspend the shelf registration or delay the effective date at any time.[44]

§ 2.03 *Shorter Waiting Period*

Under the new law the waiting period has been shortened from thirty days to fifteen days.[45] This was possible because of the development of

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34. S.E.L., *supra* note 3, arts. 23-4, 197, 200.

35. A.G., *supra* note 26, art. 23-4-2.

36. *Id.* art. 23-4-3.

37. D.R., *supra* note 13, art. 14-4. Since the registration becomes effective 15 days after filing, the issuer may want to file a delaying amendment to postpone the effective date.

38. S.E.L., *supra* note 3, art. 23-4.

39. D.R., *supra* note 13, art. 14-4.

40. S.E.L., *supra* note 3, art. 23-5.

41. *Id.* art. 23-8.

42. A.G., *supra* note 26, art. 14-7.

43. S.E.L., *supra* note 3, arts. 23-9, 23-10. For example, additional documents would be ordered if an issuer failed to include the name of the firm acting as underwriter or to submit a list of the locations at which its disclosure reports are available. See *supra* § 2.01[3].

44. S.E.L., *supra* note 3, art. 23-11.

45. *Id.* art. 8.

computer and communication technology, which has accelerated information analysis. The M.O.F. can further shorten the period if the issuer's information is readily available to the general public.[46] Registration for an issuer eligible to use reference disclosure can become effective seven days after the filing.[47]

§ 2.04 *Reinstatement of Disclosure Requirements for Secured Bonds*

The registration requirements for issuing secured, legally guaranteed, and preferred bonds were temporarily waived in 1953,[48] but they exist again under the new law. The reasons for the temporary waiver of the registration requirement were as follows:[49] (1) most of the secured bonds were acquired by financial institutions; as a result, there was no need to protect public investors; (2) these bonds were secured, or legally guaranteed, and were thus safer than other securities; and (3) the issuers of these bonds continued to file periodic reports. It was unnecessarily burdensome for the issuers to file registration every time they wanted to issue such bonds.

The reasons for reinstating registration requirements for such bonds include the following: (1) the general public now purchases more than half of these bonds; (2) deregulation under the Commercial Code now means these bonds are no safer than unsecured bonds; and (3) the disclosure procedure has been simplified by the new law. As a consequence, registration of secured bonds is required under the current law for the protection of public investors with minimal burden on issuers.

§ 2.05 *A Higher Issuing Amount for Registration Exemption*

Under the old regime, an issuer had to file a registration statement if the issuing amount exceeded 100 million yen (830 thousand U.S. dollars). This had been the standard since the 1971 S.E.L. amendment.

As a result of inflation and currently large issuing amounts, 100 million yen is no longer an appropriate threshold for imposing the burden and cost of registration on issuers. Accordingly, the amount has been raised to 500 million yen (4.2 million U.S. dollars).[50] However, the issuer still has to file a notification with the M.O.F. if the issuing amount exceeds 1 million yen (8.3 thousand U.S. dollars).[51] If the issuing amount exceeds 500 million yen, the issuer must file a registration statement. If the amount is between 1 million and 500 million yen, the issuer has to file a notification with the M.O.F. If the offering is for less than one million

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46. *Id.*

47. A.G., *supra* note 26, art. 8-1.

48. Securities and Exchange Law No. 25 of 1948, *amended by* Law No. 142 of 1953, supp. provision item 7 (Kaiseiho Fusoku 7).

49. Kakuro Kanzaki, *"Kigyo Naiyo Kaiji Seido No Kaisei"* [*"Enterprise Disclosure Amendments"*], 806 KINYU SHOJI HANREI [FINANCIAL AND COMMERCIAL CASES] 24 (1988).

50. S.E.L., *supra* note 3, art. 4; D.R., *supra* note 13, art. 2.

51. S.E.L., *supra* note 3, art. 4; D.R., *supra* note 13, art. 4.

yen, the exemption is self-executing.

§ 2.06 *Expanded Requirements for Filing Current Reports*

Under the old regime, an issuer who had a duty to file periodic reports was required to file a current report under the following circumstances.[52]

(1) There was a change of the issuer's parent or an important subsidiary.

(2) There was a change of the major shareholder.

(3) An issuer met with a disaster.

(4) The issuer was issuing or selling securities other than bonds abroad in amounts exceeding 100 million yen (830 thousand U.S. dollars). Under the new amendment the amount has been increased to 500 million yen (4.2 million U.S. dollars).

(5) A decision was made by a shareholders' meeting or by the board of directors for private sale of securities, other than bonds, in amounts exceeding 100 million yen. Under the new amendment the amount has been increased to 500 million yen.

Under the new amendment, these requirements still exist,[53] and there are six additional circumstances under which an issuer must now file a current report.

(1) A law suit has been filed against the issuer, and the alleged damages exceeds five percent of total assets, or the issuer has paid damages equal to more than one percent of total assets as a result of a law suit.

(2) The board of directors signs a merger or a consolidation contract that will increase or decrease the issuer's sales or total assets by more than ten percent, or dissolve the issuer.

(3) The board of directors signs a contract for the purchase or sale of the business or assets that will increase or decrease the issuer's sales or total assets by more than ten percent.

(4) A change of the representative director occurs.

(5) The issuer's debtor or the guarantor of the debt defaults on a debt instrument to *any* party (emphasis added), OR the debtor or guarantor is undergoing reorganization. Such default or reorganization, however, need be reported only if it might result in a default or delay in paying a debt to the issuer in an amount that is more than ten percent of the issuer's total assets.

(6) Any event occurs that has a substantial effect on the issuer's financial situation or business.

The new disclosure requirements benefit the public, which now has

52. S.E.L., *supra* note 3, art. 24-5.
53. *Id.*

access to more accurate and up-to-date information about the issuer.

§ 2.07 *Disclosure of Segmental Information*

Full disclosure of business operations is required in both the initial registration and periodic reports. The issuer must disclose total sales of each product and quantities sold within the last two fiscal years. An issuer that exports most of its products overseas must disclose the importing countries or areas and, for each product, the percentage of sales in the respective country or area.

In addition to these requirements, under the new amendment, the issuer must disclose (1) sales and profit or loss of each business, (2) sales and profit or loss in different business locations, and (3) overseas sales.[54] Public investors thus have more information about the issuer's financial performance.

§ 2.08 *Penalties and Remedies*

There is a three year imprisonment or fine of three million yen[55] (25 thousand U.S. dollars), or both, for filing an untruthful registration statement.[56] If the issuer continues to offer securities without filing a supplemental registration when ordered to do so, a one year prison term, a fine of up to 1 million yen (8300 U.S. dollars), or both may be imposed.[57] Any issuer that fails to file a supplemental shelf registration when ordered to do so and continues to offer or sell securities is liable to the person who acquired the securities and sustained damage as a result.[58] If the M.O.F. issues an order suspending the registration and the issuer does not obey the order, the issuer faces a penalty of up to six months imprisonment or a fine no greater than 500 thousand yen (4.2 thousand U.S. dollars), or both.[59]

§ 2.09 *Disclosure Summary*

The new disclosure system integrates registration disclosure and continuous disclosure. It gives reporting companies that meet the criteria for shelf registration flexibility to choose the best time to issue securities and simplifies filing requirements for such companies. It also gives public investors more pertinent information relating to a company's finance and business operations. The requirements for segmental and geographic reporting of specified financial information will also facilitate the efforts by

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54. D.R., *supra* note 13, arts. 10, 14, 17.

55. S.E.L., *supra* note 3, art. 197.

56. *Id.* arts. 197, 202. S.E.L. Article 202 states: "A prison term and a fine may be imposed in parallel with one another on any person who commits any crime referred to in the preceding five articles depending on the circumstances relating to such crime." Capital Market Research Institute, S.E.L., 135 (1989).

57. S.E.L., *supra* note 3, art. 198.

58. *Id.* arts. 16, 23-12.

59. *Id.* art. 200.

Japanese issuers to gain access to foreign capital markets, including the United States. It should be noted, however, that the segmental and geographic reporting requirements in Japan are not as detailed as the requirements of Regulation S-K in the United States.

§ 3. INSIDER TRADING

The 1988 and 1992 amendments included a well publicized effort to prevent insider trading. The discussion below argues that this new development is illustrative of the Japanese genius for maintaining the status quo despite outward manifestations of reform — in fact, the law on the books may never be realized in practice.

§ 3.01 *Reasons for Reinforcing Insider Trading Regulations*

There were three reasons for reinforcing the insider trading provisions. First, because the Tokyo Stock Exchange is among the biggest listed markets in the world in terms of market capitalization, the Japanese want to build a fair trading market image. Since the creation of the Securities and Exchange Law in 1948, almost no insider trading cases have been exposed. The foreign media accuse Japan of being an "insider's haven."[60] The Japanese want to rid themselves of this image. Second, the prevention of insider trading is a world-wide trend. The United States enacted the Insider Trading Sanctions Act of 1984 and the Insider Trading and Securities Fraud Enforcement Act of 1988.[61] The latter Act was under consideration at the time of the adoption of the Japanese amendment. The United Kingdom enacted the Company Securities (Insider Dealing) Act of 1985 and the Financial Services Act of 1986. France, Germany, and Switzerland also reinforced their insider trading regulations.[62] Japan wanted to follow the trend in order to foster a new "fair trader" image, thereby further boosting the already fantastic growth of its securities markets. Third, the Tateho case focused Japan's attention on insider trading. As a result of this case, the Japanese government accelerated the reform of insider trading provisions.[63]

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60. Akio Takeuchi, *Insaida Torihiki Kisei No Kyoka* [*The Reinforcement of Insider Trading Regulation*], 1142 SHOJI HOMU [COMMERCIAL LAW JOURNAL] 3 (1988).

61. Securities Exchange Act of 1934, 15 U.S.C. § 78u-1(a)(2). Although the Insider Trading and Securities Fraud Enforcement Act of 1988 had not yet been adopted, the Japanese translated the bill and published it in their law journals. The Japanese found the American insider trading provisions to be more strict than their own.

62. Kakuro Kanzaki, *Naibusha Torihiki No Kisei Ni Kansuru Kakokuho No Doko* [*Foreign Countries' Insider Trading Regulation Trends*] 819 JURISUTO [JURIST] 79, 85-86 (1984) (Switzerland). The Germans created insider trading self-regulation in 1971, and amended it in 1976 and 1988. Sakamoto, *Sho Gaikoku Ni Okeru Kisei No Jokyo — Doitsu* [*Foreign Regulations, Germany*], 806 KINYU SHOJI HANREI [FINANCIAL AND COMMERCIAL CASES] 78 (1988).

63. TAKEJI YAMASHITA, JAPAN'S SECURITIES MARKETS 253-54 (1989); Kawamoto, *Hokaisei Ni Itaru Keii* [*The Texture of the Amendment*], 806 KINYU SHOJI HANREI [FINANCIAL AND COMMERCIAL CASES] 98-100 (1988); David I. Sanger, *Insider Trading, The Japa-*

Tateho is a listed company and a chemical manufacturer. In August 1988, the company suffered a loss of 24 billion yen (200 million U.S. dollars) against capitalization of only 2.5 million yen (21,000 U.S. dollars) because of speculation on the future bond market. On August 31, the management notified its eight banks to come to company headquarters for a conference, which was scheduled for the afternoon of September 1. After Tateho's announcement of its loss on September 2, the price of its stock dropped dramatically. Meanwhile, from August 11 to August 21, six of Tateho's high-level managers, including three officers, sold shares. One of these officers was "advised" by the Osaka Stock Exchange to return his profit from the tainted trade because of his violation of Article 189 (now Article 164) of the Securities and Exchange Law. Article 189 had been a copy of Section 16(b) of the American Securities Exchange Act of 1934. The Article requires corporate insiders to disgorge their short-swing profits to their corporations.

One of Tateho's eight banks, Hanshin Sogo Bank, sold all of its 337,000 Tateho shares on September 1. According to the bank's managers, the sale verdict was made on the morning of the first, but there was no connection with Tateho's conference that afternoon. Two of the top ten shareholders also sold their shares during August, but neither of them owned more than ten percent of the company's total shares. In all, seventy-six stockholders sold over 20,000 shares each in August. According to the Osaka Stock Exchange's investigation, these transactions had nothing to do with confidential information. However, there are strong suspicions to the contrary.[64]

How did the bank manage to avoid a loss by selling all of its Tateho shares? Japanese banks know their customers very well because they can access their customers' inside information. For example, a bank always checks its customer's financial and managerial activity through loans and other financial services, usually holds its important customers' shares in order to stabilize the relationship between them, and always monitors its customers' accounts to oversee any unusual activity. Therefore, Hanshin Sogo Bank may well have known about Tateho's financial crisis.

Why did so many shareholders sell their shares in August? Was there

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nese Way, N.Y. TIMES, Aug. 10, 1988, at 1.

64. The following statement was made by the Osaka Stock Exchange:

> The Osaka Stock Exchange has made every effort to investigate the true facts related to the possibility of insider trading of Tateho stock. According to our investigation, there is no evidence of insider trading. But we found trading which might cause misunderstanding. We feel very sorry about this incident, since it came right after our notification to all listed companies to monitor insider trading. We strongly point out that insider trading is unfair and damages investors' confidence in securities markets. Triggered by this incident, we want to make every effort to prevent the misuse of confidential information by insider trading, and to protect the trustworthiness of trading markets. We also hope listed companies, securities firms, and related persons will prevent insider trading. Kawamoto, *supra* note 63, at 98-100 (Author's translation).

any sign or rumor that made these shareholders act? These questions are left unanswered. However, because the case was widely reported by the Japanese press,[65] the Japanese public became sensitized to the reality of insider trading.

§ 3.02 *The New Regimen*

[1] Article 157

Article 157 prohibits any person in a securities, future, option, or index transaction, including future securities transactions on a foreign market, from (1) employing any device, scheme, or artifice to defraud; (2) making any untrue statement of a material fact or omitting to state a material fact; or (3) using a false quotation to induce another person[s] to buy or sell securities. Violations of this Article carry a penalty of up to three years in prison or a fine of up to 3 million yen (25,000 U.S. dollars), or both.[66]

Article 157 is similar to Rule 10b-5 adopted under the U.S. Securities Exchange Act of 1934.[67] Rule 10b-5 is a catch-all fraud provision in federal securities regulation, and it has been widely used in the United States.[68] In contrast to Rule 10b-5, Article 157 has seldom been used in Japan. Like Rule 10b-5, Article 157 prohibits "any" person from doing "any" fraudulent act in "any" kind of securities transaction. The 1988 amendment extends the Article's scope to trading in futures, options, and indexes. The scope of this Article is very broad, and it can be applied to any kind of security, whether listed, traded on the over-the-counter market, held privately, or issued by governments or foreigners.

The reason this Article has not been used much is that its wording is too vague and its scope too broad. The Article was substantially copied from the United States and is very difficult to apply in a Japanese court. Under the Japanese legal system, there is no jury at a criminal trial. The judge decides both the facts and the law. To protect defendants, very strict conditions are imposed upon the prosecution. A prosecutor must

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65. *Id.*

66. S.E.L., *supra* note 3, arts. 197, 202. Article 197 provides a penalty of no more than three years in prison, *or* no more than three million yen in fines, for the breach of Article 147. Article 202, however, reads, "Any person who has committed a crime as prescribed by the proceeding five Articles may be confined to imprisonment with hard labour *and* fined concurrently in consideration of circumstances." (emphasis added). *Id.*, *translated by* THE JAPAN SECURITIES RESEARCH INSTITUTE, JAPANESE SECURITIES LAWS 71 (1987). Nonetheless, these Articles stand for the proposition that if the crime is serious, the defendant may be punished by both prison and fines. CAPITAL MARKET RESEARCH INSTITUTE, S.E.L. 58 (1989).

67. KATSURO KANZAKI, SHOKEN TORIHIKIHO (Shinpan) [SECURITIES AND EXCHANGE LAW (New Edition)] 612 (1987); TAKEO SUZUKI & ICHIRO KAWAMOTO, SHOKEN TORIHIKIHO (Shinpan) [SECURITIES AND EXCHANGE LAW (New Edition)] 555 (1987); LOUIS LOSS ET AL., JAPANESE SECURITIES REGULATION 192 (1983). Article 157 was designated as Article 58 before the 1992 amendment.

68. ROBERT CLARK, CORPORATE LAW 309 (1986); LOUIS LOSS, FUNDAMENTALS OF SECURITIES REGULATION 726-29 (1988).

prove the defendant's "intention" to commit the crime and "the definite cause and effect" of the crime. A prosecutor is considered a very "high authority" in Japan. Once a defendant is prosecuted, a guilty decision is expected. If a prosecutor accumulates too many "not guilty" judgments, s/he will be deemed incompetent. Because Article 157 does not specify what kind of defendant conduct falls under its aegis, prosecutors are reluctant to use it for fear that failure will hurt prosecutorial reputations. The Ministry of Finance itself stated that "the Article is too vague and too broad. There is a limitation to its use in an insider trading case."[69]

[2] Article 163

Article 163 was copied from Section 16(a) of the American Securities Exchange Act of 1934.[70] It requires a corporate insider (director, auditor,[71] or major shareholder who owns more than ten percent of the company's shares) to file a report with the Minister of Finance after purchasing or selling company securities.

[3] Article 164

Article 164 was copied from Section 16(b) of the American Securities Exchange Act of 1934.[72] It requires a corporate insider to surrender short-swing profits (made from the purchase and sale, or sale and purchase

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69. SECURITIES BUREAU (OF THE M.O.F.), THE SECURITIES AND EXCHANGE COUNCIL REPORT, May 11, Showa 51 (1976). The report states, "In the United States, our Article 58's [now Article 157] twin, Rule 10b-5, has been widely used and extended to insider trading cases. However, it is very difficult for us to precisely define the scope of insider trading. If a tippee should fall under this Article, that would be overreaching. Furthermore, the Article's purpose is to prevent fraud. There is a limitation on expanding it to insider trading cases." (Author's translation). *See also* KANZAKI, *supra* note 67, at 612; SUZUKI & KAWAMOTO, *supra* note 67, at 555; TATSUTA, in LOUIS LOSS ET AL., JAPANESE SECURITIES REGULATION 192 (1983).

70. Wataru Horiguchi, *Shoken Torihikiho Dai 189 Jo No Kenkyu* [*A Study of the Securities and Exchange Law, Article 189*] 39-6, IKYORONSO [HITOTSUBASHI UNIVERSITY REVIEW] 641 (1958); SUZUKI & KAWAMOTO, *supra* note 67, at 556; TATSUTA, *supra* note 69, at 107. Article 163 was Article 188 before the 1992 amendment.

71. Commercial Code Article 273 requires that every company must have at least one auditor to supervise the company's business operation. The auditor has the right to check the directors' management. The auditor can ask the directors or other employees to submit business reports and can check the business and property of the company. The auditor can oversee the company's subsidiaries' business. The auditor can forbid the directors' doing business if the auditor finds the directors' actions will harm the company. If litigation occurs between the company and one of its directors, the auditor will represent the company. The auditor cannot be a director of the company or its subsidiaries. If the auditor neglects his duty, he bears responsibility for the company's harm. An auditor, like a director, is an employee of a company. The auditor is not an independent, outside CPA. Only a big company (with capital over 0.5 billion yen ($4 million) or liability over 20 billion yen ($167 million)), or a listed company, is required to have an outside CPA auditor or an accounting firm. Kabushiki Gaisha No Kansato Ni Kansuru Shoho No Tokurei Ni Kansuru Horitsu [Commercial Code Special Law on Audit of Stock Companies] Article 2; S.E.L., *supra* note 3, art. 193-2.

72. See *supra* note 70. Article 164 was Article 189 before the 1992 amendment.

within six months) to the company. If the company does not ask the insider to surrender the profit, any shareholder can bring a stockholder derivative suit against the insider to disgorge the profit to the company on behalf of the company.

[4] Articles 163 & 164 in Tandem

Article 163 is a pure disclosure requirement. Article 164 uses this disclosure to make insiders return profits from insider trading. Article 164 contains the following provisions.

(1) If a corporate insider purchases and sells, or sells and purchases, his company's securities within six months and makes a profit, the company can request the insider to return the profit to the company.

(2) Any shareholder can demand that the company ask insiders to return profits to the company. If the company fails to ask insiders within sixty days after the shareholder's demand, the shareholder can request that insiders return short-swing profits to the company.

(3) If neither the company nor any shareholder requests the insider to return the profit, the request right will expire two years after the insider takes his short-swing profit.

(4) If the Minister of Finance, based on the insider's transaction report, finds that any insider received profit from the short-swing transaction, the Minister shall notify the insider. If there is no objection from the insider, the Minister of Finance shall notify the company with the insider transaction report. If the Minister of Finance knows that the insider has already returned the short-swing profit to the company, the Minister does not have to notify the company.

(5) If an insider denies his profit from the short-swing transaction, he shall file an objection with the Minister of Finance within twenty days after he receives the notification from the Minister.

(6) If an insider challenges the short-swing trading assertion with legitimate grounds, the Minister of Finance may erase the allegation portion of the statement that will be sent to the company.

(7) If the insider does not deny the short-swing profit, the Minister of Finance shall make public the insider's transaction report thirty days after the Minister of Finance's notification to the company, and this disclosure shall last two years, until the date upon which the profit request right expires. If the Minister of Finance knows the insider has returned the profit to the company, the Minister will not make the report public.

(8) If a major shareholder was not a major shareholder at either the time of the purchase or the time of the sale, the shareholder shall not fall under the Article.

(9) The Minister of Finance shall set up a rule that provides a

method of calculating the short-swing profit of the insider.[73]

The purpose of these Articles is to prevent corporate insiders from trading on the basis of confidential information.[74] These Articles do not require proof that insiders have possessed and traded on confidential information.

Article 164 is related to Article 163. After an insider reports to the Minister of Finance, the Minister can ascertain whether the insider has breached Article 164. If the Minister finds that an insider profited from a short-swing transaction, he must notify the insider and his company and make public the name of the insider. This notification should give the company a chance to recover its loss. If the company does not ask the insider to return the profit from the insider trading, the company's shareholders can sue the insider and make him relinquish the profit to the company. Although the Japanese copied both Articles from the Americans after the Second World War, the Japanese deleted Article 163 in 1953. The reason for this elimination was that the Article was not deemed "effective." Perhaps it was too burdensome for the Ministry of Finance to check the reports.[75] As a result, without Article 163's reporting duty, Article 164 became worthless, thus the 1988 reform.

There was only one case brought under Article 164 before the 1988

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73. The method is provided by Showa 63 (1988), No. 40 M.O.F. Ordinance, art. 6. First, the profits are calculated by finding the difference between the two transaction prices, and multiplying by the matching number of the shares. Any securities exchange tax and commissions are then subtracted. The matching number of the shares is the number of the shares that are purchased and sold, or sold and purchased, within six months. For example, Insider A sold 1,000 shares at a price of 5,000 yen per share and bought 1,200 shares at a price of 3,000 yen per share within six months. The matching number is 1,000, so the profits are 2,000 x 1,000 = 2,000,000 yen, minus tax and commissions.

Second, if there is more than one transaction, the first purchase should match the first sale, or reverse. The rest of the transactions should be matched by the transaction order. For example, insider B bought 1,000 shares at a price of 3,000 yen per share on July 10; 1,300 shares at a price of 3,200 yen per share on July 20; 900 shares at a price of 3,500 yen per share on July 30. Then he sold 800 shares at a price of 6,000 yen on October 1; 1,600 shares at a price of 6,500 yen per share on October 11; 200 shares at a price of 6,300 yen per share on October 21. The profits from the first set of transactions are 3,000 x 800 = 2,400,000 yen. The profits from the second set of transactions are (3,500 x 200) (3,300 x 1,300) (3,000 x 100) = 5,290,000 yen. The profits form the third set of transactions are 2,800 x 200 = 560,000 yen. The total profits are 8,250,000 yen, minus tax and commissions.

Third, if there is more than one purchase or sale in a day, the lowest purchase price or the highest sale price should be used to calculate the first transaction. For example, if insider C sold his shares twice in one day, the higher price of the securities should be used to calculate the first transaction. If he purchased his company's securities twice in one day, the lower price should be used to calculate the first transaction.

74. CLARK, *supra* note 68, at 295; Loss, *supra* note 68, at 542; KANZAKI, *supra* note 67, at 618; SUZUKI *et. al.*, *supra* note 67, at 556; SEIJI TANAKA & WATARU HORIGUCHI, KONMENTARU SHOKEN TORIHIKIHO [COMMENTARY ON THE SECURITIES AND EXCHANGE LAW] 713 (1990).

75. KANZAKI, *supra* note 67, at 621; SUZUKI *et. al.*, *supra* note 74, at 557; TANAKA & HORIGUCHI, *supra* note 74, at 713.

amendment.[76] Togo was the founder and president of Shokusan Jutaku Sogo Company. He bought 560 thousand Shokusan shares at a price of 479 yen per share on July 20, 1972. He sold thirty thousand shares on September 14 and 530 thousand shares on October 2, 1972. He made a net profit of over 1.1 billion yen. One of Shokusan's shareholders requested that the company sue Togo to make him disgorge the short-swing profit under Article 164. The shareholder who asked the company to sue Togo is known as a "sokaiya."[77] A sokaiya is a shareholder who criticizes the company's management at the annual general meeting, if the company does not pay to keep him quiet, or one who is paid by the company to prevent other shareholders from speaking in the general meeting. Many sokaiya belong to gangs called "yakuza."[78] In this case, the sokaiya had attempted to blackmail Togo for a sum of money after Togo's short-swing transaction, but Togo refused to pay. As a consequence, the sokaiya requested that the company sue Togo under Article 164. Because the sokaiya belonged to a very notorious criminal group, the company reluctantly sued Togo. However, the case was settled out-of-court in December 1988. Togo had been found guilty of tax evasion in another case. The

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76. TANAKA & HORIGUCHI, *supra* note 74; SUZUKI *et. al.*, *supra* 74, at 557; KANZAKI, *supra* note 67, at 621. There are three cases related to Shokusan Jutaku, concerning tax evasion, bribery, and insider trading. Nihon (Japan) v. Togo, Saikosaibansho Saibanshu (Keiji) 236 Go 179 [236 Supreme Court Reports (Criminal Law) p. 179] (tax evasion); Nihon (Japan) v. Takata and others, Saikosaibansho Hanreishu Dai 42 Kan Dai 6 Go 861 [Supreme Court Reports, Volume 42, No. 6, p. 861] (bribery). Junji Abe, *Shokusan Jutaku Jikan Saikosaibansho Ketei Ni Tsuite* [*The Supreme Court Decision in Shokusan Jutaku*], 920 JURISUTO [JURIST] 4 (1988).

77. Isaacs writes: "In effect, the general meeting of shareholders merely approves management proposals . . . [S]hareholders are not expected to question management, or express any opinion . . . [T]he meetings are kept very short . . . [I]t was the general practice of a number of public companies to offer money and other benefits to a limited number of 'specialists' to ensure that they attended general meetings for the purpose of encouraging orderly proceedings and to support company management. . . . '[S]pecialists' could often guarantee that there would be no disruption of the meetings, as they used violence and other unlawful means of influence. . . . The 'specialists' who enjoyed the greatest reputations had come from a yakuza background (organized syndicates of gangsters) or right-wing political groups." He continues with an example: "In May, 1979, more than 500 shareholders attended an annual general meeting of shareholders of a company listed on the Tokyo Stock Exchange, 200 of whom were sokaiya taking up all the front row seating. . . . Not a single speech or question was presented to management by the ordinary shareholders present, and the meeting was wound up after 25 minutes." However, under a 1982 Commercial Code amendment, companies are not allowed to pay sokaiya. Sokaiya have set up many "economic study groups" to "study" companies' publicly disclosed documents. Sokaiya publish "economic study" periodicals at very high prices. For example, a periodical of three or four pages published once a month will cost a company 500,000 yen (about $3900). If a company does not subscribe to the periodical, the sokaiya might buy one share of the company's stock, attend the general meeting, and criticize the management violently. Issacs continues: "A report in January 1984 that Sony's annual general meeting of shareholders took more than 13 hours had a tremendously negative impact [on the company's image]." JONATHAN ISAACS, JAPANESE SECURITIES MARKET 123-128 (1990); ARON VINER, INSIDE THE JAPANESE SECURITIES MARKETS 91-92 (1988).

78. ISAACS, *supra* note 77.

Japanese government confiscated Togo's property and he became insolvent. After the company found that it was impossible to make Togo disgorge the profits from the tainted transaction, the case was tried in Tokyo District Court — from 1974 until 1987! There is a question as to how the shareholder, the sokaiya, could allege that Togo breached Article 164, even though the Article 163 duty to report had been deleted in 1953. This question remains unanswered. Nevertheless, *Shokusan Jutaku* was the only Article 164 case brought between the enactment of the Securities and Exchange Law in 1948 and its 1988 amendment.

Article 163, as revived, requires that a corporate insider must file a report with the Minister of Finance before the fifteenth day of the next month, after the insider's purchase or sale of his company's securities. If the transaction is executed by a securities firm, the report should be submitted to the securities firm by the insider. The securities firm then submits the report to the Minister of Finance on behalf of the corporate insider.

[5] Exceptions to Insider Filing Under Article 163

The important exceptions to the insider filing provisions under Article 163 include the following: (1) fractional shares and non-rounded units; (2) employee securities purchase plans; (3) employee trust funds; (4) stock-index future transactions; and (5) stabilizations under Article 125(3).[79]

[a] Fractional Shares and Non-rounded Units

A fractional share is a portion of stock that is less than one full share. In contrast, a non-rounded unit is a unit of stock that contains several shares but is not a full unit. Fractional shares and non-rounded units may be created by a stock dividend, share split, or a reverse share split; but non-rounded units could also be created in connection with a new issue.

The par value of most Japanese companies' stock is fifty yen (about 0.42 U.S. dollars), if the company was organized prior to 1981. Par values were so low due to the hyper-inflation that occurred during World War II and the post-war period. The low par value created a tendency for stocks to trade at relatively low prices, and it is inconvenient for the stock exchanges to trade such small-value stocks. Under the 1981 amendment to the Commercial Code, an older company's listed stock should be traded in the form of units that contain several shares since the exchange rules require that listed companies' stock should have a par value or unit par value of more than 50,000 yen (about 420 U.S. dollars).[80] Unlisted compa-

79. S.E.L., *supra* note 3, art. 163; Law No. 40 of 1988, Ministry of Finance Ordinance, art. 4.

80. Law No. 74 of 1981, Fusoku [Supplementary Provisions], art. 15. Another reason for raising the trading price was to block sokaiya because a non-rounded unit shareholder cannot attend the shareholders general meeting. If a sokaiya wants to attend the meeting he

nies can choose whether they want to use the unit system. The 1981 amendment also requires new companies to set up their stocks' par value at 50,000 yen or greater. As a result, many older companies set up before 1981 use 1,000 shares as a unit in order to comply with the amendment and to be in accord with the new companies' 50,000 yen par value. All listed companies' stocks are traded in either shares or units. Therefore, fractional shares and non-rounded units (i.e. with a unit par value of less than 50,000 yen) are not allowed to be traded on the stock exchange. Since fractional shares and non-rounded units are not easily liquidated, there is little fear of insider trading, and insiders are exempted from the duty to report.

[b] Employee Securities Purchase Plans

If a company has an employee securities purchase plan, a contract with a securities firm to buy the company's securities on a well-planned and regular basis, and if the purchase decisions are not based on a case-by-case investment judgment, company insiders are not required to file transaction reports. In these situations, there is a limitation of one million yen for every employee in each purchase. If the purchase is over this limit, insiders must file transaction reports.

[c] Employee Trust Funds

Conditions and limitations upon employee trust funds are the same as those imposed upon employee securities purchase plans. Both employee securities purchase plans and employee trust funds are part of employee welfare programs. Purchases of employee welfare programs are intended to raise pension funds, to improve the relationships between employers and employees, and to give employees incentives to work hard. There is little danger of insider trading because (1) the amount of each employees' purchases is limited; (2) the purchases are executed by a third party (securities firm or trust company) on a planned and regular basis, and (3) the purchase decisions do not involve case-by-case investment judgments. Such transactions are also exempted from a duty to report because the government seeks to encourage employee stock purchase programs.

[d] Stock-Index Future Transactions

A stock-index future transaction is based on the average price of many stocks in the future — the stock-index future — and is considered a package of all stocks. For instance, the "Stock Future 50" is an average price of fifty kinds of different stocks' future prices on the Osaka Stock Exchange. Since a stock-index future involves stocks of so many companies, a price change of the stock of one company will not have a substan-

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must buy a round unit (higher price), compared with the lower price of one share of non-rounded unit. ISSACS, *supra* note 77, at 127.

tial impact on the stock-index future. Even an insider who trades stock-index futures that include his company's stock future price is exempted from the duty to report.

[e] Stabilizations Under Article 125(3)

Securities stabilization is a policy designed to prevent a new-issue stock price decline. In a securities stabilization, the issuer must disclose to the general public that the company is under stabilization. There are also many restrictions on the company's securities price and on the time limit for the stabilization.[81] There is no fear of insider trading and insiders are exempted from the duty to report.

[6] Scope of Articles 163 and 164

The scope of Articles 163 and 164 is limited to public companies, which include listed companies and companies whose securities are traded on over-the-counter (OTC) markets.[82] Before the amendment, there were different opinions about the scope of Article 164 because there was no clear definition as to what kinds of securities fell under the Article. The amendment ended this disagreement. As a result of the amendment bringing future and option transactions within the Article, the securities covered include stocks, convertible bonds, bonds with warrant, warrants, options, and future transactions of the securities described above. If a corporate insider does not file a report required by Article 163, or files a false report, or if an insider makes a false objection under Article 164, there is a fine of up to three hundred thousand yen (2,500 U.S. dollars).[83]

Some argue that an astute major shareholder can evade Article 164 by selling his securities twice. For example, if a shareholder has 10.2 percent of a company's shares, he can sell 0.3 percent of the company's shares and return the short-swing profit to the company. Then he can sell the rest of the 9.9 percent of the company's shares without returning the short-swing profit to the company. It is true that the major shareholder can evade Article 164, but one must consider its legislative purpose. Since it is very difficult to prove that an insider traded on confidential information, this Article uses a very objective standard — ten percent of the company's securities — to settle the threshold of proof. Any shareholder who owns more than ten percent of a company's securities falls under Article 164. As long as s/he is no longer a major shareholder, s/he is outside of

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81. TANAKA & HORIGUCHI, *supra* note 74, at 562-72; SUZUKI *et. al.*, *supra* note 67, at 535-48; KANZAKI, *supra* note 67, at 639-56.

82. In the 1988 amendment, only listed companies' insiders were subject to these two articles. Many commentators argued that the scope was too narrow. In the 1992 amendment, insiders of companies whose securities are traded on OTC markets were included. See Shen-Shin Lu, *Are the 1988 Amendments to Japanese Securities Regulation Law Effective Deterrents to Insider Trading?*, 1991 COLUM. BUS. L. REV. 179, 224.

83. S.E.L., *supra* note 3, art. 205.

the restriction of Article 164. However, if any shareholder commits fraud or makes a false statement, s/he falls under Article 157.

[7] Article 165

Article 165 prohibits any corporate insider from short-selling his company's securities.[84] Short-sales are legal in Japan, but short-sales will accelerate securities price decline in a falling market. The Securities and Exchange Law does not preclude everyone from short-selling. There are some Ministry of Finance and stock exchange rules to restrict exchange members, usually broker/dealers, from short-selling.[85] However, corporate insiders are not allowed to short-sell because they can access confidential information. For example, suppose a company has a loss, and before the information is disclosed, the insiders short-sell the company's securities. They then buy securities for the settlement at a lower price after the disclosure of the bad news. The insiders can take advantage of their trading counterparts by trading on confidential information. Short-sale by insiders is a kind of insider trading.

Before the 1988 Amendment, Article 190 (now Article 165) read: "A listed company's officers and major shareholders shall not sell their company's stock, if they do not have their stocks."[86] The content of the Article was not clear. If a major shareholder did not have shares of a company, how could s/he be the company's major shareholder? The Article could also have been interpreted to mean that if an officer or a major shareholder had only one share of company stock, s/he could short-sell

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84. Article 165 was Article 190 before the 1992 Amendment.

85. Yukashoken No Karauri Ni Kansuru Kisoku [Securities Short-Sale Rule], Showa 23 (1948); Shoken Torihiki Iinkai Kisoku 16 [Securities and Exchange Commission Regulation 16]; Tokyo Stock Exchange Gyomukitei [Operational Rules] Article 72; Osaka Stock Exchange Gyomukitei [Operational Rules] Article 70. These rules define "short-sale" as a transaction in which either a stock exchange member or his client does not possess the securities, and the member borrows securities for settlement of the client's account. Securities future trading, margin trading, and issue-day settlement trading are excluded from the scope of short-sale. The rules require stock exchange members to state whether a transaction is short-sale or not. The sale price cannot be lower than the last sale price. An exchange member must state that a transaction is a short-sale unless the following apply: (1) he knows that he or his client has the securities and there is no inconvenience or expense in delivering the securities promptly; (2) he has the securities in the client's account or will receive the securities in a pending transaction; or (3) he bought the securities in the same exchange but the settlement has not been completed. These rules are copied from Rules 3b-3, 10a-1, and 10a-2 of the U.S. Securities Exchange Act of 1934. However, there are small differences. For example, U.S. Rule 10a-1 requires that the short-sale price cannot be lower than the two last sale prices, while the Japanese rules only require that the price cannot be lower than the last sale price.

86. The Japan Securities Research Institute translated Article 190 (now Article 165), before the 1992 Amendment, as follows: "No officer nor major shareholder of a corporation, the shares of which are listed for trading on a securities exchange, shall sell such portion of the same shares as he does not actually have." JAPANESE SECURITIES LAWS 64 (1987). "[S]uch portion of the same shares" should read "such stock." The ambiguity of the Article is manifest.

any amount of the company's stock.

In order to clarify the content of the Article, the amended Article reads "[a] listed company's officer/major shareholder shall not (a) sell his company's securities, when he has less 'value' of the same class of the securities than the securities he wants to sell; or (b) put or call an option of sale of his company's securities, when he has less 'value'[87] of the same class of the securities than the securities he wants to sell." Since future and option transactions are now within the Article, the "securities" include stocks, convertible bonds, bonds with warrant, and warrants. As some of the securities do not have prices, the Article uses "value" to evaluate prices of securities.

To illustrate, although a class of stock has a price on the daily stock exchange, a conversion right of a convertible bond or a warrant does not have a price. Even if a stock has a price every day, the price will change drastically in a fluctuating market. It is very difficult to determine the value of the right of a convertible bond or warrant because no one can prejudge whether or not the right will be executed. If not, the right is worth nothing. Similarly, an option that is not exercised is worth nothing. The method of calculating the value of such securities is promulgated by a Ministry of Finance ordinance.

Article 165 does not prohibit insiders from doing future transactions because insiders can future-trade as a way of risk hedging. As a result, the Article precludes a public company's insiders from selling or putting/calling a sale option worth more than the value of the securities they hold, and if they sell or put/call a sale option worth more than the value of the securities they hold, they fall under this Article because they have sold short. There is a fine of up to three hundred thousand yen (2,500 U.S. dollars) for breach of this Article.[88]

[8] Article 166

[a] Introduction

Articles 166 and 167 were added by the 1988 amendment.[89] Article 157, the general anti-fraud provision, is too vague and too broad to be used in an insider trading case. The Japanese wanted to clarify the concept of insider trading and to make it illegal. These Articles describe who is an insider and what kind of act shall fall under insider trading provisions. They constitute the first Japanese laws that clearly prohibit insider trading since the Securities and Exchange Law was created in 1948. Arti-

87. S.E.L., *supra* note 3, art. 165.

88. *Id.* art. 205.

89. The Japanese created these two articles as Articles 190-2 and 190-3 in 1988. The numbers were changed to Articles 166 and 167 in 1992. The substance of these Articles has not been changed by the 1992 Amendment. However, since there was much criticism from many commentators, the scope of the Articles was enlarged to include public companies, compared with only listed companies in the 1988 Amendment. *See* Lu, *supra* note 82.

cle 166 prevents "corporate-related parties" and "primary tippees" from insider trading, while Article 167 regulates them in the case of a tender offer. These Articles have the same content; the only difference is that Article 166 covers ordinary securities transactions, while Article 167 covers tender offers.

[b] Proscriptions

Article 166 prescribes that if "corporate-related parties" know the "material facts" of an issuer's business, the parties shall not purchase or sell the issuer's securities until the "material facts" are disclosed. This Article also prescribes that any person, a "primary tippee," who directly knows the "material facts" of an issuer from the "corporate-related parties," shall not purchase or sell the issuer's securities until the "material facts" are disclosed. The securities covered by this Article include a public company's stocks, bonds, warrants, and options.

[c] Definitions of Terms

[i] Corporate-Related Parties

"Corporate Related Parties" include:

(a.) an issuer's director, auditor, agent, or employee who knows the issuer's business' "material facts" through his work;

(b.) an issuer's shareholder who has the right to examine the issuer's books and records under Commercial Code Article 293-6, and knows the issuer's business' "material facts" through exercise of the right;[90]

(c.) a person who has the legal right to oversee, or has authority over the issuer, and knows the "material facts" of an issuer's business through exercise of the right or authority;

(d.) a person who has a contract with the issuer and knows the issuer's business' "material facts" because of the contract; or

(e.) an officer of any entity employing persons in categories (a.) and (b.) above, if such officer has learned of any material fact in connection with the performance of his duties.

The "corporate-related parties" remain subject to this Article for a period of one year after they have terminated their duties, employment, or contracts.

Under this Article, people in categories (a.) and (b.) are "insiders," while those in categories (c.) and (d.) are "quasi-insiders." Category (a.) includes everyone who has connections with the issuer. Even a part-time worker who cleans the issuer's office may fall under this Article. Category (b.) includes the shareholder's agents or employees, if they exercise the

90. A shareholder who has over ten percent of his company's stock can ask the company to let him examine or copy the company's books and records. SHOHO [COMMERCIAL CODE], art. 293-6.

examination right. If the shareholder is a company, and one of its directors, auditors, agents or employees exercises examination rights, s/he may fall under this Article. A secondary party who knows the issuer's "material facts" from any person who exercises the examination right in such a company may fall under this Article.

To illustrate, X company is a major shareholder of Y company. X's employee Z exercises the examination right to learn Y business' "material facts." Instead of taking advantage of the information himself, Z tells W, another of X's employees, the "material facts," and W does the insider trading. W will fall under this Article. In this case, W is also a "primary tippee." Category (c.) includes all persons who can examine, license, or have authority over the issuer, for example a government bureaucrat who receives the issuer's application for producing a very effective anti-AIDS medicine, or who receives an issuer's application for registering its new patent, or a Ministry of Finance officer who just examined the issuer's books or records. Category (d.) includes all persons who have contracts with the issuer, such as the issuer's attorneys, accountants, bankers, and underwriters. For example, a printing company that has a printing contract with the issuer, or an interpreting company that sends interpreters to the issuer would both be controlled by this Article. If the entity that has a contract with the issuer is a company, the conditions stated in category (b.) will apply — the company's directors, auditors, agents, employees, and their primary tippees will fall under this Article. For example, X securities firm is the underwriter of issuer Y. Z, one of X's employees, knows the "material facts" of Y's business through the underwriting contract. Z passes this confidential information to W, and W does the insider trading. W falls under this Article.

[ii] Primary Tippee

Any person who receives the "material facts" of an issuer's business directly from the "corporate-related parties" is a "primary tippee." Article 166 prohibits any "primary tippee" from trading the issuer's securities before the "material facts" of the issuer's business are disclosed. This restriction is effective within one year after the "corporate-related parties" have terminated their duties, employment, or contracts. For instance, X company's former employee Z, out of his job for ten months, knows the "material facts of Y's business through his former work; Z tells his friend W the confidential information and W trades Y's securities before Y's disclosure of the "material facts;" Z falls under this Article. However, if W received the confidential information within one year of Z's termination but traded one year after Z's termination, W does not fall under this Article.

According to the Ministry of Finance's explanation,[91] the reason this

91. Akio Takeuchi, *Insaida Torihiki Kisei No Kyoka [The Reinforcement of Insider Trading Regulation]*, 1144 SHOJI HOMU [COMMERCIAL LAW JOURNAL] 9, 15 (1988). Professor

Article prevents only "primary tippees" from insider trading is to make the scope of the Article clear. If all tippees fell under the restriction, no manageable limits would exist. For example, in the case above, if W, instead of taking advantage of the confidential information by himself, told M, then M told N, and N did the insider trading before Y's disclosure, W, M and N are all tippees. It is impossible to restrict all tippees because anyone could be called a tippee. To narrow this Article's scope, only "primary tippees" are prohibited from insider trading.

[iii] Material Facts

"Material Facts" include the following:

(a.) Management decisions relevant to the execution of the following matters:

(1) issue of stocks, convertible bonds, and bonds with warrants;

(2) capital reduction;

(3) share splits;

(4) dividends;[92]

(5) mergers or acquisitions;

(6) disposing of all or a part of the company's business; as well as acquiring all or part of another company's business;

(7) dissolution;[93]

(8) bringing a new product or new technology into the market; or

(9) entering into a joint venture, or other matters similar to (1) — (8) above which are prescribed by ordinance.

(b.) When any of the following happen:

(1) a disaster, or other damage occurs to the company;

(2) a change of a major shareholder;

(3) an event which will unlist the company; or

(4) any events, like (1) — (3) above, that are prescribed by ordinance.

(c.) A new estimate indicating that the company's sale, ordinary profits, or net profits will be different from the previous estimate, as this new estimate may have an impact on the investor's judgments.

(d.) In addition to (a.) through (c.), any important facts about the

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Takeuchi is the Chairman of the "Unfair Trading Special Department" of the Securities and Exchange Council. The Securities and Exchange Council is an advisory council in the Securities Bureau. The Unfair Trading Special Department consists of five scholars, one bureaucrat of the Justice Department, one Tokyo Stock Exchange assistant director, one drug company president, one president of a securities research firm, one trustee of an economic study fund, and a director of a Japanese economic newspaper.

92. Only if the management decides to change the amount or the method of the preceding dividend does this decision fall under the scope of "material facts."

93. The only exception is dissolution by merger.

company's operation, business, or property that will have an impact on investor judgment.

[d] Disclosure of Material Facts

There is a disclosure of material facts if:

(a.) the company complies with an ordinance to make "material facts" public, or

(b.) the company files a statement or a report under Article 25.[94]

An order of the M.O.F.[95] requires a company to publicize material facts in at least two forms of mass media. Disclosure is complete twelve hours after the publication. The mass media include a national daily paper, a national industry or economic newspaper, or a national radio or television broadcast. The twelve hour requirement commences with the publication in the second medium.

[e] Exceptions

The following persons, securities, and transactions are beyond the scope of this Article:

(a.) a person who obtains stock by exercising a warrant;

(b.) a person who obtains stock by exercising his conversion right under a convertible bond;

(c.) a person who trades securities to complete his mandatory obligation or requests the issuer to buy his shares under the Commercial Code;[96]

(d.) a person who follows a decision of the board of directors to buy securities against a tender offer;

(e.) a person who trades securities under a stabilization that is regulated by an ordinance;[97]

(f.) a person who trades bonds or options on bonds, unless these

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94. S.E.L., *supra* note 3, art. 165-2. Under Article 25, the Ministry of Finance must make public the company's disclosure document for a special period of time — for example, five years for annual and supplemental reports.

95. S.E.L. Operation Order, art. 30, ¶ 1.

96. Appraisal Right: under the Commercial Code a shareholder can ask the issuer to buy his shares in the following circumstances: (1), if a shareholder opposes the issuer's important managerial decision, such as disposing of an important property, he can ask the issuer to buy his shares (Article 245-2); (2) if the issuer decides to make restrictions on the qualification of its shareholders, any shareholder who opposes this decision can ask the issuer to buy his shares (Article 349). However, this situation should not arise, because once the issuer makes this decision, its securities will be removed from the list or the OTC market and only a public company is within the scope of Article 166; or (3) a shareholder can ask the issuer to buy his shares if s/he opposes the issuer's merger decision (Article 408-3).

97. A stabilization is a way of preventing a sharp price drop of a newly issued security under the supervision of the Ministry of Finance. TANAKA & HORIGUCHI, *supra* note 74, at 749; SUZUKI *et. al.*, *supra* note 67, at 595; KANZAKI *supra* note 67, at 639.

bonds or options come with warrants or conversion privileges;

(g.) a transaction among insiders and primary tippees not on an over-the-counter market or a stock exchange;[98]

(h.) an execution of a securities transaction by the issuer; either the transaction had been decided/contracted before the "material facts" happened or other similar transactions that are prescribed by an ordinance.

[9] Article 167

Article 166 prohibits any insider, quasi-insider, or primary tippee from insider trading in an ordinary securities transaction, while Article 167 prohibits them from insider trading in the case of a tender offer. Article 167 has almost the same content as Article 166. The only difference between these two Articles is that the term "material facts" in Article 166 is replaced by the term "tender offer facts" in Article 167. Under Article 167 no insider, quasi-insider, or primary tippee of the offeror can buy or sell the target company's securities if he knows the offeror has made a decision to execute or withdraw a tender offer. The concept of insiders, quasi-insiders, and primary tippees is the same as that in Article 166. The exceptions to Article 167 are the same as those to Article 166.

[10] Article 154

Article 154 gives the Minister of Finance the right to order both the stock exchanges and listed companies to file reports about their business or properties or to submit documents. The Article permits the Minister to examine only the stock exchanges' business, properties, books, and records, not the listed companies'. Before the amendment, the Minister had the right to order or examine only the stock exchanges. The new law gives him the additional right to order listed issuers to file reports.[99]

§ 4. THE 1992 AMENDMENT: SECURITIES AND EXCHANGE SURVEILLANCE COMMISSION

§ 4.01 *History of the Law Reform*

The Unfair Trading Special Department[100] (hereinafter, the Department) of the Securities and Exchange Council in M.O.F. was set up in 1987. It began major reform against insider trading in 1988. As a result of the creation of this agency, the Japanese hoped additional securities

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98. There is no danger of abuse of confidential information among insiders and primary tippees because they all know the confidential information. However, in this case, if the seller knows the buyer would resell these securities to a third party, the seller should not sell the securities to the buyer. For instance, A and B are both insiders or primary tippees. If A knows that B would resell the securities bought from A to C, an outsider, A should not sell B the securities because B would take advantage of C by using confidential information. S.E.L., *supra* note 3, art. 166.

99. Telephone interview with Wataru Horiguchi by the author, February 1, 1993.

100. See *supra* note 91 and accompanying text.

problems could be addressed. One such scandal occurred in July of 1991, when the "Big Four" (Nomura, Daiwa, Nikko and Yamaichi) securities houses illegally compensated their large clients.[101] Nomura Securities and Nikko Securities were also found to have manipulated the stock price at a railway company on behalf of an organized crime boss.[102] Following this chain of events, the presidents of Nomura Securities and Nikko Securities resigned.[103] Subsequently, a top aid to Finance Minister Hashimoto resigned after admitting he had helped arrange a loan-fraud scandal[104] worth U.S. $93 million. Following this, the Minister of Finance himself resigned.[105]

In an attempt to consider the impact on U.S. investors and markets, the S.E.C. sent queries to Japanese securities firms regarding the stock scandal.[106] Two large U.S. pension funds also reacted by sending notice to the Big Four to request reforms of the Japanese brokers.[107] The extent of this outside pressure forced the Japanese Prime Minister to commence with financial reform.[108] Many scholars criticized the abolition of the U.S. S.E.C.-style regulator that was imposed after W.W.II.[109] The Japanese business leaders, after all of the aforementioned scandals, strongly urged their government to set up an American S.E.C.-type of independent securities watchdog.[110] The Prime Minister responded by asking the M.O.F. to propose establishing a new institution that would oversee the securities markets as well as the securities industry. The M.O.F. then submitted a proposal for the "Securities and Exchange Surveillance Commission" to be designed within the M.O.F., despite the fact that an independent institution outside of the M.O.F. was demanded by the Administration Reform Council.[111] The M.O.F. did not want to give up its power.

The Japanese also adopted the "honest" and "fair" principles recommended by the International Organization of Securities Commissions

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101. Christopher J. Chipello & Masayoshi Kanabayashi, *Japan's 'Big Four' Firms Try to Cool Payment Furor*, WALL ST. J., July 30, 1991, at A13.

102. Clay Chandler, *Tokyo is Scrutinizing Allegation of Nomura Stock Manipulation*, WALL ST. J., June 27, 1991, at A11.

103. *Trapped in the Rubble*, THE ECONOMIST, June 29, 1991, at 65.

104. *Top Japanese Aid Quits in Loan Scandal*, BOSTON GLOBE, Aug. 4, 1991, at 14.

105. Quentin Hardy, *Hashimoto's Exit, New Securities Laws Are Just A Drop in Japan Reform Bucket*, WALL ST. J., Oct.. 4, 1991, at A10.

106. Michael R. Sesit et al., *SEL Sends Queries to Japanese Firms on Stock Scandal*, WALL ST. J., Aug. 1, 1991, at C1.

107. Kathryn Graven, *Pension Funds Ask Japanese Brokers To Make Reform*, WALL ST. J., Aug. 5, 1991, at B6a.

108. Chuck Freadhoff, *Japan Scandal May Hasten Financial Reform*, INVESTOR'S DAILY, Aug. 7, 1991, at 1; Weisman, *Scandals Prompt Kaifu Offer Securities Reform*, N.Y. TIMES, Aug. 8, 1991, at A6.

109. Lu, *supra* note 82, at 235.

110. *Japanese S.E.C. Is Urged*, N.Y. TIMES, July 4, 1991, at D11.

111. *Shoken Torihikiho Kanshi Iinkai No Hasoku* [*The Start of the Securities and Exchange Surveillance Commission*], 470 TEGATA KENKYU [BILL STUDY] 70 (1992).

(I.O.S.C.O.) in 1991.[112] The new amendment binds securities firms and their employees to be honest and fair with their clients at all times. The securities firms were then prohibited from offering any compensation to clients, and the penalties for this were raised in the new amendment.[113]

§ 4.02 *The Securities and Exchange Surveillance Commission*

The Securities and Exchange Surveillance Commission (S.E.S.C.) consists of three commissioners with one serving as the chair.[114] The commissioners are appointed by the Minister of Finance after gaining the approval of both chambers in the Diet.[115] Their term is three years and can continue by reappointment.[116] The commissioners cannot be dismissed against their will.[117] The S.E.S.C., including these commissioners, presently employs 118 people.

The Minister of Finance's right to ask for reports under Article 154 is delegated to the S.E.S.C..[118] The S.E.S.C., as structured, has the right to investigate all securities crimes, including insider trading and market manipulation.[119] The S.E.S.C. can subpoena information of individuals, as suspects or as witnesses, to assist in its investigations.[120] The Securities and Exchange Surveillance Commission also has the power to check items in the possession of the *suspect*, when actually questioning him, but cannot similarly examine items in the possession of a witness.[121] The S.E.S.C. cannot search the suspect's office or home without a court warrant because Article 35 of the Japanese Constitution requires a warrant in order to conduct a search. If necessary, the S.E.S.C. can request the courts to issue warrants for searches and to have access to property to confiscate relevant evidence.[122] The S.E.S.C. also can request information and cooperation from other government departments.[123] The S.E.S.C., in other words, investigates all facets of the securities firms and self-regulation organizations.[124]

The S.E.S.C. must report to the M.O.F. when the S.E.S.C. discovers illegal activities.[125] The S.E.S.C. does not have the power to discipline one who violates the laws or to initiate a proceeding. The S.E.S.C. can only

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112. S.E.L., *supra* note 3, art. 49-2.
113. *Id.* arts. 50-3, 199, 207.
114. Okurasho Sechiho [Ministry of Finance Establishment Law] art. 10 [hereinafter MOFEL].
115. *Id.* art. 11.
116. *Id.* art. 12.
117. *Id.* art. 13.
118. S.E.L., *supra* note 3, art. 154-2.
119. *Id.* art. 210.
120. *Id.*
121. *Id.*
122. *Id.* art. 211.
123. *Id.*
124. *Id.* arts. 55, 56, 79-14, 79-15.
125. *Id.* art. 226.

advise the Minister of Finance.[126] The Minister, then, is expected to give serious consideration to the S.E.S.C.'s advice.[127] The S.E.S.C. can follow up with a request for the report on any action taken by the Minister of Finance after the S.E.S.C. recommendations have been given.[128] The S.E.S.C. then can make further suggestions to the Minister of Finance.[129] Given the Japanese cultural norms, the S.E.S.C. cannot be expected to act independently or to challenge the M.O.F. in the event the M.O.F. does not follow the S.E.S.C.'s recommendations. This new watchdog, which is under the aegis of the M.O.F. and has a position similar to an inside council, observes, investigates, and reports, but it does not have the teeth to bite into the securities market.

§ 5. CASES AFTER THE 1988 AMENDMENT.

Since the 1988 Amendment, there have been two major cases related to Article 164's short-swing profit. In these cases, the insiders either returned the short-swing profit privately or were ordered to do so by the court.[130] There also have been two Article 166 (insider trading) cases. In the first Article 166 case, the Tokyo District Court fined a president of a finance company 200,000 yen (1,667 U.S. dollars) by summary judgment for breach of Article 166 in September 1990.[131] The second case, the *Macros* Case,[132] was decided by Tokyo District Court in 1992. Here the defendant, who was the director of a listed company, "window-dressed" the company's sales and sold the company's stock before the scheme was exposed. He made a profit of 18,000,000 yen (150,000 U.S. dollars), but was later fined 500,000 yen (4,167 U.S. dollars) with no prison sentence, despite the fact that the Court found him extremely malicious (akushitsu). The court fined him without further penalty because he had donated half of the profit to a pro bono legal service and he had suffered enough social sanction.[133]

These new insider trading laws obviously carry too light of a penalty. Also of import is the point that in Japan, defendants will not be sentenced to imprisonment unless they have a previous criminal record.[134] The new law, therefore, is not an effective deterrent to insider trading.

§ 6. PROBLEM AREAS

The 1988 and 1992 amendments reinforce the proscription upon in-

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126. MOFEL, *supra* note 114, art. 19.
127. *Id.*
128. *Id.*
129. *Id.* art. 20.
130. Lu, *supra* note 82, at 206.
131. *News*, 1229 SHOJI HOMU [COMMERCIAL LAW JOURNAL] 130 (1990).
132. *Makuros No Insaida Torihikijiken Hanketsu* [*Macros Insider Trading Judgment*] 1306 SHOJI HOMU [COMMERCIAL LAW JOURNAL] 27 (1992).
133. Tokyo District Court Judgment, Sept. 25, 1992.
134. Lu, *supra* note 82, at 231.

sider trading, but some important problems have not been solved.

§ 6.01 *Bribes to Politicians*

In the gift-giving society, important politicians receive scores of invitations to many kinds of ceremonies every day. Their aides send flowers, money, or other gifts to cover events that they cannot attend. Politicians need money. Gift-giving is a strong Japanese tradition, especially among those who help each other. Japanese politicians spend a lot of money giving gifts — and, like some politicians in every country, a number of them receive gifts as bribes. Japanese companies bribe politicians in return for profitable favors. The *Recruit Scandal* is one such example of a Japanese company bribing politicians through insider trading.[135]

Under the Japanese life-employment system, job hunting for a senior university student is very important because it will have a critical influence on his whole life. "Recruit" magazine, published by Recruit Company, is the most popular job-hunting magazine, sponsored by thousands of private companies. The magazine, widely read by students, gives seniors private company job information. The students use the magazine as a "job hunting Bible," and it makes Recruit large profits every year. Private companies and the Japanese government alike want the best university graduates to join them. The two entities always compete with each other, trying to get the best new employees. The government uses a bureaucratic examination system to find the highest level of university graduates, while private companies use an interview system. The government and many private companies have an agreement that prohibits senior students from visiting the companies for interviews before the government examination results. However, many companies do not follow the agreement.

In 1984, the government changed the examination schedule to better compete with private companies, and there was a rumor that the government was going to abolish "the agreement." Without the agreement Recruit would have lost significant business.[136] Recruit proceeded to bribe the Chief Cabinet Secretary and other congressmen to put pressure on the administration to follow the agreement. As Recruit was a listed company and had many shareholders, it was preferable to use the stock of its subsidiary — Recruit Cosmos Real Estate Co. — to bribe the politicians.

When a company goes public its stock price often trades at a sub-

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135. Sanger, *supra* note 63; *Seijika Yonjuyonin Ni Shikin* [*Money Given to Forty-four Politicians*], ASAHI SHINBUN [NEWS], June 13, 1989, at 15, col. 2; Asano, Kawamoto, Shibahara, Nishita, & Yasuhara, *Rikuruto Jiken No Horitsu Mondai* [*The Legal Problem of the Recruit Case*], Zadankai [Conference], 947 JURISUTO [JURIST] 16 (1989); ISAACS, *supra* note 77, at 138-39.

136. If the agreement had been broken, Recruit's sponsors would have gone out to advertise themselves as soon as possible because there would have been no time restriction. Since these companies would not have advertised themselves at the same time, Recruit would have lost much advertising business.

stantial premium above the offering price. Recruit Cosmos gave confidential information to politicians regarding the company going public and sold company stock to them to complete the bribe. Here is how it worked.

Cosmos registered its stock on the over-the-counter market on October 30, 1986. Before registration it sold 242,000 shares to forty-four Japanese politicians at a price of 3,000 yen (25 U.S. dollars) per share. After registration, its stock was traded on the over-the-counter market at a price of 5,270 yen (44 U.S. dollars); then it rose to 7,250 yen (60 U.S. dollars). The forty-four politicians sold their shares and took a total profit of 730,000,000 yen (6 million U.S. dollars). In addition to the trading profit, the Recruit Group also gave these politicians money donations, entertainment, and other benefits such as quantity purchases of tickets for party fund-raising events. By May of 1988, the total Recruit bribes to the politicians, including the trade profit, was over 1,330,000,000 yen (11 million U.S. dollars).

Prime Minister Takeshita received about 201,000,000 yen (1.7 million U.S. dollars) during his service as Minister of Finance and later Prime Minister. The former Minister of Foreign Affairs, Abe, gained 137,000,000 yen (1.2 million U.S. dollars). The Minister of Finance, Miyazawa, received 122,000,000 yen (1 million U.S. dollars). Former Prime Minister Nakasone made a 110,000,000 yen profit (0.9 million U.S. dollars).

After the scandal was exposed, the politicians denied knowledge of the stock transactions and donations because these transactions and donations were executed in the names of their wives, children, aides or others. However, all of the politicians were found to have had connection with the plot. Most of them resigned from office and their political parties for a period of time but subsequently were re-elected. One of the Prime Minister's aides, Aoki, committed suicide on April 26, 1989.[137]

Although over twenty persons who had connections with the scandal were prosecuted for bribery, most of them were company directors or officers. Only two congressmen and four aides of politicians were prosecuted. Nakasone, Takeshita, Abe, and Miyazawa were not prosecuted. There were no prosecutions for breach of Article 157.

In another insider trading case, *Meitanco Co.*, an electric appliance manufacturer, announced that the company had invented a "highly effi-

137. The reason for Aoki's suicide was that this was his only way out. There is no plea-bargain system in Japan. Even if he had testified in the Diet, no immunity to avoid prosecution would have been available. As a consequence, he would have gone to jail even if he had testified. His family would have lost his support. By proving his loyalty to his "master" — by committing suicide — his master became committed to the care of his family, and of course would himself be spared the consequences of unfavorable testimony. If the aid had betrayed his master, society would have criticized him for his disloyalty! In the Lockheed Scandal, in which the aircraft manufacturer bribed former Prime Minister Tanaka to push Japanese airlines to buy Lockheed products, Tanaka's driver committed suicide for the same reasons. *Lokido Jiken Nisshi* [*Lockheed Case Diary*], 676 JURISUTO [JURIST] 169, 171 (1978).

cient device" to save electricity, registered the device, and received a patent. The president of Meitanco bought a large stake of the company's stock before the new invention's announcement. He also bribed politicians with the company's stocks and with money. After the announcement, the company's stock price soared, and the president asked "his" politicians to speak in the Diet to push government departments to buy the company's new device. Ironically, government test reports proved that the new device could not save any energy at all.[138]

Article 157 should apply to scandals like *Recruit* and *Meitanco*. However, Article 157 is too vague and too broad for the Japanese legal system. Since it has been a dead letter for over forty years, there is little anticipation that it will be used in the future. As a result, things have not yet changed. Although Articles 166 and 167 specifically make insider trading unlawful, it is unlikely that Japanese courts will impose penalties of the magnitude necessary to serve as a deterrent.[139]

Politicians (and others) also can still take advantage of public companies in order to engage in insider trading. For instance, a listed company A's insider B tells C, one of politician D's aides, A company's "material facts," and D buys A company's securities and profits. D is not restricted by Article 166 because D is not a primary tippee. D is a secondary tippee. There is no insider or primary tippee penalty for passing "material facts." As a result, if a tippee other than a primary tippee does insider trading, no one in the scheme will be sanctioned.

It is a reasonable conclusion that Japanese politicians do not intend to ban all insider trading. They have left seams in the net in order to allow the astute to pass through. The politicians passed a very strict-looking law in order to convince foreigners that Japan would no longer be an "insider's haven," but at the same time they also allowed room for evasion of the law. The Japanese call this "getting two birds with only one marble."

§ 6.02 *Civil Remedies and Legal Fees*

It is very difficult to secure a remedy for losses resulting from insider trading. The Securities and Exchange Law does not provide for civil liabilities in insider trading. The only way for an insider trader's victim to get a private remedy is to sue the insider in tort on the basis of Civil Code Article 709. For example, insider A bought XYZ company's stocks from B and made a substantial profit. B can sue A; however, B has the burden of proof. Usually, it is very difficult to prove that A knew the business' "material facts" through his work or duty. It is also very difficult to prove how much B lost in a fluctuating market. The Japanese law does not recognize implied liabilities.

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138. *Nagaseko Ni Jikei Sannen* [*Nagaseko Sentenced to Three Years*], ASAHI SHINBUN [NEWS] (Yukan [ev. ed.]), May 9, 1989, at 1.

139. See *supra* § 4.

A shareholder who sues an insider under Article 164 has to pay his own legal fees. Article 164 prescribes that if a company does not ask an insider to return his profits from insider trading, any shareholder can sue the insider to disgorge the profits to the company on behalf of the company. However, even if the plaintiff wins he must pay the legal fees, and profits will be returned to the company. Thus, shareholders rarely want to sue insiders on behalf of their companies.

§ 6.03 *Bureaucratic Ambivalence*

There is no independent public regulator with adequate authority to oversee the securities market in Japan. The Japanese do not have an American-style Securities and Exchange Commission. The S.E.S.C. does not have the bite. It can only advise or make suggestions to the Minister of Finance. The new law appears to give the S.E.S.C. extensive power, but actually the S.E.S.C. is still dependent upon the M.O.F. as it cannot initiate any proceeding. The M.O.F. is unwilling to give power to an S.E.C.-like independent regulator.

Another reason for the bureaucrats' failure to expose insider trading is that personnel of the Ministry have been involved in scandals. Two Prime Ministers and two Ministers of Finance were involved in the *Recruit Scandal.* The fact is that when Nakasone was Prime Minister, Takeshita was the Minister of Finance; when Takeshita became the next Prime Minister, Miyazawa became the Minister of Finance. During these two recent terms of cabinet both the Finance Ministers were involved in insider trading. Ministry of Finance bureaucrats are not in the habit of exposing their bosses.

Finally, whether the Japanese government has the mind-set to effectively regulate securities markets is questionable. The Wall Street Journal, in January of 1993, reported that the Japanese government was using "vast amounts of money from the postal system and other funds" to purchase securities in an effort to stem "the relentless slide in the Nikkei 225-stock index."[140] The Journal reported that "the objective is apparently to keep stock prices high enough that banks and other corporations with big stock portfolios won't have to declare major losses on their investments when the fiscal year ends March 31." Although the government "officially says its intention isn't to prop up the Nikkei," the Journal cites convincing evidence of massive purchases by the government through the banks that largely offset the fact that institutional investors were large net sellers during the fourth quarter of 1992. "What happens after the critical March 31 date passes," the Journal continues, "is anyone's guess."[141] Nor is the denial by the government that it is supporting the market credible, since it publicly announced, in August of 1992, an emer-

140. Quentin Hardy, *Japan Fights Uphill Battle to Aid Stocks*, WALL ST. J., Jan. 25, 1993, at C1.

141. *Id.*

gency package of economic measures that included a promise to invest more public funds in the stock market."[142] This was all against the continued decline during 1992 in the Nikkei and an eighty five percent reduction during 1992 in net purchases by international investors in securities traded on the principal Japanese stock exchanges.[143]

§ 7. CONCLUSION

The Japanese recently amended their Securities and Exchange Law in order to convince foreigners that their securities market is a fair one. Article 157 is the general anti-fraud provision, but this Article is a dead letter because it is too vague, too broad, and has yet to be used in an insider trading case. There is little hope that the Japanese will use this Article in the future. Article 163 requires corporate insiders to file reports with the Minister of Finance after they trade their company's securities. Article 164 requires corporate insiders to disgorge profits from tainted transactions to their companies. Article 163 (relating to the filing of insider reports), while inactive for a long time, was revived in the new amendment. Article 165 prohibits insiders from short-selling. Articles 166 and 167 are new Articles, and they look very strict on paper. Article 166 prohibits insiders, quasi-insiders, and primary tippees from insider trading in ordinary transactions, while Article 167 regulates them in tender offers. Article 154 reinforces the right of the Minister of Finance to examine stock exchanges, and to order issuers to file reports with him. The S.E.S.C. was created and delegated powers of the M.O.F. under this Article to serve as a new watchdog. The S.E.S.C. is not an independent regulator. Therefore, securities regulation in Japan still depends on the old M.O.F., which has not been an effective enforcer of the laws.

The new amendments seem like a great advance in preventing insider trading in Japanese securities markets, but they certainly have not yet changed things to any significant degree. Insider trading has been too inherent in the Japanese political scene to expect Japanese politicians to ban all insider trading. On the one hand, they have created very strict-looking rules in order to convince foreigners that the Japanese market is fair. On the other hand, they conveniently preserve ways that permit evasions of the regulatory scheme.

There is no provision for civil liabilities against insider trading in the Securities and Exchange Law. An insider's trade "victim" has to sue the insider under Civil Code Article 709. The burden of proof lies with the plaintiff, and it is very difficult to prove the amount the plaintiff lost, or that the insider knew the "material facts" through his work or duty. If a shareholder sues an insider for the return of profits to a company under Article 164, that shareholder has to pay his own legal fees. As a result,

142. Robert Thompson, *Fall in Foreign Purchases in Tokyo*, FIN. TIMES, Jan. 13, 1993, at 13.

143. *Id.*

few shareholders will sue an insider on behalf of a company. There is no U.S.-style S.E.C. in Japan. The past involvement of certain high level personnel of the Ministry of Finance and other politicians in insider trading, makes it unlikely that lower level bureaucrats will strive to expose insider trading that may involve the highest levels of government. Even the recent change of leadership in Japan, from the long-standing Liberal Democrats to a nascent coalition, dismantles little of the historic fabric throughout which insider trading penetrates.

Although it seems that the new law has reinforced anti-insider trading provisions, it leaves many loop-holes. The new amendments to the Securities and Exchange Law are neither severe nor effective enough to prevent insider trading in Japan.

INTERNATIONAL TRADE SECTION

Trade in Culture: Consumable Product or Cherished Articulation of a Nation's Soul?

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I. INTRODUCTION

> There are three classic ways to control the culture of another country: through political coercion, which is less feasible as the Communist collapse demonstrates; through acquisition, which is expensive; and through flooding.
>
> . . . [F]lood the markets of other countries with your slick, cheap, heavily advertised product, swamping the local variety until it ceases to exist.[1]

Once culture was seen through the artifacts left behind by lost civilizations. Later, as man matured, culture was expressed in song and dance handed down through oral traditions. Today, culture is broadcast across thousands of miles to the farthest reaches of the globe, disseminated through radio, television, and film. For the first time since the dawn of man, the exchange of culture has become a profit making business, forcing nations to create a regime for trade in culture.

In 1948, the nations participating in the first round of the newly established General Agreement on Tariffs and Trade (GATT) could not envision that one day film and television sales would represent a multimillion dollar industry. Accordingly, they neglected to create a regime to account for trade in culture. Presently, the trading community does not

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1. Silvia Fraser, *Canada and the U.S.: Too Close for Comfort?*, WORLDPAPER, Mar. 1992, at 12.

know whether to classify cultural products as goods, services or a completely separate entity. With American film and television sales generating more than $4.5 billion in trade surplus during a time in which the United States runs a mighty trade deficit, it is evident that "the prosperity of the American economy is increasingly tied to Hollywood's well being."[2] Accordingly, the United States contends that cultural products are like any other tradeable commodity, subject to the strictures of liberalized trade negotiated under GATT. On the other hand, the European Community (E.C.),*** struggling against very successful American programming, contends that "cultural industries are intrinsically different from manufacturing and pose unique political problems that defy normal trade rules."[3]

In the first confrontation over this issue, the United States was willing to exclude culture from liberalization in the United States-Canada Free Trade Agreement. Cognizant of the United States' failure to liberalize trade in culture with Canada, the E.C. subsequently passed its "Television Without Frontiers" legislation mandating that European television consist of at least fifty percent domestically created products. Although cultural industries in the United States vehemently objected to the Directive as unwarranted protectionism, the mandatory ratio remains in full effect and serves as the foundation of other European cultural endeavors. Thus far the issue of trade in culture has been enmeshed in the endless bureaucracy of the Uruguay Round of GATT and will not likely see a rapid resolution.

This article will trace the evolution of trade in culture, beginning in Part II with the cultural derogation embodied in the United States-Canada Free Trade Agreement. This section will identify and analyze the Canadian rationales for the derogation and the subsequent responses from the United States. Part III will discuss European cultural initiatives designed to protect culture, focusing on the 1988 Broadcast Directive. The rationales and responses will be analyzed and contrasted to those used in the United States-Canada Free Trade Agreement. Part IV of this article will look at the viability of treating culture as a tradeable commodity under the GATT and alternatively as a service under a General Agreement for Trade in Services (GATS), ultimately concluding that neither is adequate. Finally, this article proposes the creation of a General Agreement on Trade in Culture that acknowledges the unique nature of culture as both a consumable product as well as the cherished articulation of a nation's soul.

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2. Bruce Stokes, *Tinseltown Trade War*, NAT'L J., Feb. 23, 1991, at 432.

*** The European Community changed its official name to the European Union, effective January 1, 1994. The name European Community will still be considered correct, however, and will be used in this article.

3. *Id.*

II. UNITED STATES-CANADA FREE TRADE AGREEMENT

A. *Definition of Culture*

The amorphously defined word "culture" suffers from a multiplicity of meanings. The Canadians have taken a broad view, believing culture to be inclusive of the "knowledge, beliefs, attitudes and practices of a society . . . ."[4] In the broadest sense, the Canadians see culture as the embodiment of their national identity, an identity which is on the verge of extinction and becoming more Americanized each day.[5]

"To Americans, broadly speaking, culture is another service industry, an outgrowth of their country's economic machine as surely as automobiles and apple pie."[6] The claim to cultural sovereignty is at best a vague nationalistic concept and realistically a feeble attempt at protectionism.[7] Under either definition, culture and its collateral industries have significant financial worth. Since culture is quantifiable in monetary terms, shouldn't it fit within the auspices of free trade like all other quantifiable commodities?[8]

B. *Historical Perspective*

The 1988 United States-Canada Free Trade Agreement (FTA) was a landmark achievement in an otherwise long and somewhat jaded trade history.[9] The main objective of the FTA was to promote freer trade between the two countries and "build on their mutual rights and obligations under the [GATT]."[10] The FTA created an open market between the

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4. CENTER FOR RESEARCH ON PUBLIC LAW AND PUBLIC POLICY, OSGOODE HALL LAW SCHOOL OF YORK UNIVERSITY, TRADE-OFFS ON FREE TRADE 139 (Marc Gold & David Leyton-Brown eds., 1988) [hereinafter TRADE-OFFS ON FREE TRADE].

5. David Trigueiro, *Cultural Cannons Fire Broadside*, CALGARY HERALD, Sept. 18, 1992, at A4. *See also* Mary Lamey, *Quebec Artists Enrich Culture of Canada: Film Executive Shaping the Future*, THE GAZETTE (Montreal), Feb. 11, 1992, at B1 (quoting Harold Greenberg, Chairman of Astral Inc., "We believe the country that loses the ability to express itself is no longer a country.").

6. *See* Jeffrey Simpson, *Living Beside a Cultural and Economic Colossus*, N.Y. TIMES, Aug. 24, 1986, §4 at 3. While such a view is a broad generalization, the official U.S. position is to treat cultural products as any other quantafiable good, thereby giving credibility to this assessment.

7. Laurie Watson, *Cultural Sovereignty Issue*, UPI, June 29, 1986, *available in* LEXIS, Nexis Library, UPI file. One Canadian author, attempting to explain the cause for such difference of opinions, wrote, "[W]hen you are the dominant force in [selling] copyright . . . it's hard to understand how the customer looks at it." *Id.*

8. *See e.g.*, SERVICES POLICY ADVISORY COMMITTEE (SPAC), REPORT ON: NORTH AMERICAN FREE TRADE AGREEMENT at 18-19 (1992); ADVISORY COMMITTEE FOR TRADE POLICY AND NEGOTIATIONS, REPORT ON THE NORTH AMERICAN FREE TRADE AGREEMENT at 68-69 (1992).

9. *See generally* Jean Raby, *The Investment Provisions of the Canada-United States Free Trade Agreement: A Canadian Perspective*, 84 AM. J. INT'L L. 394 (1990) (for a general discussion on U.S.-Canadian trading history); *see also* Ann Carlsen, *The Canada United States Free Trade Agreement: A Bilateral Approach to the Reduction of Trade Barriers*, 12 SUFFOLK TRANSNAT'L L.J. 299, 301-2 (1989).

10. The United States-Canada Free-Trade Agreement, Jan. 2, 1988, 2 B.D.I.E.L. 359

world's two largest trading partners, phased out most tariffs within a ten year period,[11] applied national treatment[12] to many parts of the service sector, and greatly liberalized investment policies.[13]

Although "Canadians have recognized the existence of economic interdependence with the United States and have sought the benefits of a closer relationship," they have simultaneously feared the loss of Canadian distinctiveness, autonomy, and independence.[14] So while the FTA broadly embraced the principle of national treatment, several key sectors were explicitly exempted from liberalization, among them Canadian cultural industries.[15]

C. *The Cultural Industries Exemption*

Cultural industries have been broadly defined to include all expressions of a nation's culture.[16] This encompasses all aspects of publication, distribution, sale, exhibition or transmission of printed materials, music, radio, and television.[17] Under Article 2005.1 of the FTA, cultural indus-

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[hereinafter FTA]. Article 102 of the FTA sets out five objectives: (a) Eliminate trade barriers to goods and services; (b) Promote fair trade;(c) Liberalize the investment climate; (d) Establish joint procedures to administer the FTA and to resolve disputes; (e) Promote further cooperation on trade and investment issues both bilaterally and multilaterally. *See also* RALPH H. FOLSOM ET AL., 1991 DOCUMENTS SUPPLEMENT TO INTERNATIONAL BUSINESS TRANSACTIONS 8 (2nd ed. 1991). "Free trade is a theoretical concept that assumes trade between two or more parties unhampered by government measures such as tariffs or non tariff barriers." *Id.* Basic to the notion of free trade is the concept of comparative advantage that suggests "that a country or region should specialize in the production and export of those goods and services that it can produce relatively more efficiently than other goods and services, and import those goods and services in which it has a comparative disadvantage." *Id.* at 3.

11. NORTH AMERICAN FREE TRADE AGREEMENT: THE NAFTA PARTNERSHIP 2 (Government of Canada ed., 1992) (available from the Canadian Consulate) [hereinafter NAFTA PARTNERSHIP] (U.S. and Canada negotiated two rounds of accelerated tariff reductions in 1990, covering 400 items worth six billion in two way trade, and in July 1991, covering 250 items and two billion in trade).

12. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187 (The concept of National Treatment, encompassed in Article III, ensures that goods of a foreign sovereign shall be treated no less favorably than domestically produced goods) [hereinafter GATT].

13. *See generally* FTA, *supra* note 10; Jeffrey J. Schott, *United States-Canada Free Trade: An Evaluation of the Agreement*, INST. FOR INT'L ECON. POL'Y ANALYSES IN INT'L ECON. 2, 4 (1988).

14. TRADE-OFFS IN FREE TRADE, *supra* note 4, at ix.

15. *See* FTA, *supra* note 10. (*See* Chapter 12, Articles: 1304, 1401, 1601, 1701, and respective Annexes. Among sectors remaining protected are communications, transportation, oil and gas, uranium, agricultural support etc.).

16. *See generally* A.W. Johnson, *Free Trade and Cultural Industries, in* TRADE-OFFS ON FREE TRADE, *supra* note 4, at 350 [hereinafter Johnson].

17. FTA, *supra* note 10.

> Article 2012. Definitions
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> Cultural industry means an enterprise engaged in any of the following activities:
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> (a) the publication, distribution, or sale of books, magazines, periodicals, or

tries are exempted from the confines of free trade.[18] In effect, this derogation not only allows Canada to grandfather all its prior restrictive and discriminatory laws but gives it the right to design legislation to protect those industries in the future.[19]

The one limitation to the Cultural Industries Exemption ("Exemption") is the retaliation provision of Article 2005.2.[20] This Article states that if Canada takes action that discriminates or has a negative impact on American cultural industries, then the United States will have the right to take retaliatory measures of equivalent commercial effect.[21]

The United States was and remains the largest owner and producer of cultural products in Canada.[22] By 1986, American cultural producers dominated the Canadian market.[23] Considering that seventy-five percent of all cultural products consumed in all of Canada are imported, the vast majority of which are from the United States, it should be no surprise that Canada wanted to protect cultural industries from extinction.[24]

Given the dominance of the American cultural product on the Cana-

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newspapers in print or machine readable form but not including the sole activity of printing or typesetting any of the foregoing,
(b) the production, distribution, sale or exhibition of film or video recordings,
(c) the production, distribution, sale or exhibition of audio or video music recordings,
(d) the publication, distribution, or sale of music in print or machine readable form, or
(e) radio communication in which the transmissions are intended for direct reception by the general public, and all radio, television and cable television broadcasting undertakings and all satellite programming and broadcast network services.

Id.

18. FTA, *supra* note 10.
Article 2005.1 Cultural Industries
1. Cultural Industries are exempt from the provisions of this Agreement, except as specifically provided in Article 401 (Tariff Elimination), paragraph 4 of Article 1607 (Divestiture of an Indirect Acquisition) and Articles 2006 (Retransmission Rights) and 2007(Print-in-Canada Requirement) of this Chapter.

Id.

19. DEBRA P. STEGER, A CONCISE GUIDE TO CANADA-UNITED STATES FREE TRADE AGREEMENT 49 (Carswell ed., 1988). *See also* JOHN D. RICHARD ET AL., THE CANADA-U.S. FREE TRADE AGREEMENT 16 (1987). These rights are unilaterally given to Canada. United States cultural industries assume no advantages or obligations via the FTA.

20. FTA, *supra* note 10. "Article 2005.2: Notwithstanding any other provisions of this agreement, a party may take measures of equal commercial effect in response to actions that would have been inconsistent with this agreement but for paragraph 1 [2005.1]." *Id. See* Pamela Young, *Dancing With An Elephant*, MACLEANS's, Sept. 19, 1988, at 37. (Retaliatory measures need not be limited to the cultural sector. Canadians fear this is a convenient way of pitting the Canadian cultural industry against other Canadian industries, thereby undermining the entire purpose of the exemption).

21. *Id.*

22. Simpson, *supra* note 6 (books at 81%; newspapers and periodicals at 91%; movies 90%; records 52%; royalties, licensing, rental fees 90%).

23. *Id.*

24. *Id.*

dian market, the desire of Canadians to protect their "cultural identity," and the built in retaliation provision that enables the United States to take actions of reciprocal commercial effect, the following question naturally arises: Why was the United States' entertainment industry so adamantly opposed to a cultural exemption in the FTA? In part, the considerations were fiscal, but of far greater concern was the precedential value that such an exemption would set for the international trading community.[25] Americans feared that other countries, whose markets were not as saturated as Canada's, would demand similar derogations, the financial effect of which could be devastating.

While the FTA is four years old and stands on its own record, the arguments made regarding the cultural exemption are far from moot. The perceived need to regulate the amount of foreign culture imported into Canada is based upon the conviction that Canada's very survival as a distinct nation state is jeopardized by the overwhelming dominance of American culture.[26] To fully understand the presence of the Exemption, we must explore Canada's rationale for withdrawing cultural products from free trade negotiations. The success or failure of the Canadian arguments is essential in determining if the Canadian exemption is a viable precedent for other nations who also seek cultural exemptions.

D. *Canadian Arguments*

The Canadian arguments begin with the assumption that culture and economics are inextricably intertwined, so changes in one will necessarily effect changes in the other. As the Canadian and United States' economies become increasingly intertwined, it will be even more important to protect Canadian culture, the remaining vestige of national identity. Secondly, the Canadians suggest that each country has sectors it wishes to protect and justifies a cultural derogation on the same basis as the U.S. justifies national security exemptions. Finally, Canada makes its most compelling argument suggesting that the common language, geographic proximity, and the parallel history it shares with the United States has created unique circumstances that necessitate a cultural exemption.

1. Economics and Culture are Inextricably Intertwined, so Changes in One will Necessarily Effect Changes in the Other[27]

It is illogical, inefficient, and impossible for a relatively small trading nation in an increasingly interdependent global economy to limit consumption to their own products.[28] Assuming trade liberalization is a ne-

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25. The FTA was envisioned as the model for all bilateral and multilateral negotiations designed to set the tone for NAFTA, Enterprise for the Americas, and most importantly, the ongoing Uruguay Round of GATT.

26. David Elton, *Competing Perspectives on Trade*, *in* CANADA-U.S.- FREE TRADE AGREEMENT 94 (Earl H. Fry et al. eds., 1986) [hereinafter CANADA-U.S. TRADE AGREEMENT].

27. *See generally* Johnson, *supra* note 16.

28. Alan M.Rugman, *Multinationals and the Free Trade Agreement*, in TRADE-OFFS

cessity for economic viability in the world order, the question becomes whether "we can separate the trade and economic aspects [of our lives] from the social, cultural, and political dimensions which are the touchstones of our sovereignty."[29]

When the FTA was negotiated, Japan, Europe, and the United States were the three international centers of economic power.[30] Economic sense compelled Canada to affiliate with a trading power rather than get caught in the cross-fire of a triad trade war.[31] The United States was the only logical choice for Canada, considering the geographic proximity, language similarity, and long history of trade between the two nations.[32] Unfortunately, a closer trading relationship is inversely proportional to sovereign autonomy.[33] A broadened U.S. trading regime would undermine Canada's economic independence, and, correspondingly, its political sovereignty.[34] Reduction of political sovereignty will place a premium on the preservation of culture, a nation's last link to a unique identity.[35]

Pierre Juneau, president of Canadian Broadcasting Corporation (CBC), stated, "Much of what Canadians and most other nations consider as culture, as essential to our sovereignty and therefore requiring attention and support by governments, the United States leaves to a large extent in the hands of private enterprise."[36]

"Canada is pre-eminently a political nation; the bonds of our nationhood are primarily in the sphere of government and in activities decisively shaped by government."[37] Accordingly, it is no surprise that the "Canadians have built up one of the Western world's most costly subsidy systems, providing rich grants for everything from automobile manufacturing to oil exploration."[38] Compared to Americans, Canadians accept a stronger role of government in their daily lives and have come to expect it in terms of services, financial assistance, medical care, and a host of other

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ON FREE TRADE, *supra* note 4, at 4, 10.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*; *see also* ROBERT YOUNG, THE CANADA U.S. AGREEMENT & ITS INTERNATIONAL CONTEXT 20-28 (1986).

33. Brenda Dalglish, *Partners in Power*, MACLEAN'S, Dec. 14, 1992, at 28.

34. *Id.*

35. *Id.*

36. *Presentation to Center for International Affairs at Harvard*, April 1986, *quoted in* TORONTO GLOBE & MAIL, June 22, 1986, at 5.

37. Donald Smiley, *Impact on Canadian Policy Autonomy*, *in* TRADE-OFFS ON FREE TRADE, *supra* note 4, at 444.

38. John F.Burns, *Why Canada Walked Out of Trade Talks*, N.Y. TIMES, Sept. 27, 1987, § 4 at 2. *See also Trade Stakes are Getting Higher*, THE GAZETTE (Montreal), July 25, 1992, at B4 [hereinafter *Trade Stakes*] ("Books, magazines, film broadcasts and other cultural products are building blocks of a national identity. They are in many ways just as vital to sovereignty as are weapons and other items vital to national security, and trade deals routinely exempt goods related to national security.").

areas.[39] In light of the pervasive nature of American culture in every aspect of Canadian society, it is generally accepted that state intervention is necessary "to create and support a countervailing cultural force to the unrelenting flow of Americana across the border."[40]

2. Sensitive Sectors, Such as National Security in the United States and Culture in Canada, Require Protection

As an underlying rationale to remove cultural industries from the negotiating table, the Canadians asserted that trade negotiations should take place in the context of broader values that each country cherishes: national security in the United States and cultural sovereignty in Canada.[41] Interestingly, the objective of all trade liberalization agreements is not free trade but "freer" trade. Trade officials generally recognize that some restrictions on trade always remain in effect, even if those goods and services are produced at a comparative disadvantage.[42] "[S]elected exclusions are part of virtually all free trade agreements. The size of the exclusions typically reflect the differential in living standards or a recognition of extreme import sensitivity of certain sectors."[43] Accordingly, Canadian culture must be afforded the same preferential status that the telecommunications, marine transportation, and energy industries enjoy in the United States.[44]

3. Language, Proximity and Heritage

Canada's most persuasive argument happens to be its most basic: The endangered status of Canadian culture emerges from the unique circumstances presented by a shared language, geographic proximity, and common heritage with the United States.

a. Language Factor

Ironically, as Canada attempts to preserve its culture from the unrelenting flow of Americana, it is faced with an internal cultural revolu-

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39. *See generally* Rick Salutin, *Culture and the Deal: Another Broken Promise*, in TRADE-OFFS ON FREE TRADE, *supra* note 4, at 365.

40. Watson, *supra* note 7. The Canadian subsidy system contains tax breaks for publishers, movie investment incentives, content regulations, preferential postal rates for magazines, as well as tariffs on imported records and other cultural products. *Id.*

41. *Id.* The cultural industries are the "building blocks of national identity [and] are in many ways just as vital to sovereignty as are weapons . . . to national security." *Trade Stakes*, *supra* note 38, at B4.

42. FTA, *supra* note 10, at 359. (FTA essentially exempts the following industries based on their "sensitive" nature in light of national interest: financial services, government procurement, transportation, and energy).

43. Stewart & Stewart, *Consideration of a North American Free Trade Agreement: Need for Each Government to Examine Possible Exclusions* 2 (Position Paper Prepared for Libby Glass).

44. Jonathan Ferguson, *Culture Not Part of Talks, Wilson Says*, TORONTO STAR, June 14, 1991, at A3.

tion.[45] For years French speaking Canadians, primarily domiciled in Quebec, have resisted the assimilation policy propagated by the national government.[46] In recent years, Quebequois have seriously entertained the notion of seceding from the rest of Canada and thereby gaining their independent sovereignty.[47] Generally, American culture has affected Quebec less than the rest of Canada.[48] Given that Quebec shares one of the most populous borders with the United States and all aspects of its existence have mirrored the rest of Canada, Quebec's relative disinterest in American cultural products supports the inescapable conclusion that language has been an effective barrier to cultural assimilation.[49]

b. Geographic Proximity

Canada is almost twice the area of the United States, with only one-tenth its population.[50] Most Canadians live within 100 miles of the U.S. border and have free access to American television and broadcasting stations.[51] Such proximity gives the majority of Canadians the same access to American cultural products as if they resided in U.S. territory.

c. Common Heritage

During the long trade history between the United States and Canada, their economies have become interdependent.[52] "All analysts have agreed that bilateral free trade entails larger adjustments in the smaller economy."[53] Complete integration between the two economies necessarily had its effect upon Canadian cultural industries.[54] Canada remains the foremost exporter of television to the United States, exceeding all other foreign programming combined, yet it accounts for only one percent of the profits realized in the U.S. market.[55] On the other hand, despite three

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45. *See generally* Charles Falzon, *Film, TV Central to Sense of Nationhood*, TORONTO STAR, June 17, 1991, at A21.

46. *Id.*

47. Mark Clayton, *Trying to Save the Soul of Canada*, The CHRISTIAN SCI. MONITOR, Sept. 21, 1992, at 14.

48. *Id.*

49. Ian Austen, *Hispanic Culture: Will it Make its Presence Felt in Canada?*, THE OTTAWA CITIZEN, Aug 15, 1992, at B1 ("[C]ulture . . . is overwhelmingly determined by language. Look at Quebec." (quoting historian Jack Granatstein)).

50. CALIFORNIA WORLD TRADE COMMISSION, CALIFORNIA, CANADA AND FREE TRADE: A GUIDEBOOK FOR CALIFORNIA BUSINESS, § 3.4, at 19.

51. *Id.*

52. YOUNG, *supra* note 32, at 24.

53. *Id.*

54. Robert Lantos, *Hollywood and Canada: Balancing the Scales*, Notes for Remarks at Luncheon Meeting of The California-Canada Chamber of Commerce, Sept. 22, 1992 at 8 (transcript available from Alliance Communications Corporation). In the words of Prime Minister Trudeau, "Living next to you is in some ways like sleeping next to an elephant. No matter how friendly and even tempered the beast, one is affected by every twitch and grunt. Even a friendly nuzzling can sometimes lead to frightening consequences." *Id.*

55. Fraser, *supra* note 1, at 12.

years of cultural protection, the United States maintains an eighty-percent share of Canadian cultural domination.[56] With advances in telecommunications technology, the spread of Americana will permeate even the farthest reaches of Canada.[57] Consequently, a cultural exemption is necessary to prevent the otherwise inevitable absorption of Canadian culture into that of its southern neighbor.

E. *United States Responses*

Americans have long viewed culturally restrictive policies as contradictory to the philosophy of free trade, freedom of communication, and the unencumbered flow of ideas.[58] While Canadians argue that these policies tend to be either defensive or constructive in character rather than externally aggressive, Americans have long held the view that such policies are no more than blatant protectionism.[59] Canadians claim such policies reflect their desire to preserve and foster their cultural heritage. While a meritorious goal by international standards, the negative economic consequences are unacceptable to the United States.

Ultimately, the statistics are the most prolific defense to the Canadian insistence of retaining the cultural industries exemption.[60] Since the FTA, Canada has instituted a wide variety of cultural preservation programs,[61] none of which were considered economically harmful to Ameri-

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56. *Id.* (As of 1992, after three and a half years of FTA, U.S. cultural products maintain an ominous presence in the Canadian market. The following are percentages of foreign ownership in Canadian cultural industries, the majority of which is U.S. ownership: 97% of films, 96% of television drama, 90% records and tapes, 76% of published books purchased in Canada, 75% of magazines purchased in Canada. The total is 80% American ownership).

57. *Id.*

58. Denis Stairs, *Canada's Trade Relations with the United States: The Non-Economic Implications of an Economic Issue, in* CANADA-U.S. FREE TRADE AGREEMENT, *supra* note 26, at 51 (Examples: (1) Deductibility of Foreign Advertising Expenses, (2) Simulcasting: removal of U.S. advertising commercials and replacement with Canadian ones, (3) Telecommunications Programming Services Act: imposes six percent tax on revenue of Canadian cable corporations that is used to subsidize Canadian programming).

59. *Id.* (One example was the Canadian decision to remove tax benefits for business advertising in Time Magazine, a measure designed to prevent further new penetrations by American interests and to give artificial support to indigenous alternatives).

60. *Ottawa Must Look Beyond the Bottom Line to Protect Culture*, THE GAZETTE (Montreal), Aug. 4, 1991, at B3.

61. *See* Jamie Portman, *Book Publishing Industry: Government Boosts Industry Aid By 260%*, THE OTTAWA CITIZEN, Jan. 29, 1992, at D12 (In April 1992, a new policy was instituted that was designed to replace the Baie Comeau policy, which infuses $104 million into Canadian book publishing and distribution industries over five years, representing an increase of 260% capital infusion over existing levels); *Federal and Provincial Governments Come to Aid of Alberta's Cultural Industries*, CANADIAN NEWSWIRE, Apr. 22, 1992 (On April 22, 1992, $7 million was committed to a joint project between the federal government and Alberta to assist the province's film and video, sound recording, and book and periodical publishing industries. "The Agreement is designed to strengthen long-term economic viability of Alberta companies active in the cultural industries, expand domestic and international marketing and distribution opportunities for Alberta's cultural products . . . ."). *See also* Tu Thanh Ha, *Culture Policy Calls For $57 Million Investment in the Arts*, THE

can cultural industries.[62] Possibly the threat of retaliation under § 2005.2 dissuaded the Mulroney government from pursuing new cultural initiatives that might have adversely affected American cultural industries.[63] Alternatively, the absence of a United States complaint may simply be attributed to the fact that their fears never came to fruition.

F. *Summary*

The United States believes that culture is a tradeable commodity, while Canada maintains that it is inextricably intertwined with the survival of their sovereignty as a nation.[64] In the words of one Canadian author, "culture is a candy mint and a breath mint. It's simultaneously a consumable product and a cherished articulation of a nation's soul . . . If it wasn't both a commodity and something more permanent then the relationship between trade and culture would be nonexistent or irrelevant."[65] In light of the statistics, and the large number of Canadian cultural industries owned by American interests, many consider the Canadian cultural derogation a Pyrrhic victory.[66] Notwithstanding the exemption, figures at end of 1991 indicate the same statistical facts as in 1988 with the United States owning ninety-three percent of Canada's movie and video revenues, ninety-two percent of book publishing, and receiving $350 million (U.S) from television and program sales.[67]

Despite the rhetoric of then United States Trade Representative Carla Hills that "there are no sacrifices, there are no tradeoffs,"[68] in reference to Amercian cultural industries, clearly they were bargained away.[69] Whether the tradeoff was for a minimum content on car parts or subsidies on agriculture, we may never know. Despite the reasons for its existence, the derogation provides a precedent for exempting cultural indus-

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GAZETTE (Montreal), June 20, 1992, at A5.

62. NAFTA Hearing Before the House Ways and Means Committee, Sept. 9, 1992 (Statement of USTR Carla Hills in response to question by Rep. Anthony (D-AR)).

63. Jamie Portman, *U.S. Changing Tune on Protectionism; Beleaguered Canadian Culture May Benefit From U.S. Move*, THE OTTAWA CITIZEN, Oct. 27, 1991, at C2.

64. Robert Bragg, *American Culture Strictly Business*, CALGARY HERALD, July 24, 1991, at A4.

65. *Id.*

66. *Id.*

67. Jonathan Ferguson, *Culture, Jobs Give PM Trade-Talk Willies*, THE TORONTO STAR, July 28, 1991, at B4. *See also* Jeff Silverstein, *Canada Wants to Guard Culture in North American Pact*, THE CHRISTIAN SCI. MONITOR, Nov. 13, 1991, at 8.

68. *Intellectual Property and International Issues: Hearings before the Subcommittee on Intellectual Property and Judicial Administration of the Committee on Judiciary House of Representatives*, 102d Cong., 1st Sess. 49 (1991). (Response of United States Trade Rep., Carla Hills, to question by Rep. Craig James (R-Fla.)).

69. Karen Tumulty & Joe Havemann, *An Uncommon Market for U.S. Entertainment*, L.A. TIMES, Dec. 5, 1990, at F2 ("One source recalls that when the United States struck a free trade agreement with Canada a few years ago, Secretary of State James A. Baker III telephoned [Jack] Valenti at home at midnight and said: 'I'm sorry Jack. We had to throw you overboard.' ").

tries that can be, and is, invoked in multilateral trade negotiations. Pursuant to the derogation adopted in the FTA, the real issue now becomes whether other nations can rightfully protect their cultural industries within the auspices of free trade.

III. NORTH AMERICAN FREE TRADE AGREEMENT

The North American Free Trade Agreement (NAFTA) links the economies of Canada, Mexico, and the United States.[70] The United States entered the NAFTA negotiations determined not to grant Canadians the cultural exemption they received under the FTA.[71] It became increasingly clear, however, that the exemption was an indispensable condition for Canadian participation in NAFTA. Despite the United States' verbal opposition, Canada received a cultural exemption in NAFTA that mirrored the one negotiated in the FTA.[72]

Although trade in culture was a contention between the United States and Canada, Mexico announced that culture would not be an issue to it and that "[t]he rights and obligations between Canada and Mexico regarding cultural industries will be identical to those applying between Canada and the United States."[73]

While Hispanic culture is prominent in the United States, as evidenced by a multitude of Spanish radio, television, and cable networks and a large indigenous population of Mexican ancestry, in Canada it is not.[74] Not only are Canadian and Mexican cultures vastly different, but geographic distance and language differences serve as effective barriers to significant integration.[75]

In light of Mexico's relatively underdeveloped cultural sector, why was it necessary for Canada to maintain the exemption as to Mexico?[76] One explanation was that out of requisite fairness in multilateral negotiations, derogations in favor of one country should apply to the other coun-

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70. The NAFTA took effect on January 1, 1994.

71. *But see* Peter Morton, *Mexico and U.S. Clash Over Energy Contracts: Trade Deal Hits Last-Minute Snag*, THE FIN. POST, Aug. 7, 1992, at 1 ("If one side held firm and the other side wanted the deal, it was clear which way it had to go; Bush wanted the deal" (quoting U.S. Trade Consultant Bill Merkin)).

72. NORTH AMERICAN FREE TRADE AGREEMENT: AN OVERVIEW & DESCRIPTION 19 (Office of the U.S. Trade Representative ed., 1992).

73. NAFTA PARTNERSHIP, *supra* note 11, at 2 (In the cultural sector, Canada and Mexico signed a Film and Television Co-Production Agreement in April 1991 in efforts to "broaden financing and production opportunities for the film and television industries of both countries.").

74. Austen, *supra* note 49.

75. *Id.*

76. Emil Zubryn, *Mexican Film Industry Braces for Poor Year*, HOLLYWOOD REP., Aug. 25, 1992, at 16 (Association of Mexican Film Producers and Exhibitors estimated no more than 50 feature films will be produced this year. This might be overly optimistic since the National Film Industry Chamber (Canacine) decided to no longer support the official Development Fund for Quality Films.).

tries in the same manner. This argument, however, is irreconcilable with both the United States' and Canadian justifications for the exemption in the FTA: namely that the exemption was needed to protect ailing Canadian industries from relentless United States imperialism; a creature fed by their joint history, common language, and geographic proximity.

Another possible explanation is that Canadian cultural industries are so saturated by foreign interests that any subsequent foreign ownership, no matter by whom or how minimal, would be devastating.[77] Notwithstanding these possible rationales, by allowing Mexico to accept such a derogation, the Americans have undermined their own case by implicitly endorsing the protection of culture within the auspices of free trade agreements.[78] Accordingly, the United States should not be startled that other nations, particularly the European Community member states, are now lobbying for the incorporation of a cultural industries exemption within the auspices of GATT.

IV. EUROPEAN COMMUNITY

"No other market is as important for American exporters or our investors as is the market of the European Community."[79] With film and television sales generating more than a $4.5 billion trade surplus, during a time in which the United States' trade deficit continues to grow, clearly "the prosperity of the American economy is increasingly tied to Hollywood's well being."[80] As domestic demand for television stagnated,[81] American industries began looking to overseas markets as fertile depositories for their cultural products.[82] Having saturated Canadian markets,

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77. Heather Hartt, *Lantos Blasts Valenti over NAFTA*, HOLLYWOOD REP., Sept. 23, 1992, at 3, 16. "The Cultural exemption is not directed against the U.S. any more than it is directed against Ireland or Spain or Australia, [i]t's directed toward Canada." *Id.*

78. *See* M. Jean Anderson et al., *Intellectual Property Protection in the Americas: The Barriers Are Being Removed*, 4 Prentice Hall Law and Business J. Proprietary Rts. 2, 7 (1992). NAFTA is the first step in the goal of an enlarged FTA that encompasses all of the Americas and has an accessions clause that will enable other countries in Latin America to join. *ABA Meeting Looks at NAFTA and Intellectual Property Rights*, INT'L TRADE REP. (BNA), Apr. 22, 1992 (Much of the phrasing of the intellectual property part of NAFTA is modeled after the Dunkel Text, further indicating the influential value NAFTA will have to GATT negotiations.).

79. *U.S. Welcomes Changes in Europe, But Fears of Trade Barriers Linger*, AVIATION WK. & SPACE TECH., 127 (June 12, 1989).

80. Stokes, *supra* note 2.

81. *Id.*

> Movie theater admissions are no higher now than they were in the 1960s. The number of commercial TV stations, the single largest consumer of the industry's product, is barely growing. And the average number of hours of broadcast TV usage per household has plateaued, undermining advertising revenues that determine what stations will pay for programs.

Id.

82. *Id.* ("By the year 2000, half of the revenues from American movies and records will be earned in foreign countries."). *See also* Carl Bernstein, *The Leisure Empire*, TIME, Dec. 24, 1990, at 56.

American attention focused on the European continent. With steadily rising per capita incomes, a combined population greater than that of the United States, and a newly deregulated television industry, European markets have become the newest venue for American cultural products.[83]

Since its inception in 1958, the European Community has joined with the United States in pursuing freer trade and open markets. Despite their common goals, both sides throughout their trading history have employed a variety of protectionist measures resulting in bilateral conflicts.[84] In 1992, the E.C. was added to the United States priority watch list that identifies countries that maintain the most pervasive and egregious anti-American trading barriers.[85] Not surprisingly, in a manner of diplomatic *quid pro quo*, American measures deemed protectionist by the European Community were the subject of an annual report entitled "Problems with Doing Business with the United States."[86]

While the United States runs a trade deficit with Europe in a number of economic sectors, the sale of U.S. videos, movies, music, and television programs account for a trade surplus of more than $8 billion (U.S.).[87] Overseas revenues of Hollywood studios have doubled in the past five years. If this trend continues, overseas sales may soon exceed domestic revenues.[88] Coupled with this growth trend is the incontrovertible fact that American programming dominates European markets, while European Community programming has but a *de minimis* appeal outside national boundaries.[89]

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83. *Id.*

84. *Trade Relations E.C.- U.S.A and E.C.- Canada*, COOPERS & LYBRAND E.C. COMMENTARIES, Oct. 8, 1992 at § 2.2.

85. Among the barriers identified as egregious was the Broadcast Directive promulgated in 1989. *Id.*

86. *Id.*

87. Noreen Janus, *Hollywood Meets the NAFTA*, AM. CHAMBER OF COM. OF MEX. BUS. MEX., May 1992. *See also* Steven Greenhouse, *Europe Reaches TV Compromise; U.S. Officials Fear Protectionism*, N.Y. TIMES, Oct. 4, 1989, at A1 (some estimates suggest 70% of entertainment shows are of American origin); Clyde H. Farnsworth, *U.S. Fights Europe TV-Show Quota*, N.Y. TIMES, June 9, 1989, at D1 (television producers collected $630 million in programming revenues in European Community representing two-thirds of the foreign sales); Jonathan Weber, *Turning the Volume Down; Hollywood Nervous Over Possible European TV Quotas*, L.A. TIMES, July 26, 1989, at B1 (sales of movie and television programs are worth more than $800 million annually); Jacqueline Frank, *European Television Without Borders or Without Americans?*, THE REUTERS LIBRARY REPORT, July 26, 1989. (1989 U.S. film and television industry contributed $2.5 billion trade surplus, with television sales alone over $600 million).

88. *Briefs: Overseas Fortunes*, HOLLYWOOD REP., Feb. 18, 1992, at 6. Presently, external sales account for 42% of Hollywood studio revenues with continued growth projected. Movie revenues from foreign theaters will grow to $4.95 billion by the year 2000, up from $2.27 billion in 1991. Hollywood's rentals amounted to 15% of movie revenues and will likely grow to 19% by 2000. Janus, *supra* note 87. TV programming, to Europe, accounts for $600 million annually. Growth in these sectors has been attributed to a number of factors including great advances in technology and the recent deregulation of many European broadcasting systems. *Id.*

89. *The Audiovisual Industry*, PANORAMA OF E.C. INDUSTRY 26-8.

A. *Television Without Frontiers Directive*

On October 3, 1989 the European Community, by a vote of ten to two, adopted a broadcasting directive, known as Television Without Frontiers ("Directive"), aimed at regulating trans-European television broadcasting.[90] The goal of the Directive is to encourage development of the European television industry, a step considered essential in achieving continental unification.[91] While the Directive covers a broad array of cultural policies,[92] the most controversial section creates a regime in which 50.1% of member state television programming, excluding news, sports, game shows, and advertising, must be of European origin.[93] This objective may be achieved by, among other things, the use of quotas[94] and subsidies.[95] The goal of the Directive is preservation of a "European cultural identity" that, the E.C. contends, is being eroded excessively by American programming.[96] Although the United States immediately denounced the Directive as a violation of free trade principles and warned the European Community of possible trade repercussions, the Directive remains in force and is the foundation of European cultural policy.[97] The rationale under-

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> Nearly 72% of programs purchased by Community Members come from the United States whilst only two percent of the audiovisual product broadcast across the Atlantic are Community origin . . . Not only is there a lack of community program exports but also 90% of these programs never cross the frontiers of their country origin.

Id.

90. Timothy M. Lupinacci, Note, *The Pursuit of Television Broadcasting Activities in the European Community: Cultural Preservation or Economic Protectionism?*, 24 VAND. J. TRANSNAT'L L. 113, 115 (1991).

91. *Audiovisual Communications*, COOPERS & LYBRAND, E.C. COMMENTARIES, March 25, 1993, § 3.1, *available in* LEXIS, World Library, ALLWLD file [hereinafter *Audiovisual Communications*].

92. *Id.*

93. *Council Directive of 3 Oct. 1989 on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Pursuit of Television Broadcasting Activities*, 32 O.J. EUR. COMM. 23 (1989). Article IV:

> Member states shall ensure where practicable and by appropriate means, that broadcasters reserve for European works, within the meaning of Article VI(a), a majority proportion of their transmission time, excluding the time appointed to news, sports events, games, advertising and teletext services. This proportion, having regard to the broadcaster's informational, educational, cultural, and entertainment responsibilities to its viewing public, should be achieved progressively, on the basis of suitable criteria.

Id. 28 AM. SOC'Y OF INT'L L., Nov. 1989.

94. *See* Weber, *supra* note 87. Quotas have the effect of depressing prices by dividing the market into local and foreign segments. Accordingly, European shows will increase in value being able to satisfy the local content requirement while the price of U.S. programs will drop with an ensuing glut in the market. *Id.*

95. Lupinacci, *supra* note 90, at 116.

96. *Id.* at 120.

97. *See generally* Paul Presburger et al., *Television Without Frontiers: Opportunity and Debate Created by the New European Community Directive*, 13 HASTINGS INT'L & COMP. L. REV. 495 (Spring 1990); Brian L. Ross, *"I Love Lucy," But the European Commu-*

lying the Directive has been the basis for a series of related directives aimed at preservation of European culture.[98]

The European Community cites three broad justifications for its position: (a) the Directive is a political rather than a legal commitment that contains no enforcement provision and leaves implementation to individual member states,[99] (b) since United States sales account for only twenty-eight percent of the rapidly growing E.C. television market, American industries will have ample opportunity to grow,[100] and (c) culture is not like all other tradeable commodities. While culture has quantifiable monetary value, it simultaneously represents the essence of national sovereignty and thereby must be treated differently than common tradeable goods.

1. The Directive is Merely a Political Commitment

Supporters of the Directive argue that it is a political rather than a

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nity Dŏesn't: Apparent Protectionism in the European Community's Broadcast Market, 16 BROOK. J. INT'L L. 529 (1990). For a broader discussion of European Broadcast Directive see Suzanne M. Schwarz, *Television Without Frontiers?*, 16 N.C. J. INT'L L. & COMM. REG. 351 (Fall 1991).

98. *Transatlantic Television Can You Spare a Reel?*, THE ECONOMIST, Aug. 19, 1989, at 56; Adam Dawtrey, *EC Crackdown on Subsidies Dropped*, THE HOLLYWOOD REP., Oct. 16, 1990 [hereinafter Dawtrey]. In recognition of Europe's rapidly developing broadcast sector and the need to remove the physical, technical, and fiscal barriers that exist between states, the Commission has adopted a broad base media policy consistent with the mandates promulgated by the Treaty of Rome. While the effect of the Broadcast Directive has not been immediately devastating, U.S. cultural industries live in fear that the European Community will continue to impose an array of protectionist measures that will greatly disadvantage them. Robert Marich, *AFMA Blasts EC 'Rental Rights'*, THE HOLLYWOOD REP., July 2, 1992, at 3, 24 [hereinafter Marich]. The "rental rights" directive received approval on October 28, 1992 with implementation to begin in July of 1994. In addition to establishing regulations to combat piracy, the directive "seeks to establish across the countries of the EC an agreed definition of the potential artistic beneficiaries of the video-rental exploitation of films made within the EC, and at the same time to establish a rule of equitable renumeration for all involved." *Audiovisual Sector a Major Political Issue in GATT Talks*, INFORMATION SERV. TECH. EUR., No.0076, Nov. 5, 1992. The home video tape directive calls for member states to collect a levy on "rental or lease transactions for videocassette, CDs and other software, the proceeds of which will go to European cultural projects." Susan W. Liebeler et al., *EC 1992 and its Potential Effects on the United States Entertainment Industry*, ENT. L. REP., June 1989, at Legal Affairs Vol. 11 No. 1. In at least three EC member states a tax is levied on the sale of empty video cassettes, the proceeds of which are used primarily to compensate European copyright holders as well as promote or subsidize local cultural industries; Karen Tumulty et al., *An Uncommon Market for U.S. Entertainment*, L.A. TIMES, Dec. 5, 1990, at F2; Susan W. Liebeler et al. *EC 1992 and its Potential Effects on the United States Entertainment Industry*, ENT. L. REP., June 1989 at Legal Affairs Vol. 11 No. 1. In the spirit of EC media policy, a number of states have imposed screen quotas thereby limiting the number of foreign films shown in domestic theaters. Furthermore, many countries require a dubbing license be bought before showing a dubbed film or alternately require dubbing to be performed domestically. For a full discussion of the entire EC Media Policy see generally *Audiovisual Communications*, *supra* note 91.

99. Lupinacci, *supra* note 90, at 123.

100. *Id.* at 124.

legal obligation, implicitly suggesting that the European Court of Justice would not take action if faced with a member state in violation of the Directive's mandates.[101] In support of this view, many have suggested that without the Directive the United States would face an array of different quotas resulting in a regime far more restrictive, more difficult to administer, and far less predictable.[102]

2. United States' Sales are Minimal in a Growing European Market

A combination of events, including the staggering rate of technological advances and the recent deregulation of broadcasting stations across Western Europe, "has created a number of new generation broadcasters hungry for ratings and starved for commercial television."[103] The United States' television and film industries, being the most lucrative U.S. export behind aerospace, sold programming worth $844 million to the E.C. in 1988 with profits expected to triple by the end of 1992.[104] Despite these figures, European statistics show American programming sales to be far below the fifty percent limit.[105] With the European audio-visual market growing by nearly eleven percent each year, the European Community suggests that Amercian sales will not stagnate or decline but rather

101. Steven Greenhouse, *Europe Reaches TV Compromise U.S. Officials Fear Protectionism*, N.Y. TIMES, Oct. 4, 1989, at A1.

102. Tyler Marshall, *European Community Sets Quota For Television Imports*, L.A. TIMES, Oct. 4, 1989, at C1.

103. *See* Weber, *supra* note 87 (advances in telecommunications have enabled American TV to reap profits through sales to European network, cable and satellite services). Fred Hift, *TV Trade War Heats Up*, THE CHRISTIAN SCI. MONITOR, Nov. 2, 1989, at 10 (the American business has created a new group of European entrepreneur who are dependent on popular U.S. programming to maintain their ratings). *See The Audiovisual Industry*, PANORAMA OF E.C. INDUSTRY 28-1 ("the EC audiovisual industry has experienced significant growth. Television which only ten years ago was almost exclusively controlled by the public sector, is now largely privatized."); Bethany Haye et al., *Eureka Has Golden Message for U.S.: No Euro TV Quotas*, HOLLYWOOD REP., Oct. 3, 1989 (In past two years Europe has consumed 15 years worth of American production. With all the new channels projected to be opened, not even the Americans could fill the void.).

104. Lupinacci, *supra* note 90, at 126.

105. Marshall, *supra* note 102. David Kelly, *Fritts Says Valenti is Ringing EC Alarm Too Soon*, HOLLYWOOD REP., June 29, 1992, at 4, 16. The U.S. industries are not close to the 50% quota. Penetration is at 25%, suggested the National Association of Broadcasters President Edward Fritts, therefore the quotas are not nearly as detrimental as MPAA suggests.

increase.[106]

Generally, local programming remains the best selling commodity within an E.C. member state, but as among foreign programming, the United States' programming is the product of choice.[107] For example, in Germany domestic programs will typically be preferred to American programs, but given the choice between American programs and programs produced in other member states, German viewers will choose the programs from the United States.[108] The fact remains that while American exports account for the vast majority of foreign films in Europe, only fifteen percent of European films are seen outside their national boundaries.[109] United States producers "have gained because of superior distribution across the E.C. region, better marketing, and because they have been able to win marginal sales in the European Community at low prices that can be [subsidized] by sound profits already earned" in the domestic U.S. market.[110] Despite American fears and the proliferation of a variety of new cultural directives,[111] U.S. television industries remain a dominant force in European sales.[112] As one commentator put it, "The Hollywood lead is so enormous — in TV and movies — that the Europeans will have

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How the Definition of European Can Vary, FIN. TIMES, Sept. 20, 1989.

European content of TV in Member States

Belgium	71%
Denmark	77
France	67
Greece	78
Ireland	61
Italy	54
Luxemburg	48
Netherlands	70
Portugal	66
Spain	65
UK	69
West Germany	83
Average Total	68%

106. Clyde H. Farnsworth, *U.S. Fights Europe TV-Show Quota*, N.Y. TIMES, June 9, 1989, at D1 (Television is expected to grow to 400,000 hours in 1990s from 250,000 hours in 1987. The U.S. sells 70,000 hours of TV time to Europe (1990) and hopes to have it increase threefold by 1995 representing 4 billion in sales.); *GATT to Examine Broadcasting*, THE FIN. TIMES, June 28, 1990 (The number of channels expected to double by year 2000); Marshall, *supra* note 102 (By 1995 an estimated 120 major channels will be looking to fill more than 200,000 additional TV hours by 2000). *See also* ECONOMIST Aug. 19, 1989; David Dodwell, *U.S. Filmmakers Focus on Uruguay Round: The Audio-Visual Trade Tussle Has Come to a Head in Geneva*, FIN. TIMES, Jan. 7, 1993, at 4.

107. John Marcom Jr., *Empty Threat?*, FORBES, Nov. 13, 1989, at 43.

108. James Ulmer, *Euro, U.S. Lawmakers Trade Views in L.A. on TV Quotas*, HOLLYWOOD REP., Sept. 25, 1989.

109. Joel Kotkin, *How the West Was Lost? Why the Sun Won't Set On the Empire Built By the Anglo-Americans*, THE WASH. POST, July 5, 1992.

110. Dodwell, *supra* note 106.

111. *See* Dawtrey, *supra* note 98.

112. *Id; see also* Dodwell, *supra* note 106.

to run faster just to keep up."[113]

3. Culture is Different from Other Tradeable Commodities and its Unique Nature Requires it to be Protected

The Directive represents merely one of many recent efforts claiming to be the vanguard of a collective European culture.[114] While such cultural directives[115] go beyond the powers conferred by the Treaty of Rome,[116] which established a purely economic alliance, they fall directly within the purview of the Maastricht Treaty, which elevates culture to a level of importance equal to that of other major community policies.[117] The European Commission's main objective was to preserve the history of the European people by supporting their cultural endeavors at home and creating avenues for its dissemination throughout the world.[118] Critics suggest that the concept of "a common European heritage" is dubious coming from a continent that has been ravaged by two World Wars and has seen the likes of Napoleon, Mussolini, and Hitler.[119] But recent evidence suggests that European youth are increasingly finding commonalities not merely in fashion, music, and food but in attitudes, values, and lifestyles.[120] Commonalities among European youth are increasingly anti-American and distinctly European.[121]

The preservation of cultural values and national identity as a component of sovereignty is a well established goal of international agreements. For example, Article 19 of the Universal Declaration of Human Rights promulgated by the General Assembly of the United Nations in 1948 recognizes free expression as a fundamental human right.[122] Similarly Article 1(1) of the International Covenant on Civil and Political Rights affirms the right of all peoples to "freely determine their political status and

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113. *Id.*

114. Adam Dawtrey, *EC Crackdown on Subsidies Dropped,* HOLLYWOOD REP., Oct. 16, 1990 (at least 6 of the 12 members are urging the Commission to take an official stance on protecting European culture).

115. *See* Marich, supra note 98.

116. Dawtrey, *supra* note 114.

117. *Culture: Single Market Should Favor Cultural Exchanges,* EUR. SOC. POL'Y, May 14, 1992. *See also EC Scriptwriters, Directors, and Producers of Cinematographic Works Call for Enquiry into U.S. Trade Practices,* REUTER TEXTLINE AGENCY EUROPE, Nov. 18, 1992, *available in* LEXIS, World Library, ALLWLD file.

118. *Id.*

119. *U.S. 'Outraged' By EC Move To Restrict Foreign TV Programs, Will File GATT Case, Hills Says,* 6 INT'L TRADE REP., BNA, 1292 (Oct. 11, 1989); David Dodwell, *U.S. Film makers focus on Uruguay Round,* FIN. TIMES, Jan. 7, 1993, at 4 (the EC is a market that is fragmented for both cultural and lingual purposes).

120. Jeff Kaye, *The Rave of Europe,* L.A. TIMES, Feb. 3, 1993, at E1.

121. *Id.*

122. UN Declaration HR, Article 19: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

freely pursue their economic, social and cultural development."[123]

Both the European cultural directives and the cultural derogations granted to Canada are based on the right of a sovereign nation to protect its culture and regulate its own internal broadcast industry.[124] Then European Community president Jacques Delors framed the issue as a matter of cultural survival, stating that "[e]ach country should be able to defend its own culture . . . . Culture is not a piece of merchandise like other things . . . we have [a] right to exist, to perpetuate our traditions."[125]

The unique nature of cultural products necessitates their regulation outside the traditional rules of economics that underlie a free trade system. Modern international trade is based on a theory first propounded by David Ricardo in 1817, known as comparative advantage. The theory of comparative advantage "holds that a country or region should specialize in the production and export of those goods and services that it can produce relatively more efficiently than other goods and services, and import those goods and services in which it has a comparative disadvantage."[126]

Cultural products do not fit well within such a scheme. First, price is not always the determinative factor in their purchase, and second, inefficient producers are still motivated to produce despite economic loss.[127] Therefore, treating cultural works as a tradeable commodity would force it to exist under a theory of economic Darwinism, a fate that would lead to the production of cultural works by a few low cost producers. This result is not only incongruous with numerous treaties protecting culture but also threatens national sovereignty by disabling the country's ability to express itself.

Most countries employ a wide variety of subsidy schemes recognizing the need to protect cultural endeavors that are not profit generating nor self sustaining.[128] For example, Native American crafts in the United States may not have survived without significant government subsidization. Similarly, the cultural directives promulgated by the European Community benefit far more than the film and television industries but have substantial impact upon non-profit cultural works.[129]

While official United States policy refuses to accept culture as anything more than a tradeable commodity, the European Community sim-

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123. JOSEPH SWEENY ET AL., THE INTERNATIONAL LEGAL SYSTEM, DOCUMENTARY SUPPLEMENT 67 (1988) (quoting the International Covenant on Civil and Political Rights, Art. 1:1).

124. Fred H. Cate, *The First Amendment and the International "Free Flow" of Information*, 30 VA. J. INT'L L. 372, 382 (1990).

125. Greenhouse, *supra* note 101.

126. RALPH FOLSOM ET AL., INT'L BUS. TRANSACTIONS, DOCUMENT SUPPLEMENT (1991) at 3.

127. Theater arts have long been associated with a nation's cultural endeavors yet remain dwarfed in profitablility compared to revenues from film and television.

128. *See generally Trade Relations E.C.-U.S.A. and E.C.-Canada*, COOPERS & LYBRAND E.C. COMMENTARIES, Oct. 8, 1992, *available in* LEXIS, World Library, ALLWLD file.

129. *Id.*

ply points to the cultural derogation granted to Canada in both the FTA and NAFTA, as well as American domestic restrictions on the ownership of entertainment industries, and argues that the mere existence of such is *de facto* proof that culture deserves protection.[130]

B. *Reactions of the United States*

In direct response to the Broadcast Directive, the U.S. House of Representatives introduced and unanimously passed Resolution 257 that denounced the Directive as a contravention of GATT and merely "another episode of protectionism hiding behind the masque of patriotism."[131] The United States' reaction to the Directive has been the foundation from which it argues against all culturally protectionist measures. The Congressional rejection of the Directive, as compared to their approval of the FTA, suggests that there is a distinction between the cultural exemption granted to Canada and the cultural policies that the E.C. continues to propagate.

The United States consistently defends the derogation granted in favor of Canada as one strongly objected to, but necessary for the benefits of freer trade and supports its position through three severable arguments: (1) the geographic proximity, shared history, and similarity of language has inextricably intertwined Canada and the United States thereby creating a unique relationship deserving of special treatment in certain areas; (2) Canada's situation is unique because its cultural industries are so highly saturated by foreign investment; and (3) the United States has never conceded the validity of a cultural exemption and has explicitly reserved the right to take retaliatory measures against foreign actions harmful to American cultural industries.[132]

1. Proximity, Language, and History

The derogation insisted upon by and granted to Canada was more a matter of comity and understanding than official United States policy. While it is clear that due to geographic, economic, social, political, and linguistic factors, Canada and the United States share a unique co-existence, it does not necessarily follow that a "cultural derogation" is uniquely applicable only between them. Rather, the European Community suggests that with the onslaught of modern technology capable of transferring information at the touch of a button, the United States has been able to expand its markets with ease.[133] Further, with English rap-

130. Roy Denman, *Television Without Frontiers*, WASH. POST, Nov. 24, 1989, at A23.

131. *House Approves Resolution Urging U.S. Action To Protest Television Programming Directive*, 6 INT'L TRADE REP. 1384 (Oct. 25, 1989) (Resolution 257 voted on October 23, 1989 by 342 to 0); Lupinacci, *supra* note 90, at 128 (the U.S. responded by bringing the E.C. into arbitral proceedings as proscribed by GATT article XXII/XXIII under the charge that the Directive violates the Most Favored Nation and National Treatment provisions).

132. *See* text accompanying note 20.

133. *See supra* note 88.

idly becoming the *lingua franca* of the modern world there is no effective difference between the road from Hollywood to Vancouver as compared to the road from Hollywood to Brussels. In time the United States' industries will overwhelm their European counterparts, and Americana will become the adopted culture of the world.

2. Canada's Cultural Industries are Completely Saturated with Foreign Investment, Justifying their Unique Treatment

The Canadian situation is not one of economic dominance but one of mere survival. The official United States position does not expressly acknowledge that the saturation levels of the Canadian cultural industries is a factor in granting the derogation to Canada. But, in light of American dominance in their market, the internationally recognized right to express one's sovereign culture, and the interest in a comprehensive free trade agreement, American saturation of Canada becomes a legitimate point.

In essence, the European Community witnessed what happened to Canada, feels similarly susceptible to the American machinery, and would rather take preemptive measures than find themselves unable to produce a domestic product in the future.[134]

The United States is quick to point out the facial inconsistency of allowing citizens to select parliamentary leaders but not television programs, yet, does not address the issue of when a country can legitimately control domestic broadcast content and when that control turns into protectionism.[135] The European Community argues that a quota and subsidy regime is one of preventative maintenance, justified by the proposition that by the time the E.C. is as saturated with American cultural products as Canada, it is already too late.[136]

3. The United States Never Conceded Validity of a Cultural Derogation

Former U.S. Trade Representative Carla Hills has repeatedly stated that the "cultural derogation [was] taken and I use the word taken because it was not given it was taken and we also took the right to retaliate if it is exercised . . . ."[137] Interestingly, the retaliation provision has never been invoked.[138] Whether this is due to want of cause or that the political

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134. Leyla Ertugrul, *European Parliament Clears "TV Without Frontiers"*, THE REUTER LIBR. REP., May 24, 1989, *available in* LEXIS, World Library, ALLWLD File.

135. *See infra* text accompanying notes 180 and 181. The FCC places limits of all kinds on programming content from language to nudity that are allowed under European standards. What FCC labels as appealing to the prurient interest to Europeans is merely part of their culture. Accordingly, U.S. objections to E.C. content restrictions are hypocritical.

136. Jack Valenti, *Television With Manacles*, THE WASH. POST, Dec. 1, 1989, at A27.

137. News conference with Carla Hills, Former U.S. Trade Rep., on Sept. 18, 1992, at 77.

138. *NAFTA Intellectual Property Provisions In North American Trade Pact Called "Model"*, INT'L BUS. DAILY, Aug. 20, 1992.

ramifications of using retaliation are too costly is not entirely clear.[139] The method through which the United States would retaliate is § 301 of the United States Trade Act of 1974 as amended by the Omnibus Trade Act of 1988.[140]

The amended Act instructs the U.S. Trade Representative to create a "watch list" and a "priority watch list" consisting of those countries promulgating practices that are otherwise burdensome, restrictive or violative of American rights and interests.[141] Use of § 301 is a drastic measure, one not entirely consistent with GATT, and for that reason has been the focus of much international debate.[142] In essence, the threat of a § 301 sanction hangs over the heads of all U.S. trading partners as essentially a mechanism of last resort to safeguard American interests.[143] As with all such considerations, the following question arises: if such a powerful trade weapon is used, will the benefits outweigh the costs?[144]

Although the European Community has articulately advocated excluding culture from the GATT, the E.C. certainly does not stand alone.[145] "Most Third World countries . . . [feel] that governments should retain the right to control the import of films and TV or video programmes in order to safeguard national cultures."[146] Mochtar Lubis, president of the Press Foundation of Asia, explained the Third World fear of West-

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139. Tumulty, *supra* note 98, at F2.

140. Title III, Trade Act of 1974, 19 U.S.C 2411 (Supp. 1993);

If the United States Trade Representative determines under section 304(a)(1) that -

(A) the rights of the United States under any trade agreement are being denied; or

(B) an act, policy, or practice of a foreign country (i) violates or is inconsistent with, the provisions of, or otherwise denies benefits to the United States under, any trade agreement, or

(ii) is unjustifiable and burdens or restricts United States commerce;

the Trade Representative shall take action. . . .

141. M. Jean Anderson et al., *Intellectual Property Protection In the Americas: the Barriers Are Being Removed*, PRENTICE HALL L. & BUS. No. 4; J. PROPRIETARY RTS. 2, 7, Apr. 1992 (in 1992, nine countries were on the priority watch list and 22 countries were on the regular watch list, one of which was Canada).

142. *Free Trade's Fading Champion*, ECONOMIST, Apr. 11, 1992, at 65 (Use of section 301 against Japan, India and Brazil in 1989 has put the world on notice of the powerful weapon contained therein. Its extended use, however, which may indeed be violative of GATT, would only lead to a number of reciprocal protectionist measures and the ultimate derogation of the free trading system).

143. *Id. See also* Bob Davis, *Kantor Takes Tough Stance on Trade With Europe, Japan at Senate Hearing*, WALL ST. J., Jan. 20, 1993, at A2. (The article suggests that the new USTR Mickey Kantor would advocate the use of Section 301).

144. *Id.*

145. Chakravarthi Raghavan, *Governments May Lose Right to Control Foreign Films, TV Shows*, THIRD WORLD NETWORK FEATURES 2, 1990. Countries in favor of cultural restrictions include Australia, Canada, Nordic Countries, Egypt, India, and most Third World countries.

146. *Id.* at 2. *See also* David Dodwell, *U.S. Filmmakers focus on Uruguay Round: The Audio-Visual Trade Tussle Has Come to a Head in Geneva*, FIN. TIMES, Jan. 7, 1993, at 4 ("[S]maller players such as Australia and India share EC concerns that their own film industries might be hurt if U.S. companies win unfettered access to their markets.").

ern cultural domination by pointing out that "[m]odern communications [are] a powerful instrument to influence the attitudes, habits, tastes, perceptions of many people around the world . . . . Thus communications penetrate into the deepest layers of the societal fabric and of culture."[147]

V. GENERAL AGREEMENT ON TARIFFS AND TRADE

"Today, culture may be [a] country's most important product, the real source of both its economic power and its political influence in the world."[148] In direct response to the promulgation of the European Broadcast Directive, the U.S. House of Representatives unanimously passed Resolution 257 denouncing the Directive as a "blatantly anti-U.S. action" in violation of international trade agreements.[149] Lobbyists have been quick to point out that the entertainment industry is America's second largest exporter and is responsible for the viability of a number of collateral industries, all of which employ thousands of people.[150] As a result, the United States has actively opposed further E.C. cultural directives and demands a withdrawal of those presently in existence. The United States lodges a variety of complaints all based on the theory that European Community cultural directives violate GATT. Unfortunately, analysis of the GATT regime does not shed light on the subject and tends to raise more questions than answers.

A. *The GATT Regime*

The United States claims that culturally restrictive legislation, such as the Broadcast Directive, violates Articles I[151] and III[152] of GATT by placing quantitative restrictions on all non-European cultural products.[153]

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147. Cate, *supra* note 124, at 381.

148. Bernstein, *supra* note 82, at 56.

149. H.R. Res. 257, 101st Cong., 1st Sess., 135 CONG. REC. H6558. The vote was 342 in favor of the resolution and none opposed, with 90 abstentions. 135 CONG. REC. H7357. Rep. Frenzels said the cultural exemptions claimed by Europe were no more than "the last refuge of trade scoundrels." *Id.* at H7330 (statement of Rep. Frenzels). "The Directive is one of the first signals of what the United States can expect from Europe in 1992 and comes across more like a red flag flying over Fortress Europe than as a friendly initiation to be neighbors in a global telecommunications village." *Id.* (statement of Rep. Markey).

150. Tumulty, *supra* note 98. The U.S. entertainment industry generates a vigorous trade surplus estimated to be US$3.5 to four billion per year. *Id.* Western Europe sales account for more than one-half of the industry's total sales outside the U.S. *Id.*

151. GATT, *supra* note 12, at 194. Article I MFN treatment requires all contracting parties to grant each other treatment as favorable as they give to any country in the application and administration of import and export duties and charges. No country is to give special trading advantages to another or to discriminate against another. MFN automatically extends bilateral agreements to all GATT members without the need for multilateral negotiations. This automatic trade liberalization mechanism is considered the cornerstone of GATT. There are exceptions to MFN, however, including an exception for Free Trade Areas in Article XXIV. *Id.*

152. *See* GATT, *supra* note 12.

153. Suzanne Michele Schwarz, *Television Without Frontiers?*, 16 N.C. J. INT'L & COM. REG. 351. The U.S. collaterally argues that the Article XXIV exception to MFN for free

The European Community contends that the Directive regulates cultural works that are services and therefore GATT does not apply to them.[154] Notwithstanding the E.C. position, even if cultural works are construed as goods properly regulated under GATT, the United States' reliance on GATT as the vanguard of its interests is misplaced. First, GATT does not clearly prohibit cultural content restrictions. Second, the United States provides similar protection for its own domestic entertainment industry, some of which may violate GATT. Third, harm to U.S. industries is speculative and accordingly will not support a GATT claim.

1. GATT Does Not Clearly Prohibit Cultural Content Restrictions

European observers are surprised at what they call "the very aggressive stance taken by the United States administration against European Community cultural rules."[155] A spokesman for the European Community emphasized that the Community's rules of origin are completely "compatible with the GATT."[156] Several GATT provisions allow derogations from GATT obligations.

a. Article XXV: Waiver

GATT Article XXV:5 provides that a country may, when its economic or trade circumstances warrant, seek a derogation from particular GATT obligations.[157] A waiver would allow the European Community to suspend most favored nation status and national treatment obligations to

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trade areas does not apply. A free trade area is defined under Article XXIV:8(b):

> A free trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories."

GATT, *supra* note 12, at Art. XXIV:8(b).

Although the European Community is a free trade area, the United States contends Article XXIV does not allow a free trade area to increase any rate or duty in a manner inconsistent with GATT.

154. *See generally* GATT, *supra* note 12, at 194 (at its inception, GATT was designed to facilitate only the trade in goods, not services.).

155. GATT: U.S. Will Submit Rules of Origin Proposal at Next Meeting of GATT, USTR Hills Says. 6 INT'L TRADE REP., (BNA), 1152 (Sept. 13, 1989).

156. *Id.*

157. GATT Article XXV:5 reads:

> "In exceptional circumstances not elsewhere provided for in this Agreement, the Contracting Parties may waive an obligation imposed upon a contracting party by this Agreement; Provided that any such decision shall be approved by a two-thirds majority of the votes cast and that such majority shall comprise more than half of the contracting parties. The Contracting Parties may also by such a vote
>
> (i) define certain categories of exceptional circumstances to which other voting requirements shall apply for the waiver of obligations, and
>
> (ii) prescribe such criteria as may be necessary for the application of this paragraph.

non-E.C. nations permitting the operation of the Directive's European content restrictions.

Although the United States argues that the Directive violates Articles I and III, the United States has benefited from a similar waiver. Nonetheless, the United States and Canada concluded an agreement in 1965 that provided for preferential duty free entry of Canadian auto parts into the United States.[158] Auto exporting GATT nations such as Great Britain and the former West Germany objected to the pact as a violation of Most Favored Nation treatment (MFN).[159] The United States sought and was granted a waiver of its MFN obligations even though it conceded that the agreement violated Article I.[160]

The European Directive presents a strikingly similar situation: a local content regulation promulgated within a regional trading area. Arguably, cultural content restrictions are no different than the American auto part restrictions suggesting that a GATT waiver may likewise apply.

b. Article XIX: Escape Clause

Article XIX, the Escape Clause, is an exception to GATT Article XI prohibiting quotas.[161] The Escape Clause allows GATT member states to impose quotas on products that are being imported in increased quantities and that cause, or are likely to cause, serious injury to competing domestic producers.[162] Arguably, the increase of American entertainment products in European markets has caused serious injury to domestic producers. Subsequently, Article XIX:3(a) would permit the European Community to impose a quota on American entertainment imports to the extent and for the period of time considered necessary to rectify the injury

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158. United States-Canadian Automotive Products Agreement, Jan. 16, 1965, *entered into force* Sept. 16, 1966, 17 UST 1372, TIAS No. 6093. *See also* Stanley D. Metzger, *The United States-Canadian Automotive Products Agreement of 1965*, 1 J. WORLD TRADE L. 183 (1967).

159. S. REP. No. 782, 89th Cong., 1st Sess., pt. 1 (1965). Canada argued that although the Agreement technically violated GATT Article I, the net effect would be an expansion of trade, and the Agreement would be applied in a non discriminatory manner in conformance with GATT goals. *Id.*

160. *See Report of the GATT Working Party, quoted in* Harold Hongjuh Koh, *The Legal Markets of International Trade: A Perspective on the Proposed United States-Canada Free Trade Agreement*, 12 YALE J. INT'L L. 193 (1987).

161. GATT, *supra* note 12, at 194.

162. *Id.* Art. XIX:1(a) provides:

> If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting parties shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.

to European producers.[163]

c. Article XXI: Security Exception

An exception to both Articles I and III is Article XXI, which provides "[n]othing in this Agreement shall be construed . . . to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests."[164]

One of the central European arguments in support of the Directive is that the development and preservation of European cultures remains vital to the formation of the E.C. as a political entity.[165] The E.C. argues the Directive expresses "cultural sovereignty," within the political power of the sovereign.[166] Given the political component of cultural content restrictions, some scholars argue that ". . .the film, broadcast and sound recording industries of many countries outside the U.S. are considered to be purveyors of national culture and deserving of the treatment accorded to national security."[167]

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163. *Id.* Art. XIX:3(a) provides:

> If agreement among the interested contracting parties with respect to the action is not reached, the contracting party which proposes to take or continue the action shall, nevertheless, be free to do so, and if such action is taken or continued, the affected contracting parties shall then be free, not later than ninety days after such action is taken, to suspend, upon the expiration of thirty days from the day on which written notice of such suspension is received by the CONTRACTING PARTIES, the application to the trade of the contracting party taking such action, or in the case envisaged in paragraph 1(b) of the Article, to the trade of the contracting party requesting such action, of such substantially equivalent concessions or other obligations under this Agreement the suspension of which the CONTRACTING PARTIES do not disapprove.

See Marco C.E.J. Bronckers, The Non-Discriminatory Application of Article XIX GATT: Fact or Fiction, Legal Issues of European Integration 198½ at 39-41. It has been suggested that the Escape Clause cannot justify cultural content restrictions because many commentators believe such a quota under Article XIX must be applied nondiscriminately. However, Article XIX:3(a) indicates that a quota may be directed specifically at the "contracting party that is taking such action" to cause harm to domestic producers; Mark Koulen, The Non-Discriminatory Application of GATT Article XIX(1): A Reply, Legal Issues of European Integration 1983, at 89-95, 110-11.

164. GATT, *supra* note 12, at 194.

165. 135 CONG. REC. H7326 at 7328 (statement of Rep. Lagomarsino), "These [EC] ambassadors claimed they were integrating their markets and solidifying Europe economically and politically." *Id.*

166. *Id.*

167. *GATT Basic Instruments and Selected Documents, Geneva, 1955, 44, quoted in* Keith Acheson and Christopher Maule, *Trade Policy Responses to New Technology in the Film and Television Industry*, 23 J. WORLD TRADE L. 35, 47-48 (1989); *see also* Kelly L. Wilkins, *Television Without Frontiers: An EEC Broadcasting Premier*, 14 B.C. INT'L. & COMP. L. REV. 195 n. 81 (1991).

d. Article XVIII: Governmental Assistance to Economic Development

Article XVIII allows nations to impose trade restrictions in order to foster economic development. While Article XVIII generally applies to less developed countries (LDCs), Article XVIII:4(b) indicates that developed nations may also use quotas to establish a particular industry.[168] GATT practice shows Article XVIII can be successfully invoked by non-LDC countries to justify trade restrictions, provided they apply to an infant industry critical for the nation's further economic development.[169]

Canada has argued that it is in some ways a "third world nation culturally;" until a few years ago it "published fewer children's books than Uganda."[170] Similarly, the European Community seeks to promote its audio-visual industry as an engine of economic growth.[171] Both the EC and Canada recognize the multiplier effect that the entertainment industry has upon collateral industries. Accordingly, development of the motion picture and television production industry will spur expansion in related businesses and create jobs.[172]

e. Article IV: Motion Pictures

Article IV permits nations to set screen quotas mandating that a certain percentage of all films shown in a country are of domestic origin.[173]

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168. GATT, *supra* note 12, at 194.

Article XVIII:4(a) provides that nations that "can only support a low standard of living and are in the early stages of development shall be free to deviate temporarily from the provisions of the other Articles in this Agreement. . .". In contrast, Article XVIII:4(b) states that a nation "the economy of which is in the process of development, but which does not come within the scope of sub-paragraph (a) above, may submit applications to the CONTRACTING PARTIES under Section D of this Article.". Section D and Section C, paragraph 13, allow a member nation that qualifies under Article XVIII:4(b) and that finds "governmental assistance is required to promote the establishment of a particular industry with a view to raising the general standard of living of its people," may impose trade restrictions that would otherwise violate GATT. There is a caveat: there must be no other action permitted by GATT that would achieve the particular development objective. *See* Article XVIII Section C, paragraph 13.

169. *See, e.g.*, Agreement with Romania on Trade Relations, Apr. 2, 1975, T.I.A.S. No. 8159, at Art. 1(3) (effective 3 August 1975), *cited in* Howard Liebman, Comment, *GATT and Counter-trade Requirements*, 18 J. WORLD TRADE L. 252, 260.

170. Don Mitchell, *A Publisher Who Isn't Waiting for a Miracle*, 19 B.C. BUSINESS, Dec. 1991, No. 12, § 1 at 27.

171. Arthur Dimopoulos, *The Television Without Frontiers Directive: Preserving Cultural Integrity or Protectionism?*, 13 LOY. L.A. ENT. L.J. 293 (1993) [hereinafter Dimopoulos].

172. Bernstein, *supra* note 82, at 56.

173. Article IV provides the following, in relevant part:

If any contracting party establishes or maintains internal quantitative restrictions relating to exposed cinematographic films, such regulations shall conform to the following requirements:

(a) Screen quotas may require the exhibition of cinematographic films of national origin during a specified minimum proportion of the total screen time actually utilized, over a

Its provisions are similar to those of the Directive, the major difference being that Article IV applies only to films while the Directive covers a wider range of cultural works.

Article IV is the clearest indication that cultural industries were intended to be exempt from GATT. Article IV was negotiated in the early GATT rounds immediately following World War II. At the time, motion pictures were well established, as was American domination of the industry. Motion picture production in many countries outside the United States was slow to recover from the wartime manpower and material shortages, yet people were eager to see new movies.[174] Germany's film industry had flourished during the Reich as an artistic as well as a propaganda power. Not only did it suffer from the devastation of the war, partition, and postwar recession, but it was the special target of American occupying forces who sought to eradicate the Nazi propaganda film machine. Motion pictures, having substantial influence on society, played an important propaganda role during the war for both the Allies and the Axis.

Negotiators in 1947 could not have predicted the current explosion of films, cable television, satellite transmissions, videocassette, and audio works. Cultural content restrictions clearly follow the logic and spirit of Article IV differing only in scope by encompassing works that the original GATT negotiators could not possibly have foreseen.[175]

2. The United States' Opposition to Cultural Restrictions is Inconsistent with Its Practices that Protect the Domestic Entertainment Industry

The United States has long resisted efforts by other nations to limit the impact of American cultural exports.[176] The American opposition,

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specific period of not less than one year, in the commercial exhibition of all films of whatever origin, and shall be computed on the basis of screen time per theater per year or the equivalent thereof; . . . . *See* GATT, *supra* note 12.

174. American motion picture exports soared in the late 1940's.

175. *See* Cate, *supra* note 124, at 410. The counter-argument forwarded by the U.S. not only ignores the postwar explosion of cultural industries but also lacks logical consistency: Article IV is portrayed as a partial exemption for motion pictures and spells out the only allowable regulations nations may impose on any cultural works, all other cultural works being under the purview of GATT. *See also* Schwarz, *supra* note 153.

176. *See* Schwarz, *supra* note 153. The debate began with Third World resistance to post-World War II American control of the international broadcast industry. In the 1950's and 60's, U.S. domination of the international media was justified by First Amendment and free market values supporting an unregulated flow of communications. By 1970, UNESCO was urging a balanced, regulated flow of information to preserve national cultures. U.S. perceived Third World calls for media regulation as censorship; concerned that regulations would hamstring its domination of the international communications industry, the U.S. withdrew from UNESCO in 1984. The Directive and other cultural preservation efforts shifted the focus of the cultural debate to the entertainment sector. Because the entertainment industry is critical to the balance of trade, the U.S. shifted its response to trade terms, basing its objections in GATT language despite its own well-established protection of its

however, is hypocritical in light of a number of United States domestic practices that mandate similar cultural safeguards. This inconsistency invalidates the American argument that cultural restrictions violate GATT.

a. First Amendment restrictions are justified on cultural grounds

The United States has applied the First Amendment to oppose cultural restrictions abroad and to impose them at home. Freedom of speech is not completely free in America; the First Amendment has been used to regulate speech to conform with social norms. For example, restrictions on fighting words, defamation, and obscenity are based on majoritarian American cultural values.[177]

The Directive regulates the content of advertising by restricting commercials for tobacco, alcohol, prescription drugs, and by establishing an entire regime for advertisements aimed at children, among others.[178] Similarly, restrictions on commercial speech have been imposed to limit the freedom of speech that United States advertisers have when discourse concerns an activity regulated by social norms.[179]

b. Many FCC regulations are cultural restrictions

Many FCC regulations restrict freedom of speech on the grounds that it is necessary to promote the health, safety, and well being of viewers in conformity with majoritarian cultural norms. These regulations are often similar to the cultural restrictions imposed by the Directive.[180] The similarities suggest that the United States, like the European Community, recognizes the importance of regulating the media in order to preserve cultural values.

c. U.S. concern for American viewers is not exported

In an illustrative contrast to American attitudes toward Europe and

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domestic industry. *Id.*

177. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (fighting words); Miller v. California, 413 U.S. 15 (1983) (the definition of obscenity as being based in "community standards").

178. Dimopoulos, *supra* note 171.

179. Posadas de Puerto Rico Assocs. v. Tourism Co., 478 U.S. 328 (1986) (upholding restrictions on commercial speech regarding gambling).

180. AUDIOVISUAL COMMUNICATIONS, COOPERS & LYBRAND, E.C. COMMENTARIES, Oct. 15, 1992 [hereinafter COOPERS & LYBRAND]. For example, the FCC regulates programming and advertising aimed at children. Similarly, the Directive provides restrictions on "broadcasts which may be potentially harmful to the physical, mental and moral development of children and young people, particularly those containing pornography or gratuitous violence or inciting hatred for a particular race, sex, religion or nationality, should be identified as such by broadcasters in programme announcements and must not be shown during hours in which minors are commonly in front of the television." Right of Reply, 47 C.F.R. § 73.1920, 1930 (1989). This Directive provides for the right of reply to personal attacks and political messages. The FCC has similar guarantees of the right of reply and equal time for political rebuttals.

the Third World, in upholding the FCC personal attack rule, the United States Supreme Court said "[i]t is the right of the viewers and listeners, not the right of the broadcasters that is paramount. . . . It is the right of the public to receive suitable access to social, political, esthetics, moral and other ideas and experiences which is crucial here."[181] The U.S. opposition to the efforts of other nations to protect cultural industries is clearly hypocritical in light of its own reactions when its domestic industry is subject to foreign control. The United States has shown it places more emphasis on the preservation of its own culture than on the rights of other sovereigns to protect their cultures.[182]

d. Harm to United States entertainment industry is speculative

Given the explosion of the international broadcast and film industry, "with more broadcasting hours on more channels, the Directive should not hurt American sales."[183] It is considered unlikely that the United States' share of the European market will reach the 49.9% limit set by the Directive.[184] If the United States is unable to show actual harm to the American entertainment industry, then a claim under GATT will not be successful.[185]

3. United States Protectionism of Domestic Cultural Industries May Violate GATT

While the United States contends cultural regulations such as the Directive violate GATT, several United States practices could be considered equally violative. Even if those practices do not present clear GATT violations, they do indicate the U.S. not only recognizes the need to protect its cultural identity but will also take action to do so. Any challenge to cultural restrictions under GATT would not likely succeed if the United States was practicing the same type of restrictions in order to preserve its own domestic cultural industries.

For example, the public service aspect of broadcasting has been invoked to justify FCC regulations on the nationality of broadcast station owners.[186] This FCC regulation could be considered violative of GATT Article III because foreign citizens are not accorded the same treatment

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181. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) (upholding the personal attack rule regulating broadcast media).

182. *Id.*

183. Leyla Ertgul, *European Parliament Clears "TV Without Frontiers,"* REUTERS LIB. REP., May 24, 1989.

184. John M. Broder, *Hollywood Opposes Trade Pact*, L.A. TIMES, Jan. 11, 1993.

185. See GATT, *supra* note 12, at Art. XXIII.

186. 47 U.S.C. § 310(b). Federal law prohibits foreign citizens from more than 25% ownership of broadcast stations; foreign citizens cannot be officers of a corporation that holds a broadcast license. The most publicized example of the FCC ownership regulations involves Rupert Murdoch, a native of Australian who became a U.S. citizen in order to purchase the Fox TV network. *Id.*

as United States citizens.

Americans object to European and Third World efforts to preserve their cultures yet reacted vehemently when several landmark Hollywood movie studios were purchased by foreign corporations.[187] Former U.S. Representative Leon Panetta of California introduced a bill in 1991 aimed at limiting foreign ownership of Hollywood studios and other American cultural industries.[188] "We ought not to allow our motion picture industry and related firms to be run from abroad. The United States stands to lose both its artistic license and its integrity as a truly American institution through the intangible but sure process of foreign owners' discreet discretion, implicit censorship, or pervasive corporate philosophy."[189]

4. Conclusion

Reliance on GATT rules as the basis for United States opposition to European cultural directives is misplaced. Even if the GATT regime was applicable to trade in culture, the outcome would not be certain. Inspired by this confusion, the European Community has advocated the treatment of cultural products as services under a proposed General Agreement of Trade in Services (GATS).

VI. GENERAL AGREEMENT ON TRADE IN SERVICES

A. *Introduction*

"In 1987, the United States introduced to members of the GATT a comprehensive proposal for liberalizing trade in services. The proposal called for the GATT to recognize "the sovereign right of every country to regulate its services in industries subject only to an external control over measures which had [the] purpose or effect of restricting market access by foreigners."[190]

Pursuant to this declaration, formal talks on a GATS were begun. The European Community envisioned that cultural products, being services, would be addressed under a GATS. In contrast, the United States maintained that cultural products like all other tradeable goods must be reconciled within GATT.

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187. Jamie Portman, *U.S. Changing Tune on Protectionism; Beleaguered Canadian Culture may Benefit from U.S. Moves*, OTTAWA CITIZEN, Oct. 27, 1991, at C2. The foreign purchases included the following: Matsushita Electronics Industrial Company of Japan bought MCA for $6.16 billion; Sony bought CBS Records. Sony also bought Columbia Pictures for $3.4 billion. *Id.*

188. The Bill died in subcommittee (telephone conversation between author and former Congressman Paneta's staff, October 1992).

189. *Id.*

190. Lupinacci, *supra* note 90, at 138.

B. *Definition of Services*

Among the obstacles plaguing GATS negotiations is the lack of a generally accepted definition of services. One author defined services as "[t]hings which can be bought and sold but which you cannot drop on your foot."[191] While negotiations have progressed beyond this impotent definition, they have not gone far enough to placate all interested parties. Generally, services are processes that require "personal contact between the provider and the consumer."[192] They "involve the dissemination of skill and knowledge. . . and entail the movement of either the provider or the receiver to the other."[193] While cultural products clearly involve the dissemination of "skill," they do not require personal contact. Some cultural products also have a tangible quality because they exist in physical form, such as film reels, that makes their classification as a "service" partially inaccurate. This sentiment was echoed in the European Audiovisual Charter that stated "audiovisual works are an essential element of culture, and therefore cannot be considered services."[194]

The European Court of Justice, in the few cases that tangentially address this issue, has been unable to resolve this dichotomy. In *State v. Sacchi*,[195] the court distinguished between the transmission of television signals and the product being transmitted, holding the former to be a service and the latter a good. The court ultimately concluded that "a television broadcast must, because of its nature, be regarded as a supply of services."[196] Pursuant to *Sacchi*, the physical product can be regulated under GATT yet its transmission is necessarily excluded. While such an analysis is a plausible attempt to grapple with the unique nature of cultural products, alone it is insufficient as the linchpin reasoning for why culture must be treated as a service. Nonetheless, the European Community and a number of other nations remain wholeheartedly in favor of treating culture as a service. The EC has made crystal clear that they were not willing to envision a GATS in the audiovisual sector if their

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191. *A GATT for Services*, ECONOMIST, Oct. 12, 1985, at 20.

192. Lupinacci, *supra* note 90, at 135.

193. *Id.* at 136.

194. COOPERS & LYBRAND, *supra* note 180, at § 7.2. The Audiovisual charter also known as the Delphi Declaration was promulgated in September 1988 by the European federation of Audio-visual producers representing industry professionals from the 12 E.C. member states, Austria, Cyprus, Hungary, Iceland, Poland, Sweden, Switzerland, Turkey, and Former Yugoslavia. Its other main provisions included the following statement: "The cultural and linguistic identity of every nation must be safeguarded through financial support and a system of broadcasting quotas.". *Id.* "The concentration of production and broadcasting in the hands of a few individuals or multinationals is a threat to democratic rights. The independence of artistic expression must be protected from political and commercial pressures". *Id.*

195. Case 155/73, State v. Sacchi, 1974 E.C.R. 409, 427, 14 COMM. MKT. L.R. 177, 201 (1974). *Aff'd in* Procureur du Roi v. Marc J.V.C. Debauve, 1980 E.C.R. 833, 31 COMM. MKT. L. R. 362 (1981).

196. *Id.*

cultural concerns were not met,[197] meaning a complete exemption of cultural industries from any agreement on services on the ground that "unfettered imports would dilute European culture."[198] Since cultural products do not fit well within the definition of services, the E.C. and its cultural allies do not want cultural products included in a potential GATS, it would be nonsensical for culture to be railroaded into a services agreement when major disagreements still exist on important sectors, such as maritime transport, air transport, financial, and telecommunications services that account for more than 75% of potential trade in services.[199]

In reality, culture is no more a good than a service. Accordingly, the threshold question becomes not as much how to classify culture but how should it be treated under international trading rules? All multilateral trading endeavors begin with the realization of mutual objectives. The difficulties lie in the reconciliation of the various formulations espoused to accomplish those objectives. The United States wants to exploit the economic advantages that come with exporting its culture while remaining committed to respecting the identities and valued traditions of other sovereigns. Similarly, the European Community wants to preserve its culture while reaping the economic benefits from its dissemination.[200] Culture, like services, is an area of first impression under GATT, therefore it deserves similar treatment but not a similar definition. Such treatment consists of identifying products to be liberalized, obtaining multilateral concessions that create the parameters of its trade, and incorporating the agreement within the underlying principles of GATT.

VII. GENERAL AGREEMENT ON TRADE IN CULTURE

Although cultural works cannot properly be classified as goods or services, it must be recognized that they are cultural expressions that have quantifiable economic value. In recognition of this duality — the multibillion dollar international trade in culture and the basic principle of GATT to include rather than exclude economic issues — it is the conclusion of this article that cultural works are hybrids: an inextricable mixture of culture and commerce and that in recognition of their unique characteristics must be considered separately from a GATT or GATS regime.

Freer trade might benefit a nation's overall economy but usually at

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197. *Intellectual Property, Copyright Group Assails EC's stance in GATT talks, See Prospects as Bleak*, DAILY RPT. FOR EXECUTIVES (BNA), Nov. 1, 1990, at A-16.

198. *Id.*

199. E.C. *Negotiators Attack U.S. GATT Offer Exempting Key Sectors in Service Talks*, 58 BANK RPT. (BNA), Mar. 30 1992, No. 13, at 570.

200. Bruce Stokes, *Tinseltown Trade War*, NAT'L J., Feb., 23, 1991, No. 8 at 432. "The Community has a strong cultural heritage and we wish to preserve these national and regional identities." The best way to accomplish this goal is to "ensure a minimum amount of TV programming in local languages, produced by local film-makers." *Id.*

the expense of its lesser developed industries.[201] "The law of comparative advantage says that a country should specialize in what it does best [b]ut it turns out that a lot of what makes up a country's comparative advantage is created by government policies on everything from education to government procurement."[202] On the other hand, under a system of managed trade, the government uses trade and other policies to implement an industrial strategy and encourage the development of key industries. As these industries mature, they will gain strength, ultimately being able to compete in a free market. In the United States, managed trade is seen in the automobile, maritime transport, financial services, telecommunications, textiles, agriculture, and a host of other industries.[203] Managed trade "is the only viable alternative in the real world to protectionism"[204] and must be employed to ensure "commitments by nations to accept certain proportions of imports in their domestic markets."[205]

GATT in many senses is the ultimate free trade agreement uniting 108 countries in the goal of removing all trade restrictions.[206] Since its inception in 1948, GATT has been very successful in reducing the number of managed goods and progressively removing barriers to their free trade. Notwithstanding its successes, the GATT implicitly realizes that trade liberalization is a slow and deliberate process. "Highly sensitive industries can be seriously harmed through. . . liberalization efforts, with long term consequences to shareholders, workers, communities and regions of a country."[207] The concepts of freer and managed trade are not antithetical but rather adjacent steps in the process transcending isolationism towards free trade.

Under an envisioned General Agreement on Trade in Culture (GATC), cultural products would be traded under managed circumstances with the understanding that as industries matured, trade would be liberalized. This scheme would recognize the vital social need to preserve a nation's culture as well as the fiscal aspects attached to the sale of cultural products. The removal of culture into a separate agreement would alleviate the pressures of manipulating GATT articles to accommodate the elusive concept of culture, facilitate a GATS by allowing parties to concentrate on a comprehensive list of negotiable services and ensure the survival of a diversity of cultural expressions no matter how small or unprofitable they may be.

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201. Dalglish, *supra* note 33.

202. *Id. quoting* Andrew Jackson, senior economist with the Canadian Labor Congress.

203. *Id.*

204. Leonard Silk, *Head Off a Trade War*, N.Y. TIMES, Feb. 4, 1993, at A23, *quoting* Laura D'Andrea Tyson, Chairman of the Council of Economic Advisers.

205. *Id.*

206. Dalglish, *supra* note 33.

207. Stewart & Stewart, *supra* note 43.

VIII. CONCLUSION

"In many ways, language is the essence of culture." Presently, the people of the world speak approximately 6000 languages, "[b]ut somewhere between 20% and 50% of those languages are no longer being spoken by children. That doesn't mean they're endangered, [i]t means they're doomed."[208]

Currently 600 languages are safe from extinction because they are either spoken by more than 100,000 people or because "they are protected by the government. [A]t the rate things are going, the coming century will see the extinction. . . of 90% of the world's linguistic diversity. It is doubtful whether a culture can survive without a language. . . forcing us to consider what the cost would be of losing 90% of the world's cultures."[209]

Globalization of the world's cultures is due to a number of homogenizing forces, such as multinational corporations, immigration, and global media.[210] Threats of cultural genocide exist not only directly from bullets and bulldozers but indirectly from television, films and radio. The state of cultural arrest in Canada is a sad example of that fact. Although unable to reclaim significant portions of their market, the cultural derogation granted to Canada has been the impetus for a number of cultural endeavors used to preserve their struggling cultural regime. The world, a witness to the Canadian situation, remains fearful of a cultural imperialism the sole goal of which is not enrichment but economic profit. As a result, the E.C. has embarked upon a bold program of cultural imperatives designed to foster the continued growth of cultural industries. "Americans don't understand the serious nature of cultural politics in Europe. [T]he current political environment, Europe-wide TV deregulation and the subsequent mushrooming of the European market would have been politically impossible without a cultural safety net of some kind."[211]

The Broadcast Directive and subsequent culturally based directives are the price paid for such liberalization. While protectionism is contrary to free trade in goods, it has long been considered the rule and not the exception when it comes to trade in services. Trade in culture, being a hybrid combination of both a good and service, is furthermore inextricably combined with national sovereignty and cannot justly be treated as one or the other. If the United States continues to treat culture as a tradeable good, the European Community and its allies will refuse to address culture in any multilateral trading arrangement, leaving U.S. cul-

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208. Mitchell Stephens, *Brave New World; Pop Goes the World; MTV in Prague, Pad Tai in Topeka — As the World Shrinks, Cultures Blend and Diversity Disappears*, L.A. TIMES MAGAZINE, Jan. 17, 1993 at 23, *quoting* Michael Krauss professor of linguistics at University of Alaska.

209. *Id.*

210. *Id.*

211. Stokes, *supra* note 2, at 432.

tural products as victims of unrestricted national policies. While respective negotiating positions have been defined, the unique nature of trade in cultural products makes a victory under ill-suited GATT or GATS regimes impossible for either side.

By accepting that culture is unique and addressing it in its own forum, the fears of cultural imperialism on the one side and blatant protectionism on the other will be eradicated. The European Community will be forced to make market access commitments and possibly bifurcate its industry to protect unprofitable cultural works and simultaneously begin liberalization for films, television, and other profitable cultural endeavors. A comprehensive negotiation would enable concerned countries to limit market access in order to foster cultural industries as well as to bind countries to timetables, liberalization levels, and prevent the pure domestic regulation of trade in culture.

One author has analogized our state of cultural globalization to mixing paint. "When you first begin stirring many different-colored paints in a can, you get some colors that clash, but you also get some beautiful rainbow patterns. Maybe that is the period we are in now . . . . The Question is: What will human culture look like after the paint can has been stirred a century or two longer?"[212]

212. Stephens, *supra* note 208, at 22.

STUDENT COMMENT

The Basel Convention on Transboundary Movements of Hazardous Wastes: An Opportunity for Industrialized Nations to Clean Up Their Acts?

I. INTRODUCTION

Increasing environmental activism and awareness is forcing industrialized and developing countries to recognize the treacherous consequences of ignorance and complacency towards our rapidly deteriorating global environment. Widely publicized problems and incidents have spurred public concern over health, safety, and the future vitality of our fragile world ecosystem. Some commentators see the right to environment as an emerging human right under international law.[1] However, while the area of environmental law has progressed rapidly since it first became an item of global concern in the 1970's, even existing conventions and treaties may not be enough to protect the world environment for future generations. More drastic measures may be necessary.

Transboundary movement of hazardous waste, especially uncontrolled incidents of third world toxic dumping, is an issue of global concern that has stirred a great deal of activism. This paper explores the historical progression of the law of transboundary movements of hazardous wastes to the recent implementation of the Basel Convention. It then offers recommendations for how the United States and the world community should strengthen the Basel Convention, especially by creating more stringent requirements for liability and an international agency to supervise and enforce the convention to make it binding on all parties, and therefore more effective. The issue of the environment as a human right will also be discussed in this context, emphasizing the author's resolve that the strictest standards must be adhered to where materials that

1. *See* Dinah Shelton, *Human Rights, Environmental Rights, and the Right to Environment*, 28 STAN. J. INT'L L. 103 (1991); Melissa Thorme, *Establishing Environment As a Human Right*, 19 DENV. J. INT'L L. & POL'Y 301 (1991). *See also* Dana J. Jacob, Comment, *Hazardous Exports from a Human Rights Perspective*, 14 SW. U. L. REV. 81 (1983).

threaten human life are concerned.

II. HISTORY OF THE TRAGEDY

The 1972 Stockholm Declaration on the Human Environment[2] was the first indication of environmental consciousness among the nations of the world.[3] While showing some signs of promise, Principle 21 of the Declaration laid a weak, conflicting foundation for international actions:

> States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that the activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.[4]

In order to compensate for the inadequacies of Principle 21, the more forward-looking and expansive Principle 22 urged states to "co-operate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by the activities within the jurisdiction or control of such States to areas beyond their jurisdiction."[5]

The need for control of hazardous wastes became an item of global concern following several major tragic incidents during the 1970's and 80's. In 1976, an explosion occurred at a chemical plant near Seveso, Italy, causing a vapor cloud of toxins to be released into the atmosphere.[6] Although the chemicals released were highly lethal, it took the plant managers seven days to inform local authorities about their toxicity, and another five days for the officials to act.[7] Certain highly affected areas were evacuated, and an intensive clean-up plan was instigated. Although there were no immediate deaths caused by the chemical release, over 500 cases of skin irritation were reported, and numerous animals and acres of food were destroyed as a result of contamination.[8]

Following the Seveso incident, the Organization for Economic Cooperation and Development (OECD) in 1984 showed its concern through adoption of a Decision/Recommendation that requires countries to ensure

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2. Stockholm Declaration on the Human Environment, *adopted by* the UN Conference on the Human Environment at Stockholm, June 16, 1972, Section I of Report of the United Nations Conference on the Human Environment, UN Doc. A/CONF.48/14 and Corr.1 (1972), *reprinted in* 11 I.L.M. 1416 (1972) [hereinafter Stockholm Declaration].

3. Geoffrey Palmer, *New Ways to Make International Environmental Law*, 86 AM. J. INT'L L. 259, 266 (1992).

4. Stockholm Declaration, *supra* note 2, Principle 21.

5. *Id.*, Principle 22.

6. Ved Nanda & Bruce Bailey, *Export of Hazardous Waste and Hazardous Technology: Challenge for International Environmental Law*, 17 DEN. J. INT'L L. & POL'Y 155, 161 (1988). Prior to the explosion, plant workers complained of inadequate safety measures. *Id.*

7. *Id.* at 162.

8. *Id.* at 162-63.

that hazardous waste situated within their borders is managed responsibly, in order to protect both human health and the environment.[9] Although this was one of many "first steps" taken by international organizations toward managing the problem of toxic wastes, it was hardly the solution.

As if the Seveso incident had not been adequate warning, in 1984 toxic gas escaped overnight from a storage tank at a Union Carbide chemical manufacturing plant in Bhopal, India, covering a 25 square-mile area. The toxic gas immediately caused the death of over 1,600 people and injured over 200,000 people.[10] Several hundred more people died during the next several months due to lingering effects of the gas,[11] and even as late as 1987 victims continued to die daily.[12]

Following the Bhopal incident, and after many other disastrous incidents,[13] a second OECD Recommendation[14] was produced that enlarged the first, and in 1986 the United Nations Environment Programme (UNEP) helped establish an international environment bureau. The primary focus of these and other efforts was information generation, rather than regulation.[15]

Of primary concern was the effect of hazardous wastes on the environment in developing countries. The World Bank addressed this problem by creating a program to help developing countries effectuate policies concerning toxic wastes.[16] The effectiveness of such programs has been questioned by some commentators who believe the World Bank lacks the ability to effectively address environmental concerns in its lending policies because of internal and external constraints.[17]

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9. OECD, DECISION AND RECOMMENDATION OF THE COUNCIL ON TRANSFRONTIER MOVEMENTS OF HAZARDOUS WASTE, OECD Doc. C(83) 180, *reprinted in* 23 I.L.M. 214 (1984).

10. Nanda & Bailey, *supra* note 6, at 165-66.

11. *Id.* at 166. The Indian government reported that 30,000 to 40,000 people had suffered serious injuries from the incident, and that it had received 500,000 other claims related to the leak. *Id. citing* Matt Miller, *Two Years After Bhopal's Gas Disaster, Lingering Effects Still Plague Its People*, WALL ST. J., Dec. 5, 1986, at 30.

12. Jeffrey D. Williams, Comment, *Trashing Developing Nations: The Global Hazardous Waste Trade*, 39 BUFF. L. REV. 275 n.5 (1991), *citing* WALL ST. J., Feb. 15, 1987, at A15. The Indian government estimated the death toll at 3,329 by early 1987. *Id.*

13. The Chernobyl nuclear reactor meltdown in 1986 killed 31 people, injured several hundred more, and caused concern over abnormally high radiation levels in food and water worldwide. Chernobyl caused the international community to take a hard look at the lack of regulations and systems of liability and compensation available. Similarly, a chemical fire and major toxic chemical spill in Basel, Switzerland in 1986 threatened the countries along Rhine River (France, Switzerland, the Netherlands and Germany) and raised concern over the lack of an international regulatory scheme. See Nanda & Bailey, *supra* note 6, at 161-179 for a detailed analysis of these and the previously discussed incidents.

14. OECD, COUNCIL DECISION ON EXPORTS OF HAZARDOUS WASTES FROM THE OECD AREA. OECD Doc. C(86) 64, *reprinted in* 25 I.L.M. 1010 (1986).

15. Nanda & Bailey, *supra* note 6, at 189.

16. Ved Nanda, *International Environmental Protection and Developing Countries' Interests: The Role of International Law*, 26 TEX. INT'L L. J. 497, 505 (1991).

17. *See id.* at 506; Ved P. Nanda, *International Development Agencies (IDAs), Human*

During 1986, public awareness of hazardous waste issues grew. The *Khian Sea*, a Philadelphia ship, arrived in the Bahamas with 13,000 tons of incinerator ash, only to be turned away.[18] After two years of searching for a disposal site, the crew of the *Khian Sea* attempted to unload her cargo in Haiti.[19] After three thousand tons of the cargo, listed as "fertilizer ash," were dumped, the Haitian government ordered the ship to leave.[20] The ship departed, changed its name, and travelled through the Middle East and Far East in search of a disposal site. When next seen in Singapore, it was empty.[21] This is one of many similar incidents[22] in which developed countries have persistently abused developing countries in an effort to dispose of waste that is harder or more expensive to dispose of in developed countries.[23]

The issue of toxic waste dumping in developing countries is controversial. In considering whether the World Bank should "encourage more migration of the dirty industries to the third world," Lawrence Summers, the chief economist of World Bank, stated that "the economic logic of dumping a load of toxic waste in the lowest-wage country is impeccable."[24] Summers' major contentions were:

> First, the costs of pollution depend on earnings foregone through death or injury; these costs are lowest in the poorest countries. Second, costs rise disproportionately as pollution increases; so shifting pollution from dirty places to clean ones reduces costs. Third, people value a clean environment more as their incomes rise; if other things are equal, costs fall if pollution moves from rich places to poor ones.[25]

The basic problem with this economic model is obvious: can such a price tag be placed on human lives? The problem is complicated by the fact

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Rights, and Environmental Considerations, 17 DEN. J. INT'L L & POL'Y 29, 34 (1988).

18. Robert M. Rosenthal, *Ratification of the Basel Convention: Why the United States Should Adopt the No Less Environmentally Sound Standard*, 11 TEMP. ENVTL. & TECH. J. 61, 62 (1992).

19. *Id.*

20. *Id.*

21. *Id.* at 63.

22. In 1988, another shipment from Philadelphia was marketed and sold to Kassa (Guinea) as "raw materials for bricks" and dumped in an abandoned quarry. After the island's vegetation started dying and investigators found the substance to be toxic, Guinea protested. Since then the company has sent a ship to remove the ash. Williams, *supra* note 12, at 178-79.

23. The estimated cost of disposing a ton of hazardous waste in the United States during 1988 was $2,500. Nanda, *supra* note 16, at 506 n.71.

Therefore, even though, as in 1988, when a Detroit attorney offered the government of Guinea-Bissau (Northwest Africa) $600 million (two times the foreign debt and thirty-five times the value of all annual exports of Guinea-Bissau), he could have stood to make $400 million off the deal. Rosenthal, *supra* note 18, at 63 n.30.

24. *Pollution and the Poor: Why "Clean Development" at Any Price is a Curse on the Third World*, ECONOMIST, Feb. 15, 1992, at 18 [hereinafter *Pollution and the Poor*].

25. *Id.* This purely economic view, which the author sees as a balance of costs and benefits, ignores humanitarian issues, which will be discussed later in this paper. *See infra* notes 103-106 and accompanying text.

that some developing countries feel they need the capital created by hazardous waste dumping so desperately that for the industrialized nations to ban all dumping would be to deprive these countries of their right to have fair access to the means of industrialization.[26]

Developing countries often see environmental regulation, as one commentator aptly remarked, "as a wolf in sheep's clothing designed to perpetuate the existing cycle of impoverishment."[27] Many see the situation as coercive; one in which the developing countries, with enormous amounts of money being waved in their faces, have no option but to choose the short term gain and long term disaster of hazardous waste dumping.[28] Furthermore, because of high environmental standards in industrialized countries, many see waste dumping in developing countries as a "double standard" in which industrialized countries allow chemicals that have been banned for domestic disposal due to hazardous health and environmental effects to be exported to developing countries that do not have such stringent environmental standards.[29]

The problem is not merely one of acceptance of the waste. The fact that developing countries lack the infrastructure to control hazardous waste in a manner which would be acceptable to industrialized nations greatly increases the likelihood of accidents or improper disposal.[30] Furthermore, once environmental havoc is created by toxic waste, the costs of reversing the process are exorbitant, it is nearly impossible to entirely

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26. Williams, *supra* note 12, at 292. Although developing countries usually accept waste as a tool for industrialization (either through disposal for quick cash or recycling as industry in itself), environmentalist groups such as Greenpeace view waste as unnecessary for sustainable development and intolerable because of the unnecessary hazards it exposes people of developing countries to. A commentator makes the statement that

> If clean growth means slower growth, as it sometimes will, its human cost will be lives blighted by a poverty that would otherwise have been mitigated. That is why it would be wrong for the World Bank or anybody else to insist upon rich-country standards of environmental protection in developing countries.

Pollution and the Poor, *supra* note 24.

27. *Williams*, *supra* note 12, at 292.

28. The inequity between industrialized and developing countries has been likened to a sport where the participants are not playing on a level field, where "industrialized countries may take unfair advantage of their impoverished neighbors, who may be willing to trade an increased public health and environmental risk for a short term infusion of capital." Stephen Johnson, *The Basel Convention: The Shape of Things to Come for United States Waste Exports?*, 21 ENVTL. L. 299, 300-01 (1991).

29. *See* Williams, *supra* note 12, at 288-289.

30. In Koko, Nigeria, hazardous waste packed in steel drums was stored in the midst of a residential area for over seven months between 1987 and 1988 for only $100 per month. *See* Nanda & Bailey, *supra* note 6, at 156.

The situation is further exascerbated by the fact that developing countries have some of the worst pollution problems and most lax disposal regulations in the world. For example, in the southeastern suburbs of Algiers lies one of the world's largest municipal waste dumps.

> The refuse of the entire city, an average of 1,400 tonnes a day, is efficiently collected from the city and trucked to an area hundreds of metres square. Industrial waste is added indiscriminately. Spontaneous fires fuelled by gases emitted from the fermenting heap produce clouds of foul smoke sometimes

remove,[31] and the human misery created is irreversible.[32]

III. THE BASEL CONVENTION — THE SOLUTION?

In 1987 UNEP sponsored the "Cairo Guidelines" as a resolution to address concern about exports of waste to other countries and to assist developing countries in implementing safe hazardous waste disposal systems.[33] However, since resolutions are not legally binding, and because of growing public concern,[34] the UNEP sponsored a working group of technical and legal experts to prepare a global convention on the control of transboundary movements of hazardous wastes.[35]

The resulting document, referred to as the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their

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> creating a fog in the neighbouring areas. On occasions, the choking smoke is so thick that motorists on the highway running through the dump become disoriented and crash.
>
> In Cairo, an open canal of raw effluent runs through residential areas to a large lake that has been converted into a reeking open cesspit. From there, the effluent drains through a further canal into the Mediterranean, contaminating the sea and beaches and killing fish and wildlife.

Middle East: Earth Summit—Environment Debate Gathers Momentum, Middle East Economic Digest, Reuter Textline, May 29, 1992, *available in* LEXIS, World Library, ALLWLD File.

After witnessing the Bhopal incident and its aftermath, the devastation to be inflicted on developing countries by improper management of hazardous wastes should be convincing.

31. The problem is not limited to "Third World" countries. Eastern European countries have more than their share of environmental problems. Since reunification, Germany has had to deal with a wide spectrum of environmental problems, the least of which are abandoned coal mines that were frequently used for illegal dumping of hazardous waste. The Environment Ministry has determined that pumps will be needed for the next 50 to 100 years to prevent water from seeping into the mines, potentially causing extensive groundwater contamination. *See Government Reaches Accord on Financing Cleanup of Contaminated Sites in East*, 15 Int'l Env't Rep. (BNA) 706, Nov. 4, 1992.

The Europe Commission had to take emergency action recently when a dam in Yugoslavia, holding back millions of tons of toxic waste from such abandoned mines, was found to be crumbling into disrepair. The Commission is planning on emergency repair of the dam, which could collapse at any time; if this happens, it has been estimated that up to 7 million tons of toxic waste would flow into the Tara, Drijna, and Sava rivers, and onwards into the Danube and the Black Sea. See *Yugoslavia: Crumbling Dam's Toxic Waste "Threatens Millions"*, Reuter Textline, Guardian, Nov. 26, 1992, *available in* LEXIS, World Library, ALLWLD File.

32. Improper solid waste management can cause groundwater contamination, crop contamination, increased incidence of cancer and birth defects, and, in the case of serious contamination, severely shortened lifespan. *See* Johnson, *supra* note 28, at 306. Because in developing countries ill-health and shortage of food are already problems, the toxic waste legacy merely incurs increased misery. *Id.*

33. Rosenthal, *supra* note 18, at 72. *See also id.* at n.117.

34. *See supra* notes 18-23 and accompanying text.

35. Michelle M. Vilcheck, Comment, *The Controls on the Transfrontier Movement of Hazardous Waste From Developed to Developing Nations: The Goal of a "Level Playing Field,"* 11 Nw. J. INT'L L. & BUS. 643, 656 (1991); U.N. Doc. UNEP/GC.14/30, (1987).

Disposal[36] (Basel Convention), was signed by thirty-five countries of 116 countries participating in the negotiations in Basel, Switzerland that ended on March 22, 1989.[37] The Convention was designed to become effective upon actual ratification by twenty countries.[38] On May 6, 1992, over three years after its creation, the Basel Convention finally came into effect.[39] Yet how effective it has actually been, or has the potential to be, will depend on whether the world community can come to a consensus as to its terms and achieve full implementation of the Convention.

A. *The Ends and Means of the Basel Convention*

Dr. Mostafa Tolba, former Executive Director of UNEP, stated that the aim of the Basel Convention is "a major reduction in the generation of hazardous wastes."[40] The first objective of the Convention is "to protect countries against the uncontrolled dumping of toxic wastes."[41] The Basel Convention broadly defines waste to include "substances or objects which are disposed of or are intended to be disposed of or are required to be disposed of by the provisions of national law."[42] Hazardous wastes are

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36. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, UNEP Doc. I.G.80/3, *reprinted in* 28 I.L.M. 657(1989) [hereinafter Basel Convention].

37. Vilcheck, *supra* note 35.

Signatories to the Convention include Afghanistan, Bahrain, Belgium, Bolivia, Canada, Columbia, Cyprus, Denmark, Ecuador, Finland, France, Greece, Guatemala, Haiti, Hungary, Israel, Italy, Jordan, Kuwait, Lebanon, Liechtenstein, Luxembourg, Mexico, Netherlands, Norway, Panama, Philippines, Saudi Arabia, Spain, Sweden, Switzerland, Turkey, United Arab Emirates, Uruguay, and Venezuela. Basel Convention, *supra* note 36.

38. *Id.*

39. *United Nations Officials See Basel Treaty As "Limping" Into Effect With Limited Support.* 15 Int'l Env't Rep. (BNA) 275, May 6, 1992 [hereinafter *Treaty "Limping" Into Effect*].

40. Vilcheck, *supra* note 35, at 658.

The Preamble to the Convention also recognizes that the protection of human health and the environment should be maintained by states in their control of movement and disposal of wastes, that "any state has the sovereign right to ban the entry or disposal of foreign hazardous wastes and other wastes in its territory," that

> hazardous wastes and other wastes should, as far is compatible with environmentally sound and efficient management, be disposed of in the State where they were generated, that transboundary movements of such wastes from the State of their generation to any other state should be permitted only when conducted under conditions which do not endanger human health and the environment, and under conditions in conformity with the provisions of this Convention,

that information exchange is condoned, and, of special controversy, that there is a "need to continue the development and implementation of environmentally sound low-waste technologies, recycling options, good house-keeping and management systems with a view to reducing to a minimum the generation of hazardous wastes and other wastes." Finally, the Preamble takes into account "the limited capabilities of the developing countries to manage hazardous wastes and other wastes." Basel Convention, *supra* note 36, at Preamble, 657-59.

41. Alexandre Kiss, *The International Control of Transboundary Movement of Hazardous Waste*, 26 TEX. INT'L L. J. 521, 535 (1991).

42. Basel Convention, *supra* note 36, art. 2(1).

identified by their origin or component parts[43] and are specifically listed in the convention.[44] Industrialized countries such as the United States lobbied hard for the national definitions of waste clause to be included.[45]

Annex II of the Convention requires wastes collected from households and residues arising from the incineration of household wastes to be considered separately.[46] This broadens the definition of wastes more than most countries have had to previously deal with, and some have interpreted this to go as far as to include nonhazardous recyclables.[47]

The Convention requires States to reduce the generation of hazardous wastes,[48] and when this is unavoidable, to dispose of the waste as close as possible to the source of production.[49] The crux of the Convention is that an exporting state must guarantee "environmentally sound management" of the waste[50] and may only export waste where it does not have the technical capacity and facilities to dispose of the wastes in an environmentally sound manner.[51]

The Basel Convention prohibits the export of hazardous wastes to a developing country (Party) that has prohibited all imports by its legislation, or if the exporting country has reason to believe that the wastes in question will not be managed in an environmentally sound manner.[52] The Convention also creates an affirmative duty in a contracting state to prohibit the import of hazardous wastes into its territory if it has reason to believe the waste would not be managed in an environmentally sound manner.[53]

The Basel Convention does not allow parties to the Convention to permit hazardous or other wastes to be exported to or imported from a nonparty state.[54] There is one important exception to this standard that may hinder the effectiveness of the Convention. Article 11 allows parties to enter into bilateral, multilateral, or regional agreements or arrangements with nonparties,

> provided that such agreements or arrangements do not derogate from the environmentally sound management of hazardous wastes and other wastes as required by this convention. These agreements or

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43. *Id.* art. 1 (a), (b).
44. *Id.* annex I, III.
45. *See* Kiss, *supra* note 41, at 536.
46. Basel Convention, *supra* note 36, at annex II.
47. *See* Grant L. Kratz, *Implementing the Basel Convention Into U.S. Law: Will it Help or Hinder Recycling Efforts?*, 6 B.Y.U. J. PUB. L. 323, 334 (1992).
48. Basel Convention, *supra* note 36, art. 4(2)(a).
49. *Id.* art. 4(8).
50. *Id.* art. 4(2)(d).
51. *Id.* art. 4(9)(a).
52. *Id.* art. 4(2)(e).
53. *Id.* art. 4(2)(g).
54. *Id.* art. 4(5).

> arrangements shall stipulate provisions which are not less environmentally sound than those provided for by this Convention in particular taking into account the interests of developing countries.[55]

The Basel Convention requires a permit to be issued by party states for each transboundary movement of waste that occurs.[56] It also requires an authority to be established[57] to ensure compliance with the requirement of notice[58] to and consent from (via a written response) the receiving state.[59] An exporting state may not allow commencement of transboundary movement of waste until it has received such written consent, which also confirms that there will be adequate, "environmentally sound management" of the wastes.[60]

Since the Convention did not establish an international police force to monitor the international hazardous waste shipments, the Basel Convention requires much international cooperation and control, placing a great deal of responsibility on each individual member state. Enforcement, therefore, must take place at the national level through the establishment of strict domestic regulations in compliance with the Convention.[61] While a Secretariat provided by the convention is responsible for oversight of its implementation, the Secretariat's principle responsibility will be facilitating the flow of information, not enforcing compliance with Convention regulations.[62]

B. *Do the Means Adequately Fulfill the Ends?*

Although the Basel Convention is undoubtedly the most comprehensive and stringent effort to date to attempt some form of control over transboundary movements of hazardous wastes,[63] it is not without its critics. African nations have been opposed to the Convention from the beginning.[64] They feel the convention does not do enough to protect developing nations against dumping by industrialized countries.[65] In response to this dissatisfaction with the convention, in 1991 the Organization of African Unity (OAU) drafted the Bamako Convention on the Ban on the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes Within Africa.[66] The Bamako Convention is

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55. *Id.* art. 11(1).
56. *Id.* art. 4(7)(a).
57. *Id.* art. 5(1).
58. *Id.* art. 6(1).
59. *Id.* art. 6(2).
60. *Id.* art. 6(3)(a),(b).
61. Christina L. Douglas, *Hazardous Waste Export: Recommendations for United States Legislation to Ratify the Basel Convention*, 38 WAYNE L. REV. 289, 308 (1991).
62. *Id.* at 310.
63. *See* Vilcheck, *supra* note 35.
64. *Myra McDonald, Africans Challenge International Accord on Toxic Waste*, Reuter Libr. Rep., Jan. 28, 1989, *available in* LEXIS, World Library, ALLWLD file.
65. Kiss, *supra* note 41, at 537.
66. Organization of African Unity: Bamako Convention on the Ban on the Import into

very similar to the Basel Convention, except it is obviously more strict in that it bans all waste imports into Africa.

The executive director of the Kenya Energy and Environment Organization (KENGO), Achoka Awori, says the Basel Convention contains "slippery" language and limited provisions for monitoring disposal sites. "There are loopholes which can be exploited."[67] One of the most controversial loopholes presently is the recycling exception, which allows waste that would normally be banned under the convention to be transported and disposed of in countries for "recycling."[68]

Are the fears of the African Nations[69] and other developing countries[70] well-founded? Although there is great support among academics for the Basel Convention, at least one commentator sees the Convention

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Africa and the Control of Transboundary Movement and Management of Hazardous Wastes Within Africa, *reprinted in* 30 I.L.M. 773 (1991).

67. *Treaty "Limping" Into Effect, supra* note 39.

68. Kevin Stairs, Greenpeace's adviser on treaties and conventions, says that most hazardous waste trade is executed as recycling trade. For instance, in March the German government was forced to pay for two trains to go to Romania to recover more than 400 tons of toxic German pesticides it had sent there earlier. Greenpeace says that Romanian farmers were told by Germany that the pesticides could be re-used, but when Greenpeace investigated, they found damaged and rusting barrels with the pesticides leaking into the environment. Greenpeace claims the pesticides were illegal under Romanian and German law. Alecia McKenzie, *Environment: EC Hazardous Waste Proposal Opposed by Germany*, Inter Press Service, March 22, 1993, *available in* LEXIS, World Library, ALLWLD File.

During 1992 Britain exported 165 tons of lead wastes to the Philippines, and 280 tons to Indonesia for recycling. These are only two of 60 countries where Britain sent toxic waste last year. When Greenpeace visited lead recovery plans in Indonesia, they found workers stirring "huge vats of molten lead by hand with inadequate cloths over their faces to protect them from highly toxic lead fumes." *Id.*

In 1990, 40 million tons of waste, with a price tag of $19 billion, were exported from OECD countries for recycling in other parts of the world. The high cost of pollution control in industrialized countries is expected to cause plant closures, thus further driving recycling processes into countries with less stringent controls. *World: Europe's Green Channel for Toxic Waste*, Reuter Textline, April 23, 1993, *available in* LEXIS, World Library, ALLWLD File [hereinafter *Green Channel for Toxic Waste*].

69. Many developing countries are grappling with cleaning up past environmental damage, and because money allocated to the environment may be subtracted from that going towards feeding hungry mouths, there is a great deal of concern with stopping such environmental problems from occurring in the first place. Other nations who are not themselves as concerned — and are more concerned with the profitability of hazardous waste trade — are being pressured by neighboring developing countries, who feel threatened by the possibility of having to share waste dilemmas due to their proximity. This may be the driving force behind the OAU's insistence on a unified ban to developing countries, even though the Basel Convention clearly allows individual nations to ban imports of waste. *See supra* note 52 and accompanying text.

70. Belize has passed legislation explicitly prohibiting the importation or transit of hazardous wastes, Panama has established criminal penalties to prevent all traffic and imports of hazardous waste, the Nicaraguan and Salvadoran National Assemblies are considering bills dealing with hazardous waste trafficking, while Guatemala and Costa Rica have been criticized by Greenpeace for the loopholes in their laws that prohibit dumping toxic wastes. *See Central American Nations Considering Laws to Restrict or Prohibit Toxic Waste Imports*, 14 Int'l Env't Rep. (BNA) 551, Oct. 9, 1991.

as "add[ing] nothing new to the existing rules, and there is little reason to expect the Convention to impact seriously upon the burgeoning international hazardous waste trade."[71] A great deal depends upon who participates in the convention and how they implement its values into their national legislation, since enforcement of the Convention depends entirely upon national legislation and each country's enforcement thereof.

A liability mechanism is still not in place for the convention, even after the first meeting of the contracting parties to the Convention in December of 1992 in Uruguay to discuss implementation of the convention. The parties put off important decisions such as liability and compensation for damages and the creation of mechanisms for full treaty implementation, giving key countries such as the U.S., Japan, and the European Community more time to implement the Convention.[72] The former executive director of the UNEP, which founded the Convention, Mostafa Tolba, said of these countries' failures to ratify the convention, "[w]ithout their ratifications and active participation in implementing the treaty, obviously the Basel Convention will get nowhere."[73] The only developed nations that have thus far ratified the convention are France, Canada, Australia, and only six days after the meeting of the parties to the Convention, Japan also passed a bill to amend domestic laws to enforce the Basel Convention.[74]

The most controversial issue to be addressed at the meeting of the parties was whether the Convention would implement a ban on exports of hazardous waste to developing countries. While no hard-line agreement was reached, to the disappointment of environmental groups, the Uruguay meeting ended with a plea for such a ban, while maintaining that recycling of waste will be permitted.[75] A technical group is also being formed to create guidelines, give advice on, and have expertise in identifying, evaluating, and safely handling hazardous waste that is labeled recyclable.[76]

Other important issues which were decided at the meeting of the parties were the budget;[77] the establishment of a working group to draft a protocol on liability and accidents involving hazardous waste;[78] the planned preparation of a manual on how to manage hazardous waste in an environmentally sound manner; an agreement to create technical

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71. Williams, *supra* note 12, at 301.

72. *UNEP Conference Ends Without Calling for Toxic Trade Ban,* Int'l Env't Daily (BNA), Dec. 8, 1992. The European Community is currently in the process of implementation. *See infra* notes 80-85 and accompanying text.

73. *Id.*

74. *Basel Convention: Bill Approved to Implement Treaty on Trade in Hazardous Substances,* Int'l Env't Daily (BNA), Dec. 11, 1992. This Bill provides for immediate implementation of the Convention. *Id.*

75. *Id.*

76. *Id.*

77. The two-year budget for the Convention will be $4.9 million. *Id.*

78. A compensation fund was also arranged. *Id.*

guidelines on how to dispose of hazardous waste in an "environmentally acceptable" way; and the consideration of an emergency fund for hazardous waste accidents.[79] Thus, as in the past, the key mechanism of the convention seems to be transfer of information, leaving regulation to the states.

C. *Europe — The European Community*

The European Community has felt increased pressure to ratify the Basel Convention since a second meeting of the parties was set to occur between February and May of 1994.[80] Disagreements between Member States concerning when to ratify caused initial conflicts.[81] Denmark, the Community's current president country, has been a driving force in calling for a ban of all exports of hazardous wastes to developing countries.[82] The pronouncement is controversial, and has created greater struggle within the Community, since the United Kingdom and Germany vehemently oppose the ban.[83] Nevertheless, the initial steps towards ratification have been taken after a recent Council of Ministers and Parliament decision to ratify the convention.[84] It is estimated that it will take as long as a year to apply the Community Regulation, before which time the Convention cannot be ratified.[85]

D. *The United States*

The United States Congress failed in both the 102nd and 103rd Congresses to accept legislation which would implement the Basel Convention. The Bush administration's efforts were rejected by Democrats who didn't feel the language was protective enough.[86] Democratic efforts to draft implementing legislation have gone farther, and compromise legisla-

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79. *Id.*

80. European Report, Dec. 19, 1992, *available in* LEXIS, World Library, ALLWLD File.

81. *Id.*

82. Denmark itself is not a party to the Convention. *Environment: EC Hazardous Waste Proposal Opposed by Germany,* Inter Press Service, March 22, 1993, *available in* LEXIS, World Library, ALLWLD File. The European Community adopted legislation in February of 1993 that allows hazardous waste to be labelled as non-hazardous, thus falling outside the Basel Convention. *Green Channel for Toxic Waste, supra* note 68.

83. *Greenpeace Accuses Germany, Britain of "Toxic Colonialism,"* Agence France Presse, March 22, 1993, *available in* LEXIS, World Library, ALLWLD File. Germany and the United Kingdom are two of the largest exporters of toxic waste in Europe who have shipped waste to developing countries. *EC: The EC Decides to Sign the Basel Agreement on the Export of Dangerous Wastes,* Reuter Textline, April 24, 1993, *available in* LEXIS, World Library, ALLWLD File.

84. *See Council Formally Adopts Waste Shipments Regulation,* Europe Information Service, February 16, 1993, *available in* LEXIS, World Library, ALLWLD File; *Waste: Court Refuses to Annul Framework Directive,* Europe Information Service, March 30, 1993, *available in* LEXIS, World Library, ALLWLD File.

85. *Id.*

86. INSIDE E.P.A., July 23, 1993, at 15.

tion has also been attempted.[87] Progress during the 102nd Congress was halted by attempts to tie the implementing legislation into the Resource Conservation and Recovery Act, which is up for reauthorization.[88] This proved to be too great a feat for Congress to accomplish in one session. The United States Environmental Protection Agency has recently been drafted to aid in this effort.[89]

Several bills have been proposed that would either require a "no less strict" standard[90] to fulfill the vague "environmentally sound management" language of the Convention, a complete ban on the international trade of hazardous wastes,[91] or require that waste is managed in a manner "no less strict" than U.S. standards.[92] It will take a two-thirds vote from the Senate to create the necessary changes for ratification of the Basel Convention. Although the United States would like to participate in the Convention, most of its trade in hazardous waste is legislated through bilateral agreements with Canada and Mexico, so there is less pressure for the United States to ratify at this point. Even so, industry and government officials remain concerned that the United States is at a competitive disadvantage to its trading partners who have ratified the Convention.[93] Pressure is mounting to meet the March 1994 deadline for the next meeting.[94]

The text of the North American Free Trade Agreement (NAFTA) was released in September of 1992.[95] Fears that NAFTA would relax U.S. and Canadian standards and create problems with Mexican border industries stirred heated debate during the NAFTA negotiations.[96] However, NAFTA itself does not create any hazardous waste regulations and will not eliminate the current requirement for U.S. industries in Mexico to export their waste back to the United States.[97] NAFTA also prohibits parties from relaxing environmental regulations to promote investment and encourages increasingly stringent environmental standards.[98] Most importantly in terms of transboundary hazardous waste trade, NAFTA will be subject to the Basel Convention, and to the extent it is inconsistent with it, the latter will prevail.[99]

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87. *Id.*

88. *Id.*

89. *Id.*

90. H.R. RES. 2358, The Waste Export Control Act. Kratz, *supra* note 47, at 329.

91. H.R. RES. 2580, The Waste Export and Import Prohibition Act. This Act is primarily sponsored by environmental groups. *Id.*

92. S. 1082, The Bush Administration's Proposal. This seems to be most highly favored, since it is the most middle-of-the-road. *Id.*

93. INSIDE E.P.A., *supra* note 86.

94. *Id.*

95. *Environmental Compromise: Striking the Balance Between Trade and Ecology*, Int'l Env't Daily (BNA), Nov. 20, 1992.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

E. *Alternatives/Additions to the Current Basel Convention*

One commentator has described UNEP as having no "teeth" because it lacks executive authority,[100] and therefore it will not be able to coerce states into compliance with the Basel Convention. An international environmental agency within the United Nations is suggested[101] that would have the powers, such as those suggested by the Hague Declaration on the Environment,[102] to force countries into compliance, even without unanimous agreements. Such an innovative, radical solution may be required to combat the illegal hazardous waste trade or other trade excluded from the Basel Convention, if we are to take the goals of the convention seriously.

Furthermore, developing countries may have more than a mere right to environment stake in transboundary dumping of wastes in their territories because of the potential harmful effects to people and endangerment of their lives such dumping engenders.[103] These rights extend into the arena of human rights, which should be guaranteed to all human beings.[104] These rights have been specifically recognized in cases where individuals have brought petitions to international human rights tribunals alleging violations of guaranteed rights as a result of environmental damage due to hazardous wastes.[105] Even though the Basel Convention is an attempt to restrict trade in hazardous waste, and does allow countries to instigate their own bans, it still allows trade under the auspices of recycling, and does not altogether ban exporting hazardous wastes to developing countries. There remains, therefore, the possibility that industrialized countries may invade the province of these human rights.[106]

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100. Palmer, *supra* note 3, at 261.

101. *Id.* at 262.

102. Hague Declaration on the Environment, Mar. 11, 1989, *reprinted in* 28 I.L.M. 1308 (1989).

103. The Stockholm Declaration implies that the exercise of human rights - other than the right to environment - requires basic environmental health. Human rights threatened by environmental deterioration may include the right to life, health, suitable working conditions, an adequate standard of living, and rights to political participation and information. *See* Shelton, *supra* note 1, at 112.

104. *Id.*

105. *Id.* at 113.

106. This raises issues of great concern, especially when illegal trade, which may occur because of lax liability and enforcement standards, results in unthinkable human rights violations. For instance, attempts have recently been made to dump shipments of hazardous waste (500,000 tons) in Somalia, after an illegal agreement was made between a Swiss firm and a Somali official. Somalia is currently in a state of war and famine. The former UNEP Executive Director, Mostafa Talba, said "[t]he Somali affair should remind us that wherever there is human suffering, there is someone ready to make a profit." *UNEP Official Urges African Nations to Approve Basel Accord on Waste Shipments*, 15 Int'l Env't Rep. (BNA) 654, Oct. 7, 1992.

Such outrageous actions by multi-national corporations are precisely why stronger action must be taken to halt the problem of transboundary dumping of hazardous wastes in developing countries.

The concept of an international environmental institution with real "teeth," combined with the possibility that the deleterious effects on the environment and humans by hazardous waste might be recognized as a human right protected under international law, could be the necessary solution to the inequities of hazardous waste trade.

IV. CONCLUSION

The UNEP and signatory states to the Basel Convention should be applauded for their attempts and accomplishments toward creating a workable system of regulation for the transboundary movements of hazardous wastes. However, they should be wary of allowing the economic goals underlying some of the vagaries of the Convention's provisions to override the basic human rights entailed in charging developing countries with handling hazardous wastes. The developed countries of the world have learned their lesson of the dangers involved in hazardous substances through instances such as the Bhopal, Seveso, and Basel chemical leaks, and the lessons learned were hard and tragic, and cost many human lives. Now industrialized nations are largely unwilling to deal with the many wastes they create and would prefer to export them to developing countries who lack the infrastructure to adequately understand or manage the wastes with which they are entrusted.

The Basel Convention, while a good step forward, is not a universal panacea. As industrialized nations, we have a responsibility to protect the human rights of the many citizens of developing countries whose governments may choose to accept hazardous waste for money or to build industry through recycling. While the Basel Convention has shown clear intent to control such situations, after the first meeting of the parties has convened there still is no ban on hazardous wastes exported into developing countries, and the vague language that allows room for varying national interpretations and other bilateral agreements could provide a loophole for abuse of developing countries by multi-national corporations.

Furthermore, as the discussion of liability under the convention has been put off another year, and since the UNEP lacks actual enforcement capabilities, developing countries or other states may be left without a remedy if a state refuses to accept responsibility for the actions of its multi-national corporations or, as we have seen elsewhere in international law, hides under the principle of sovereign immunity. In these situations the international community may be left virtually powerless to force a remedy. The world community should therefore establish an International Environmental Agency to enforce the regulations through actual police power, and strict guidelines for liability should be outlined. Finally, even if these measures are instigated, the Basel Convention will be virtually meaningless to the international community without implementation

by the United States and the European Community and willingness by the industrialized nations to allow humanitarian concerns to override nationalistic economic motives for maintaining loopholes and lax standards.

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BOOK REVIEW

Breach and Adaptation of International Contracts: An Introduction to Lex Mercatoria

REVIEWED BY FRANKLIN C. JESSE, JR.*

DRAETTA, UGO, RALPH B. LAKE AND VED P. NANDA, BREACH AND ADAPTATION OF INTERNATIONAL CONTRACTS, Butterworth Legal Publishers, St. Paul (1992); ($100.00); ISBN 0-88063-750-1; 214 pp. (hardcover).

Breach and Adaptation of International Contracts analyzes various legal principles that are applied to international contracts to deal with situations in which a contract's performance does not develop as expected. It attempts to discuss whether these principles, which are common within national legal systems, are adapted in unique ways in the international arena by drafters of international contracts or by those who deal with international contractual problems after they arise.

In searching for these unique international adaptations, the authors first compare the same principles in civil and common law systems. They then attempt to determine the extent to which these principles have been "delocalized" in the international setting, i.e. delocalized by embodying modifications to the national rules in a way that transforms the principles into ones that are to some extent autonomous and not reliant on a national system for enforcement. The authors attempt to determine whether and to what extent a separate body of "delocalized" or international contract principles has developed in the international law context, calling it the *Lex Mercatoria*, or new merchant law.

The authors lay the groundwork for their analysis by identifying the special aspects of international contracts that distinguish them from wholly domestic contracts. This brief, but cogent discussion sets the stage for the author's repeated observations that established domestic legal

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principles in any national system do not adequately address the circumstances that are unique in trans-national situations.

The first chapter also introduces the concept of the *Lex Mercatoria*, the notion that business practices can evolve independently of national legal systems to eventually comprise a system of rules that are autonomous in their existence, and in their enforcement, from the legal systems of the contracting parties. The authors note that elements of such a law merchant can be found in the development of uniform international laws (e.g. the Vienna Convention on International Sales), standard form international contracts or clauses (e.g., INCOTERMS of the International Chamber of Commerce), special standard trade practices within industries (e.g., I.C.C. Uniform Customs and Practices for Documentary Credits), and arbitral decisions that are not necessarily based on national laws (e.g., arbitrators exercising their power as *amiable compositeurs*).

The book identifies many standard legal concepts that relate to contract situations in which performance is not complete. For example, the authors discuss the elements of breach, the remedies for breach, the quantification of damages, the limitations of liability due to force majeure or other reasons, and the contractual self-protections against breach. For each concept, definitions and treatment of the principle within the common law and civil law systems of the *Lex Mercatoria* are provided to determine to what extent extra-national definition and treatment (usage) patterns can be discerned.

For example, Chapter Three examines principles used in different legal systems to quantify the measure of damages once entitlement to damages due to breach has been established. The authors discuss common law principles/approaches. Within that discussion, the authors distinguish the similar approaches under English and United States law. Civil law principles for damage assessment are then discussed and contrasted with approaches under English law.

Having laid this groundwork, the authors then attempt to determine special international trade practices that have evolved to quantify damages once entitlement has been established.

The authors discuss the use of terms such as "consequential damages" and "indirect" damages. Several interesting observations are made regarding confusions in meaning that can result from the use of one of these terms outside of the national legal system in which the term's meaning has been developed, e.g. use of "consequential damages" outside the context of the United States legal system. The authors draw some conclusions in this chapter as to basic rules that may be derived by examining international arbitration decisions.

In other chapters, the authors analyze numerous other principles that relate to incomplete fulfillment of contract requirements. For each chapter, the same approach is taken as in Chapter Three: definition of the principle, discussion of its special importance in international situations, treatment of the principle under common law and civil law, and analysis

of the principle to discover if it has been modified in definition or application in the international context, thus supporting the notion that there is indeed an evolving *Lex Mercatoria* that is independent, to some extent, of any national legal system.

Although the book is largely academic and perhaps theoretical in its style, it does have practical value to an international law practitioner. It identifies approaches that have been taken in contract drafting to cope with the special qualities of an international contract setting. It illustrates the difficulty of achieving a true meeting of the minds when contracting parties come from different legal systems, systems which do not use the same approaches or definitions when addressing a given issue.

The authors' suggestion that there are unique common threads of international contract practices and principles is perhaps more a matter of style than a matter of practical substance. Each reader of this book can evaluate the evidence presented and draw his or her own conclusions. The benefit of the authors' presentation lies more in their analysis than in their conclusions. The authors' tendency to draw conclusions from relatively scant evidence of published arbitral decisions detracts somewhat from the credibility of their insightful observations.

The book distills many difficult concepts and distinctions into relatively brief and abstract discussion. Expanding the explanations of the principles addressed would enhance readability. Presenting more case illustrations of the principles addressed would also greatly assist the reader in grasping the ideas presented. As written, the book requires more analytical energy from the reader than many would care to expend.

The book should be of particular interest to academicians who have an interest in international trade or contract issues and particularly those who follow the debate over the existence of a *Lex Mercatoria*. However, it should also be of interest to the practitioner who has more than a superficial interest in international contract issues. Some ideas presented in the book are obviously those of writers with real and extensive practical international trade law experience. The authors' presentation will challenge reading practitioners to re-evaluate some of their approaches in dealing with day-to-day international contract issues.

All in all, the book contains an interesting blend of academic, theoretical and practical concepts. It succeeds in offering new insights for its readers, regardless of the varied perspectives those readers possess.

BOOK NOTES

BENVENISTI, EYAL, THE INTERNATIONAL LAW OF OCCUPATION; Princeton University Press, Princeton, NJ (1993); ($29.95); ISBN 0-691-05666-8; 241 pp. (hardcover) Index.

Eyal Benvenisti charts the history of the law of occupation, examines contemporary responses to it, and prescribes guidelines for the lawful management of occupation in this thorough introduction to the topic. One chapter is devoted exclusively to the Israeli occupation of the Golan Heights, West Bank, Gaza, and the Sinai. Another chapter examines a plethora of occupations that have occurred in the past twenty-three years, including those in Afghanistan, Kuwait, and Bangladesh. Mr. Benvenisti, a lecturer at the Hebrew University of Jerusalem, offers a historical view of enforcing international occupation law before concluding with his own response to lawfully monitoring an occupied territory in view of the difficulties of enforcing customary international law.

A framework of applicable international law provides the background for the author's discussion. Two documents have generally been recognized as the customary law on the law of occupation: Article 43 of the 1907 Hague Regulations and its successor, Article 64 of the Fourth Geneva Convention. Article 43 imposes a general responsibility on the occupying power to maintain public order and unless prevented, respect the laws of the occupied country. Early attitudes toward Article 43 viewed occupation as a transient situation, eventually leading to territorial concessions by the defeated party. However, as time passed, the economic and political rifts between occupier and occupant lead to profound economic stagnation, among other problems. Article 64 attempted to enforce Article 43, and the author argues, introduce new elements into the law of occupation, such as further delineation of an occupier's duties.

Benvenisti's examination of the occupied Israeli territories is succinct, without sacrificing the relevant historical facts. He discusses both the judicial and economic response to the occupations, briefly mentioning the import, export, taxation, and employment ramifications. He is obviously comfortable with his history here, describing all facets of the occupation, from the Jewish settlements to the applicable international law.

The chapter on "Occupations Since the 1970s and Recent International Prescriptions" is no less interesting or informative. From the Iraqi occupation of Kuwait to the Indian occupation of Bangladesh, Benvenisti

peruses the globe in his assessment of the legality and policies of various invasions. Because he covers so many occupations, he limits his discussion of each country to a page, tying up the loose ends in his analysis at the end of the chapter.

In his final two chapters, the author discusses the success of existing institutions in enforcing international occupation law and offers his own recommendations on enforcement policies. He suggests the main problem of supranational tribunals, such as the International Court of Justice, is the obvious lack of states' consent to have occupation issues adjudicated. In addition to international covenants and agreements, Benvenisti advises that the "most promising concerted and hence powerful reaction to unlawful occupation measures is the collective power behind international global and regional organizations." In his concluding remarks Benvenisti outlines the duties and powers of the occupying force, leaving the reader with his hope that deficiencies in current occupation law "will pave the way for the creation of international institutions [designated to monitor and enforce international occupation law]."

Lisa B. Berkowitz

CLAPES, ANTHONY LAWRENCE, SOFTWARS: THE LEGAL BATTLES FOR CONTROL OF THE GLOBAL SOFTWARE INDUSTRY; Quorum Books, Westport, CT (1993); ISBN 0-89930-597-0; 325 pp. (hardcover) Index.

The title of Mr. Clapes' latest effort, *Softwars*, refers to the debate over how much proprietary protection should be granted to the creators of computer programs. The literal elements of software, source and object code, are widely established as proper subjects for copyright protection. But the debate rages fierce—in courtrooms, legislatures, and professional symposia throughout the industrialized world—over the extent copyrights protect the nonliteral elements; i.e. "look and feel," "structure sequence and organization," and user interface.

To what extent does the copyright protect the screen displays, menus, audio input and response, assignment of function keys, command language, use of color, and iconography of a software package? When are these elements capable of such limited expression that they merge into the unprotected idea of the program? Is software predominantly utilitarian, with a limited number of efficient methods of operation for a given use? Or is software more artistic and creative, with endless possibility for expressive variation?

These legal issues cannot be separated from the public policy question. Will the broad protection of software maximize innovation by supplying the impetus to create, or will it unnecessarily stifle the free flow of information and thereby curtail innovation? "One side in the softwars vigorously avers that without strong legal protection for computer programs, the industry will stagnate. The other side swears that unless legal protection for computer programs is weakened, a few large monopolists

will inherit the entire business." Depending on the context, the large American software producers, who dominate the worldwide industry, tend to be strong protectionists. Large Japanese and European producers, as well as smaller American companies, whose success largely depends on product compatibility with standards developed by the industry giants, tend to be weak protectionists.

Mr. Clapes' "tour of the battlefield" begins with a detailed look at the landmark "look and feel" cases, including *Lotus Development Corporation v. Paperback Software International*, which helped establish that copyright protection extends to nonliteral elements of a program. In addition to the legal analysis, the author provides the industry context in which these cases are argued, including licensing strategies and the place of litigation in the overall business plan. By supplying a healthy dose of context and background throughout the book, Mr. Clapes enables his diverse audience of lawyers, business people, and programmers to appreciate one another's perspective.

Softwars is global, and the battles rage beyond American courts. *Microsoft Corporation v. Shuuwa System Trading K.K.*, heard in the Tokyo District Court, relates to the reverse engineering controversy; i.e. to what extent does a copyright prevent competitors from dissecting a software package in order to produce a competitive product? Another case receiving international attention from the software industry, argued before the Federal Court of Appeal in Melbourne, Australia, involved the piracy of an Autodesk, Inc. program.

The attempt to develop uniform copyright laws throughout the emerging European Community represents another battleground for *Softwars*. In the early 1990s, as an EC directive on reverse engineering of software was being formulated, lobbyists from around the world descended on Brussels. The weak protectionists, lead by Fujitsu and some large European companies, formed the European Committee for Interoperable Systems (ECIS). ECIS was opposed by the Software Action Group for Europe (SAGE), which predominantly consists of large American corporations and the Software Protection Agency.

The "reports from the front" that comprise this book are interesting and enlightening but one-sided. As Assistant General Counsel at IBM, Mr. Clapes does not hide his viewpoint. He states, somewhat facetiously, "that he is not likely to write anything that will get him fired." The very words he uses to describe the battle lines—"innovators" versus "copyists," "clones," and "imitators"—lead readers to wonder, at times, whether the author is a "war correspondent reporting from the front" (author's words) or a propagandist writing from central headquarters. However, Mr. Clapes offers strong arguments for his side and usually presents the counterarguments.

At this juncture in the softwars, legal protection for software is slightly stronger in America than in Europe and Japan. It is Mr. Clapes' well argued opinion that the continuing predominance of American com-

panies in the global software industry is inextricably bound to the continued strength of American intellectual property rights in software.

Greg S. Weber

CORTEN, OLIVIER AND KLEIN, PIERRE, DROIT D'INGERENCE OU OBLIGATION DE REACTION (RIGHT OF INTERFERENCE OR OBLIGATION TO REACT?); Bruylant Publishing, University of Brussels, Brussels, Belgium (1992); FB 1.868 ($55.00); ISBN 2-8027-0599-7; 283 pp. (softcover).

The thesis of this book lies in the notion that the right of interference stems from the classic international law's inability to effectively insure the respect of human rights inside nations. This treatise by Olivier Corten and Pierre Klein presents a comprehensive view of the law of the right of interference for human rights violations as it exists today and provides a look at the direction the law seems to be taking in the future.

As Professor Jean Salmon of the University of Brussels remarks in his introduction, the right of interference is an integral part of the new world order of which so much is made. Yet, in spite of countless debates over its place in international law, the right remains a rather vague notion. Not only do Corten and Klein wonderfully define the right of interference in a clear and concise manner, they also illustrate each doctrine or definition with concrete and often recent events.

One of this book's appealing features is the ingenuity of its authors, who do not hesitate to confront the fact that political reasons often lie behind publicly claimed humanitarian concerns.

They also do not hesitate to present a wide range of worldwide thinkers and their ideas, offering contradicting theories of various issues. They analyze the legality of interventions under the U.N. Charter as well as regional agreements such as the E.E.C. or the O.A.S. charters.

The book presents a wide array of reactions to the violations of human rights that are actually permissible under international law. These reactions vary from economic sanctions to armed intervention through the U.N. Security Council. The authors argue for the use of these alternatives over the unilateral right of interference that has proven bloody in the past (for example during the Vietnamese intervention in Cambodia in 1979).

In the second chapter of the book's second part, examples of the violations of human rights occurring during the civil war that raged in Somalia starting in 1991 are discussed. Because this book was written in 1992, the authors could not have included (or foreseen) the U.N.-led intervention in that conflict. Instead, they stated that Security Council Resolution 688 (in which the Council asked all member states, among other things, to help provide humanitarian assistance to the Iraqi population) was an isolated incident and not the emergence of a "new right of interference", because no one seemed interested in invoking the Resolution

again in order to help the population of Somalia. History has proven them wrong in the intervention that ensued. Should we then infer the emergence of a "new right of interference" in the form of armed humanitarian interventions led by the U.N. Security Council? Perhaps the authors will soon address this question in a follow-up volume.

Geraldine J. Cummins

THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL; Edited by Philip Alston; Oxford University Press, New York (1992); ISBN 0-19-825450-4; 675 pp. (hardcover).

In this book, Alston has compiled sixteen essays, each analyzing and assessing a different aspect or subdivision of the United Nations' human rights regime. This medium provides the impetus for an insightful and thought-provoking treatment of the growth and status of human rights in the United Nations. Additionally, a multitude of instruments, institutions, and bodies are treated, leaving the reader with a solid working knowledge of current issues and access to many avenues for further exploration.

The book is divided into three sections: "UN Charter-Based Organs," "Organs Monitoring Treaty Compliance," and "Other Issues." The first section contains eight essays, each analyzing a separate body relative to the global pursuit of human rights. Essays by Antonio Cassese and John Quinn each discuss the role assumed by the General Assembly in the human rights arena. Cassese presents a historic evaluation of the General Assembly, taking into account political and structural factors that have played significant roles during the first forty years of General Assembly existence. Quinn discusses General Assembly action in the 1990's and evaluates the current situation of this organ. Other commissions discussed in this section include the Security Council, the Economic and Social Council, and several other relevant commissions.

The second section of the book is devoted to an analysis of five separate committees established to oversee the implementation of their respective human rights instruments. Karl Partsch assesses the Committee on the Elimination of Racial Discrimination, presenting both a view as to the formation and evolution of the Committee and suggestions as to how the Committee could become more effective. The essay by Philip Alston charts the history of the Committee on Economic, Social and Cultural Rights, identifies obstacles and weaknesses facing the Committee, and proposes specific solutions to many of the problems he assesses. Additional essays examine the Human Rights Committee, the Committee on the Elimination of Discrimination Against Women, and the Committee Against Torture. The strength of this section of the book lies in its systematic evaluation of the various representative committees and identification of areas for improvement in light of their given purposes.

The final section of the book contains three separate essays: "The Role of the United Nations Secretariat" by Theo Van Boven, "Lessons

from the Experience of the International Labour Organisation" by Virginia Leary, and "Human Rights Co-ordination within the UN System" by Klaus Samson. Van Boven's piece identifies the various obligations assumed by the Secretariat with respect to the promotion of human rights and examines the roles of the International Civil Service, the Center for Human Rights, and the Executive Head for Human Rights Secretariat. This piece is particularly useful in light of the preceding treatment of the other main organs of the United Nations.

The United Nations and Human Rights is an invaluable source of information on the development and current posture of the United Nations' human rights regime. This value is two-fold. On the one hand the book, read as a whole, paints a detailed picture of the pursuit of human rights within the United Nations system. On the other hand the essays, when considered as independent pieces, provide keen descriptions, assessments, and evaluations of their subjects.

In sum, Alston's insightful compilation on the workings of the current United Nations' human rights regime should not go unread by serious students of international human rights.

William G. Klain